

**IMPLEMENTATION OF INTERNATIONAL LAW IN RUSSIA
AND OTHER CIS STATES**

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I. Introduction

International and comparative lawyers who follow developments in Russia and the Commonwealth of Independent States (CIS)¹ know that this region has become one of the world's most exciting laboratory of constitutional reform. From the international perspective, the most interesting aspect of Russian and CIS developments is the gradual "opening" of the domestic legal systems of countries in this region to international law. Many CIS countries have rejected the traditional Soviet dualist approach to implementation of international law in domestic legal systems and proclaimed international law to be part of domestic law. This new approach may become an important factor in enforcing rules of international law in this region of the world.

¹The Commonwealth of Independent States was established by an agreement signed by Russia, Belarus and Ukraine in 1991 (See 31 *International Legal Materials* 143 (1992)). This regional organization now comprises all the former Soviet republics apart from the three Baltic states. For details concerning the structure and powers of the CIS, see V.N. Fisenko, I.V. Fisenko, *The Charter of Cooperation*, 4 *The Finnish Yearbook of International Law* 248 (1993); S.A. Voitovich, *The Commonwealth of Independent States: An Emerging Institutional Model*, 4 *European Journal of International Law* 403 (1993); V. Pechota, *The Commonwealth of Independent States: A legal Profile*, 2 *Parker School Journal of East European Law* 583 (1995).

When a large group of states, which may be considered be one of the “constituent elements of the international community,” embraces the idea of direct incorporation of international law, the international system can only benefit because the enforcement of international law becomes much more effective.

A wider “opening” of domestic legal orders of these post-communist countries to international law is part of a general trend to recognize international norms and values in post totalitarian societies.² There are indications that there is a certain correlation between the efforts to establish democracy following the defeat of an authoritarian or totalitarian system in a war or revolution and the “opening” of state constitutions to the international community generally and international law in particular.³

The significance of the recent “opening” toward international law in post-Soviet republics can be fully appreciated only against the background of the previous experience in this field in the Soviet Union. The former Soviet Union never considered international law, especiall international law of human rights, as something that might be invoked before, and enforced by, its domestic courts. The 1977 USSR Constitution⁴ did not allow the direct operation of international law within the domestic setting. Although the Constitution proclaimed that the relations of the USSR with other states should be based on the principle of "fulfillment in good faith o obligations arising from the generally recognized principles and rules of international law, and

²See generally A. Cassese, *Modern Constitutions and International Law*, 192 *Recueil des cours* 331 (1985 III). See also E. Stein, *International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?* 88 *American Journal of International La* 427 (1994); V.S. Vereshchetin, *New Constitutions and the Old Problem of the Relationship between International Law and National Law*, 7 *European Journal of International Law* 29 (1996); Id., *Some Reflections on the Relationship Between International Law and National Law in the Light o New Constitutions*, in R.Mullerson, M. Fitzmaurice, M. Andenas eds., *Constitutional Reform and International La in Central and Eastern Europe* 5 (1998).

³See Cassese, *supra* note 2, at 351.

⁴ See *Konstitutsia (Osnovnoy zakon) Soiuzu Sovetskikh Sotsialisticheskikh Respublik* (Constitution (Fundamental Law) of the Union of Soviet Socialist Republics), 1 *Svod zakonov SSSR* 14 (Code of the Laws of the USSR).

from international treaties signed by the USSR" (Art. 29), this broad clause was never interpreted as a general incorporation of international norms into Soviet domestic law.⁵ The application of international norms was envisioned in some exceptional cases of statutory references to international treaty law, but as a matter of general constitutional principle the Soviet legal order remained closed to international legal norms.

The Soviet legal system was protected from any direct penetration of international law by its conception of international law and municipal law as two completely separate legal systems. As a result of this dualist approach, the international obligations of the Soviet state would be applicable internally only if there were transformed by the legislature into a separate statute or administrative regulation. By relying on the doctrine of transformation, the Soviet Union was able to sign numerous international treaties, including treaties on human rights, and still avoid implementing some or all of their provisions in the domestic legal order.

⁵ For details, see G.M. Danilenko, Soviet Constitutional Reforms and International Human Rights Standards, 1(2) *Collected Courses of the Academy of European Law* 211, 239-240 (1992).

The lack of a constitutional rule providing for direct incorporation of international law into Soviet domestic law was not accidental. This state of affairs reflected the longstanding isolationist tendency in the Soviet society in general, and in the Soviet legal system in particular.⁶

The movement toward reform of the "closed" legal system began only with the advent of *perestroika*. The leaders of the Soviet Union realized that the country would have no prospects for further economic and social development unless a modern society based on the idea of the rule of law were built in the USSR. An important element of the overall political and legal reform was the recognition that the country would never be fully integrated into the World community if it did not ensure the observance of the internationally accepted norms, in particular norms concerning human rights.

An analysis of the political and legal debates of this period reveals an interesting phenomenon. Numerous international commitments regarding human rights that the USSR had assumed in previous years suddenly became a source for political argumentation and legal innovation designed to effect profound changes in the prevailing restrictive laws and practices. International human rights standards emerged as an important normative yardstick for measuring the proposed legal reforms. International law thus became a critical catalyst in the drive for democracy and human rights.

The focus on international law was motivated by several political-legal considerations, some of which retain their validity for Russia and some other CIS states today. First, there was a broad consensus among policy-makers and citizens that Soviet internal laws lagged behind legal standards that had been developed at the international level. Second, the reliance on international law indicated that international institutions were accorded more trust than national authorities,

⁶For details, see G.M. Danilenko, *The New Russian Constitution and International Law*, 88 *American Journal of International Law* 451, 458-459 (1994).

which had lost much of their legitimacy after the failure of the communist idea and revelations in the media about the totalitarian state's gross violations of human rights. Third, international standards, in particular human rights standards, enjoyed a high degree of legitimacy, not only because of their prior (even if only "verbal") acceptance by the Soviet Union, but also because of their general recognition and implementation by "the civilized nations." The legitimacy attributed to international human rights standards was also based on the general perception that they expressed "universal human values" shared by the majority of the international community.

Although the reformers pressed for a comprehensive revision of Soviet law aimed at eliminating inconsistencies with international law, for political and purely technical reasons such a reformulation could not be easily accomplished. Therefore, many politicians and experts⁷ argued that the gradual transformation of international standards into new legislative acts should be accompanied by a radical constitutional change that would "open" the domestic legal system to direct penetration of international principles and norms. Such a reform required that the Soviet Union accept a general constitutional principle proclaiming international law as part of the law of the land.

⁷ Cf., e.g., V.S. Vereshchetin, G.M. Danilenko, R.A. Mullerson, *Konstitutsionnaya reforma v SSSR I mezhdunarodnoe pravo* (Constitutional Reform in the USSR and International Law), 4 *Sovetskoe gosudarstvo I pravo* 13 (1990).

The former USSR had never managed to adopt such a principle in its basic law. Nevertheless, a major change in the situation had been introduced by the 1989 Law on Constitutional Supervision.⁸ For the first time in Soviet history, this Law provided a mechanism for the direct incorporation of various international rules into the Soviet legal system: it gave the Committee of Constitutional Supervision the power to review domestic laws by reference to the USSR's international obligations specifically those concerning human rights. By introducing the concept of direct relevance of international law to the internal legal process, the country took a giant step from the previous isolationist stand, which had prevailed for more than seventy years of its history.

It is highly significant that, during its short period of work, the Committee of Constitutional Supervision relied on international law as a source of applicable law in the majority of its decisions. In its first decision, which declared unconstitutional several legislative acts that excluded certain labor disputes from the jurisdiction of the courts,⁹ the Committee invoked, among other things, Arts. 7 and 8 of the Universal Declaration of Human Rights¹⁰ and Art. 2(3) of the International Covenant of Civil and Political Rights,¹¹ concerning the right of every person to an effective remedy for violation of their rights. Another decision of the Committee challenged the existing norms of criminal law and criminal procedure, which violated the presumption of innocence. In this case, the Committee cited in support of its ruling Art. 14 of the Covenant on Civil and Political Rights, as well as Art. 11 of the Universal Declaration of Human Rights, which states the right of every accused person to be presumed innocent until proven guilty according to

⁸*Zakon SSSR O konstitutsionnom nadzore v SSSR* (Law of the USSR on the Constitutional Supervision in the USSR), *Vedomosty Siezda narodnykh deputatov SSSR i Verkhovnogo Soveta SSSR*, No. 29, item 572 (1989) (Official Gazette of the Congress of People's Deputies and Supreme Soviet of the USSR, hereinafter cited as *Vedomosty SSSR*), as amended in 1990, see *Vedomosty SSSR*, No.12, item 189, para. 14 (1990).

⁹*Vedomosty SSSR*, No. 27, item 524 (1990).

¹⁰G.A. Res. 217A (III), UN Doc. A/810, at 71 (1948).

¹¹1999 UNTS 171.

law in a public trial.¹² The Committee's last decision, handed down just before the collapse of the Soviet Union, concerned the constitutionality of the infamous regulations requiring residence permits. In declaring all such regulations unconstitutional, the Committee gave special weight to such international instruments as the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights.¹³

II. International Law in the Russian Legal System

Russia became the first CIS country which introduced far-reaching reforms with respect to relationship between international and domestic law. Russia's reform efforts are particularly interesting in this connection for at least two reasons. First, the "opening" to international law represents a radical departure from Russia's traditional isolationist stand. Second, the "opening" began several years ago. As a result, one can see how the techniques of direct incorporation have been tested and implemented in practice.

1. Reform Efforts Prior to the 1993 Constitution

The Constitution inherited by the "newly independent" Russia from its Soviet past, like a other Soviet constitutions, did not envision the possibility of direct application of international law by domestic courts and administrative agencies. The "opening" of the Russian domestic legal system to international law became one of the most important elements of the ongoing

¹²*Vedomosty SSSR*, No. 39, item 775 (1990).

¹³*Vedomosty SSSR*, No. 46, item 1307 (1991).

constitutional reform.

In view of the past massive violations of human rights in Russia, the drafters of new constitutional provisions placed special emphasis on domestic implementation of international human rights standards. In November 1991 the Congress of People's Deputies adopted the Declaration of the Rights and Freedoms of Person and Citizen,¹⁴ which was largely based on the internationally recognized human rights principles and norms. An important element of the 1991 Declaration was a general clause that incorporated international norms concerning human rights into Russian domestic law. Art. 1 of the 1991 Declaration provided that "the generally recognized international norms concerning human rights have priority over laws of the Russian Federation and directly create rights and obligations for the citizens of the Russian Federation." In Apr 1992, the 1991 Declaration, including Art. 1, became part of the Constitution that was then in force.¹⁵ Thus, for the first time in its history, Russia adopted a general constitutional principle incorporating certain international norms into its domestic law. Although Art. 32 of the 1978 Constitution, based as it was on Art. 1 of the 1991 Declaration, referred only to international norms concerning human rights, and not to international law in general, the significance of this first step cannot be overestimated.

These normative innovations have been accompanied by a general reform of the judiciary system. An important development was the adoption of the idea of constitutional review as a constituent element of democracy based on the rule of law. Like other European countries emerging from oppressive or totalitarian regimes, Russia entrusted the enforcement of the Constitution to a new judicial body.¹⁶ In 1991 the Russian parliament enacted the Law on the

¹⁴*Vedomosty RF*, No. 52, item 1865 (1991).

¹⁵*Konstitutsia (Osnovnoy zakon) Rossiiskoy Federatsii - Rossii* (Constitution (Fundamental Law) of the Russian Federation - Russia) (1978) (as amended in 1992).

¹⁶ Cf. M. Cappelletti, *The Judicial Process in Comparative Perspective* 187 (1989) ("Indeed, it seems as though no country in Europe, emerging from some form of undemocratic regime or serious domestic strife, could find a better answer to the exigency of reacting against, and possibly preventing the return of, past evils, than to introduce constitutional justice into its new system of government.")

Constitutional Court,¹⁷ which provided for the creation of a Constitutional Court -- the first court in Russian history to be given a competence to decide constitutional issues. Constitutional review exercised by the Constitutional Court has become an important mechanism which guarantees direct effect of the Constitution and imposes checks on the legislative and executive branches of the government

The 1991 Law granted the Constitutional Court broad powers to review the constitutionality of statutory legislation and other normative acts. The Court was also authorized to pronounce on the constitutionality of decisions and of "law-applying practice" of all ordinary courts, other state organs and officials from the point of view of their consistency with the constitutional provisions concerning human rights. While controversies over the constitutionality of normative acts could be resolved if brought to the Court by certain designated organs or officials, constitutional review of "law-applying" practice violating human rights might come to the Court through an individual complaint. Under this procedure, which signified a real breakthrough from the human rights perspective, any private person could file an individual complaint challenging the constitutionality of "law-applying practice" violating "fundamental rights and lawful interests" protected by the Constitution.

The first Russian Constitutional Court decided some important cases that played a significant role in working out the relationship between international and Russian domestic law. The record of the first Constitutional Court indicates that it became an important institution promoting the direct application of international law.

¹⁷*Zakon o Konstitutsionnom Sude* (Law on the Constitutional Court), *Vedomosty RF*, No. 19, item 621 (1991).

The first case in which the Constitutional Court relied on international law was filed under the "individual complaint procedure." The *Labor Code Case*¹⁸ concerned the controversial practice, sanctioned by a provision of the Labor Code, of using a simplified procedure to annul labor contracts with persons who had reached pension age. The case is particularly interesting because it was decided before the inclusion of the 1991 Declaration of the Rights and Freedoms of Person and Citizen¹⁹ into the Constitution. Yet even in that situation the Court based itself not only on the Constitution, but also on a variety of international instruments, in finding that the simplified procedure envisioned by the Labor Code violated the principle of non-discrimination. In searching for a constitutional ground that would have permitted the direct application of international norms, the Court innovated by broadly interpreting a general provision of the 1978 Constitution. This provision stated that "foreign policy activity of the Russian Federation shall be based on the recognition of and respect" for the principle of "fulfillment in good faith of obligations and other generally recognized principles and rules of international law."²⁰ While a similarly worded provision of the USSR Constitution had never been considered to be a general norm of incorporation,²¹ the Constitutional Court held that in the Russian domestic context the provision required courts to "assess the applicable law from the point of view of its conformity with the principles and rules of international law."²² Furthermore, the Court noted that the Declaration of the Rights and Freedoms of Person and Citizen ensured that the generally recognized international norms concerning human rights directly created rights and obligations for the citizens of the Russian Federation and that those norms were to be given priority over laws of the Russian Federation.²³ After clarifying the constitutional ground for the direct application of

¹⁸*Vestnik Konstitutsionnogo Suda Rossiiskoy Federatsii* (Herald of the Constitutional Court of the Russian Federation), 1993, No. 1, p. 29 (hereinafter cited as *VKS*).

¹⁹See *supra* note 14.

²⁰1978 Constitution *supra* note 15, Art. 28.

²¹See *supra* note 5 and accompanying text.

²²*VKS supra* note 18, at 33.

²³*Id.*

international norms, the Court took note of human rights standards concerning age discrimination in such instruments as the Universal Declaration on Human Rights, the Covenant on Economic, Social and Cultural Rights,²⁴ International Labour Organization conventions and recommendations.²⁵

²⁴1993 UNTS 3.

²⁵The first Constitutional Court invoked international norms in other two labor law cases. One case concerned certain procedural norms and practices restricting the right of plaintiffs in labor disputes to appeal against the decisions of lower courts. The Court found that these norms and practices violate the right to an effective remedy by a court of law. In support of its decision (See *VKS*, 1993, No. 2/3, p. 41), which declared the relevant restrictions unconstitutional, the Court cited the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights (*Id.*). Another case (See *VKS*, 1994, No. 2/3, p. 24) dealt with the existing Labor Code and the Law on Procuracy which provided that officers of the Procuracy could not challenge disciplinary measures and dismissals in courts. Again the Court found the restrictive laws unconstitutional because they violated the right to an effective remedy by a court of law. The Court relied not only on the Constitution but also on international law and cited such instruments as Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights (*Id.*)

The first Constitutional Court also relied on international law in the much-publicized *Tatarstan Case*.²⁶ The controversy involved an attempt of Tatarstan, a constituent republic of the Russian Federation, to break away from Russia. At issue were the unilateral steps taken by Tatarstan with a view to making it an independent state, as well as the constitutionality of the proposed referendum on independence. Although the Court declared the unilateral secessionist steps unconstitutional primarily on the basis of the then-existing Constitution, it also attempted to draw support from international law. In addressing the proposed referendum, the Court determined that Tatarstan was entitled to change its political status because this right stemmed from "the principle of self-determination of peoples."²⁷ However, the principle of self-determination did not necessarily provide a legal ground for separatism: it might be realized in other forms, such as free association or integration with an independent state or the assumption of some other political status. The Court found that, in any case, the realization of the principle of self-determination required the observance of other principles of international law, in particular the principle of the territorial integrity of states and the principle of universal respect for human rights. To support this conclusion, the Court cited numerous international instruments, including the Covenant on Economic, Social and Cultural Rights, the Covenant on Civil and Political Rights, Universal Declaration of Human Rights, Declaration on Principles of International Law concerning Friendly Relations,²⁸ Declaration on the Right to Development,²⁹ Helsinki Final Act and its follow-up documents.³⁰ The Court found that the unilateral succession of Tatarstan from the Russian Federation would violate the territorial integrity of Russia and legal principles protecting the rights of individuals and peoples. As a result, the Court held that the proposed

²⁶VKS, 1993, No. 1, p. 43.

²⁷Id.

²⁸Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV) (1970).

²⁹GA Res. 41/128 (1986).

³⁰Conference on Security and Cooperation in Europe, Final Act, 1975, 73 *Department of State Bulletin* 323 (1975). For follow-up documents, see, e.g., Charter of Paris for a New Europe, UN Doc. A/45/859, at 20 (1990), reprinted in 30 *International Legal Materials* 190 (1991).

referendum on independence was unconstitutional.

These cases indicate that, even before the adoption of the 1993 Constitution, the Constitutional Court, by its innovative approach, had established a firm legal basis for the direct application of international norms by national tribunals. The *Labor Code* and *Tatarstan* cases indicate that both human rights norms and other pertinent international norms could be invoked before the national authorities. These ground-breaking decisions of the Constitutional Court paved the way for the broader application of international legal norms, especially in the field of human rights, in Russia.

2. The Status of International Law Under the 1993 Constitution

The 1993 Constitution³¹ confirmed the trend in Russian practice of giving a prominent place to international legal standards in the domestic legal setting. One of the principal aims of the Constitution is to clarify the status of international law in the Russian domestic legal system.

The new Constitution contains a special clause on the relationship between international law and the Russian domestic law. Art. 15(4) provides that “the generally recognized principles and norms of international law and the international treaties of the Russian Federation shall constitute an integral part of its legal system.” It also states that “if an international treaty of the Russian Federation establishes other rules than those stipulated by the law, the rules of the international treaty shall apply.”

³¹*Konstitutsia Rossiiskoy Federatsii* (Constitution of the Russian Federation) 1993 (hereinafter cited as 1993 Constitution). The text of the Constitution was published in *Rossiiskaya Gazeta*, December 25, 1993, page 3, Col. 1. For the English language texts of the 1993 Russian Constitution and other constitutions of the CIS states cited below, see A.P. Blaustein, G.H. Flanz eds., *Constitutions of the Countries of the World* (1971, Supplement).

Two principal features of Art. 15(4) must be pointed out. First, Art. 15(4) states that all international law is part of the Russian domestic legal system. In contrast to many contemporary constitutions, which usually refer either to treaties or custom, Art. 15(4) incorporates both treaty law and “the generally recognized principles and norms of international law.” This formulation includes sources of general international law, in particular general customary law. Second, Art 15(4) establishes a higher normative status for treaty rules than for contrary domestic laws. Consequently, legal regulations in force within Russia do not apply if their application is incompatible with treaty provisions. National tribunals must give precedence to treaty norms over domestic law, be it antecedent or posterior domestic law, federal or republic-level or provincial law. Art. 15(4) does not, however, confer such superior status on “the generally recognized principles and norms of international law.” The main reason for this is the fact that customary law often lacks a sufficient degree of specificity. Another consideration may be the lack of parliamentary participation in customary law-making.

While these two considerations may have affected Art. 15(4), “the generally recognized principles and norms of international law” of human rights may enjoy a higher status than contrary domestic legislation. The human rights section of the 1993 Constitution includes Art. 17, which provides that human rights in Russia are recognized and ensured “according to the generally recognized principles and norms of international law.” At first glance, this reference to international law appears to be mere statement of policy. Yet it is still possible to interpret it as envisioning a higher hierarchical status for “the generally recognized principles and norms of international law” concerning human rights than for other “generally recognized principles and norms” mentioned in Art. 15(4). Recent court decisions appear to support the view that in the human rights area, “the generally recognized principles and norms of international law” enjoy a higher status than contrary domestic law.

3. Judicial Practice

From a broad political-legal perspective, an examination of judicial practice may indicate

whether Art. 15(4) of the Constitution has any practical effect on the operation of the Russian domestic legal system. While the 1993 Constitution represents an important step toward wider application of international law in Russia, it cannot in itself be considered a guarantee that international law will enjoy the status envisioned for it by the framers. The actual status of international law in the Russian domestic legal system is and will continue to be determined not only by the constitutional clauses but also by the willingness of courts to rely on that body of law.

It is well known that in many countries constitutional rules remain ineffective. There are many instances of domestic courts simply ignoring broad constitutional clauses referring to international law. It is not surprising that with respect to Russia, which lacks any experience in the direct implementation of constitutional norms, there is much scepticism as to the possible practical effect of Art. 15(4). An example of such scepticism is the report of the group of eminent experts of the Council of Europe who stated in 1994 that, with respect to the implementation of international human rights in Russia, Art. 15(4) seems “to be more theory than practice.”³² The actual practice of Russian courts confirms that this pessimistic assessment of the situation was incorrect in 1994 and remains incorrect today.

An examination of judicial practice is also important from a technical perspective. It is always interesting to investigate how the courts ascertain applicable international law (and whether there is any executive’s intervention in the process) or whether the courts develop a judicial doctrine aimed at avoiding direct application of international norms.

³²Report on the Conformity of the Legal Order of the Russian Federation with the Council of Europe Standards, Doc. AS/Bur/Russia (1994), reprinted in 15 *Human Rights Law Journal* 249, 250 (1994).

The 1993 Constitution envisions the new Constitutional Court as the principal domestic forum for resolving constitutional disputes. The Constitutional Court is designed to guarantee the supremacy of the Constitution and to ensure institutional protection of democracy and fundamental human rights. Under Art. 125(4) of the Constitution and the 1994 Constitutional Law on the Constitutional Court³³ the Constitutional Court has the power to review the constitutionality of “laws” in response to complaints filed by individuals and juridical persons alleging violations of constitutional rights and freedoms. This important procedure, based on the model of the German Federal Constitutional Court, means that individuals and juridical persons have direct access to constitutional review. While individuals and juridical persons may file complaints about the constitutionality of statute-level laws with the Russian Constitutional Court under Art. 125(4) of the Constitution, there also exists a general right of review of all normative acts violating human rights and freedoms in “ordinary” courts under Art. 46 of the Constitution. Art. 46 of the Constitution provides that “everyone shall be guaranteed protection of his or her rights and freedoms in a court of law.” Although the Constitutional Court has exclusive power to declare statutes unconstitutional, “ordinary” courts have been granted the power to review the constitutionality of laws or other normative acts that litigants seek to apply.³⁴

Because the Constitution expressly declares all international law part of Russian law, in assessing the constitutionality of various normative acts the Constitutional Court has been able to reaffirm its prior practice of reliance on international law when resolving constitutional disputes. The same constitutional provision has also provided a firmer basis for the application of international law by courts of general jurisdiction and arbitration (commercial) courts. In this connection it is important to note that the constitutional provisions concerning international law were reaffirmed in the 1996 Federal Constitutional Law on the Judicial System of the Russian

³³ *Sobranie zakonodatel'stva Rossiiskoy Federatsii* (Compilation of Legislation of the Russian Federation), No. 13, item 1447 (1994) (hereinafter referred to as *Sobranie*).

³⁴For a detailed discussion of the Russian judicial system and judicial review, see G.M. Danilenko, W.E. Burnham, *The Law and Legal System of the Russian Federation* (1998) (forthcoming).

Federation³⁵ which regulates the activities of all courts in Russia. The 1996 Law states that a Russian courts apply “generally recognized principles and norms of international law and international treaties of the Russian Federation” (Art. 3). It also provides that “a court, having established when considering a case the nonconformity of acts of a state or other organ, and likewise of an official, to the Constitution of the Russian Federation, federal constitutional law, federal law, *generally recognized principles and norms of international law, international treaty of the Russian Federation...* shall render a decision in accordance with the legal provision having the greatest legal force” (Art. 5) (emphasis added -G.D.).

(A) Practice of the Constitutional Court

A careful analysis of the practice of the new Constitutional Court indicates that it invokes international law in almost all of its decisions concerning human rights. It also indicates that the adoption of the 1993 Constitution has resulted in consolidation of gains achieved in the area of direct application of international law, specifically the international law of human rights.

(a) Principal Cases

³⁵*Sobranie*, No. 1, item 1 (1996).

The first case in which the newly established Constitutional Court relied on international law dealt with the right to strike. In the *Collective Labor Disputes Case*³⁶ the Constitutional Court based its decision not only on the applicable constitutional provisions but also on Art. 8 of the International Covenant on Economic, Social and Cultural Rights under which state parties must ensure “the right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.” The Constitutional Court found that the then existing restrictions on the right to strike of workers of aviation units and enterprises violated Arts. 17 and 55 of the 1993 Constitution and the applicable international standards.

³⁶VKS, 1995, No. 2/3, p. 45.

In the *Case Concerning Art. 42 of the Law of the Chuvash Republic on the Election of the Deputies of the State Assembly of the Chuvash Republic*³⁷ the Court found that local regulations governing elections violated not only Art. 3 of the 1993 Constitution which guarantees “free elections” but also Art. 25 of the International Covenant on Civil and Political Rights. Art. 25 of the Covenant provides that every citizen must have the right and the opportunity, without any discrimination and without unreasonable restrictions, to vote and be elected at “genuine periodic elections which shall be held by secret ballot, guaranteeing the free expression of the will of the electors.” The Court noted that Art. 25 of the Covenant “specifies” electoral guarantees established by the general language of Art. 3 of the 1993 Constitution. The Court also emphasized that “in the Russian Federation the rights and freedoms of the human being and citizen are recognized and guaranteed in accordance with the Constitution of the Russian Federation and rules of international law (Article 17 of the Constitution of the Russian Federation), which, according to Article 15(4) of the Constitution of the Russian Federation, constitute an integral part of its legal system.”

The Constitutional Court further relied on international law in the much publicized *Chechnya Case*.³⁸ This case raised issues of human rights violations by the Russian military in Chechnya. Although the Court lacked the power to deal with specific human rights violations, it noted that the Soviet and Russian legislature failed to implement in domestic law the requirements of the 1949 Additional Protocol to the Geneva Conventions concerning the protection of the victims of armed conflicts that are not international in character. The Court found that “improper consideration of these provisions in the domestic legislation became one of the reasons for non-compliance with the rules of the above-mentioned Additional Protocol, according to which the use of force must be commensurate with the goals to be accomplished and every effort must be made to avoid causing damage to civilians and their property...” In the *Chechnya Case* the Constitutional Court also made an important statement of principle concerning the status of

³⁷VKS, 1995, No. 4, p. 2.

³⁸VKS, 1995, No. 5, p. 3.

international law in the Russian domestic law. The Court stated that “in accordance with the principles of a law-governed state laid down by the Constitution of the Russian Federation, the organs of power are bound in their activities both by internal and international law. The generally recognized principles and norms of international law and international treaties are, under Article 15(4) of the Constitution of the Russian Federation, an integral part of its legal system and must be observed in good faith, including being taken into account by domestic legislation.”

In the *Case Concerning Certain Normative Acts of the City of Moscow and Some Other Regions*,³⁹ which dealt with the attempts of the local authorities to reintroduce the infamous residence permit practice, the Constitutional Court noted that “the rights and freedoms of human beings and citizens are recognized and guaranteed in the Russian Federation in conformity with the generally recognized principles and norms of international law and in accordance with the Constitution of the Russian Federation (Article 17(1) of the Constitution). According to Article 27(1) of the Constitution, everyone who is lawfully within the territory of the Russian Federation has the right to freedom of movement and the right to freely choose a place of temporary or permanent residence. Freedom of movement and the right to freely choose a place of temporary or permanent residence are also recognized by the International Covenant on Civil and Political Rights (Article 12), other international and international legal acts, including Protocol No. 4 to the European Convention on Human Rights (Article 2).”

³⁹VKS, 1996, No. 2, p. 42.

In the *Case Concerning Art. 97 of the Criminal Procedure Code*,⁴⁰ which concerned time limits for arrest in criminal proceedings, the Court cited Art. 14(3) of the International Covenant on Civil and Political rights according to which everyone charged with a crime has the right “to be tried without undue delay.” In the *Case Concerning Art. 418 of the Criminal Procedure Code*⁴¹ the Court relied not only on Arts. 18, 46 and 120 of the 1993 Constitution but also on Art. 14(1) of the Covenant on Civil and Political rights according to which everyone charged with a crime has the right to a fair hearing by “a competent, independent and impartial tribunal established by law.” The *Case Concerning Art. 11 of the 1993 Law on the Federal Organs of Tax Police*⁴² raised an important question about the possible limitations on the right to property. In discussing possible limitations the Court relied not only on the relevant constitutional provisions but also on the “generally recognized principles and norms of international law.” The Court relied in particular on Art. 29 of the Universal Declaration of Human Rights according to which in the exercise of his or her rights and freedoms “everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

⁴⁰VKS, 1996, No. 4, p. 2.

⁴¹VKS, 1996, No. 5, p. 15.

⁴²VKS, 1996, No. 5, p. 22.

The most recent cases confirm the general trend to rely on international law. In the *Case Concerning Arts. 180, 181, 187 and 192 of the Arbitration Procedural Code*,⁴³ which raised constitutional questions about appeal procedures envisioned by the Arbitration Procedure Code, the Constitutional Court based its decision primarily on Art. 46(1) of the 1993 Constitution which provides that “everyone shall be guaranteed protection of his or her rights and freedoms in a court of law.” The Court held that under Art. 46 of the Constitution the state must ensure a fair, independent and effective hearing of cases. According to the Court, “the same obligation results from the generally recognized principles and norms of international law, in particular those which are embodied in Articles 8 and 29 of the Universal Declaration of Human Rights and Article 2 (2, 3(a)) of the International Covenant on Civil and Political Rights.” The Court also cited Art. 14(6) of the Covenant on Civil and Political Rights which envisions revision of criminal convictions on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice. Although the *Case Concerning Arts. 180, 181, 187 and 192 of the Arbitration Procedural Code* dealt with arbitration and not criminal procedure, the Court applied Art. 14 of the Covenant by analogy and stated that “under Articles 15(4) and 17(1) of the Constitution of the Russian Federation the right of everyone to court protection envisioned by Article 46(1) of the Constitution, must be ensured in accordance with the above norm of international law, which has a generally recognized character and as such constitutes an integral part of the legal system of the Russian Federation.” The Constitutional Court invoked the right to judicial protection in another recent case - the *Case Concerning Art. 44 of the Criminal Procedure Code and Art. 123 of the Civil Procedure Code*.⁴⁴ This case involved the right of everyone to have his or her case examined by the court and by the judge under whose jurisdiction the given case falls under the law. The Court cited, among other things, Arts. 7, 8 and 10 of the Universal Declaration of Human Rights, Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms⁴⁵ and Art. 14 of the International Covenant on Civil

⁴³*Sobranie*, No. 6, item 784 (1998).

⁴⁴*Sobranie*, No. 12, item 1458 (1998).

⁴⁵213 UNTS 221.

and Political Rights. These international instruments guarantee that all persons are equal before the law. They also provide that in the determination of criminal charges against him or her or of his or her rights and obligations in a civil suit, everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Court held that “the above provisions, being a part of the generally recognized principles and norms of international law, constitute an integral part of the judicial system of the Russian Federation under Article 15(4) of the Constitution of the Russian Federation.”

Still another recent case involving international law concerned the rights of foreign nationals and stateless persons in Russia to enjoy protection under the general constitutional clauses concerning human rights. The *Case Concerning Art. 31 of the 1981 Law on the Legal Status of Foreign Nationals in the USSR*⁴⁶ was initiated by a stateless person who was arrested, detained for a long period of time in Russia and subsequently deported to Sweden. The first question before the Court was whether foreign national or stateless persons may file complaints with the Constitutional Court. The question became important because Art. 125(4) of the Constitution provides that “the Constitutional Court of the Russian Federation, in response to complaints about a violation of the constitutional rights and freedoms of *citizens*... shall verify the constitutionality of a law that has been applied or is due to be applied in a specific case” (emphasis added - G.D.). The Court held that under the Constitution, in particular its Art. 46, which guarantees judicial protection to “everyone,” foreign citizens and stateless persons must enjoy the same right to file constitutional complaints as Russian citizens. The Court also found support for this proposition in the “generally recognized principles and norms of international law which, according to Art. 15(4) of the Constitution of the Russian Federation, constitute an integral part of its legal system.” The Court cited Arts. 3, 8 and 9 of the Universal Declaration of Human Rights, Art. 5 of the Declaration on Human Rights of Persons Who are Not Citizens of the Country of Their Residence and Arts. 9 of the International Covenant on Civil and Political Rights as evidence of the applicable “generally recognized principles and norms of international law”.

⁴⁶*Sobranie*, No. 9, item 1142 (1998).

(b) Significance of Case Law

The cases described above are significant from several points of view. From a broad political-legal perspective, they demonstrate that Art. 15(4) of the 1993 Constitution is not a dead letter. International law can be invoked before the Russian Constitution Court

From a more technical perspective, these cases indicate that the Constitutional Court usually relies on international law as an additional argument in support of its conclusions based on the applicable constitutional provisions. This is quite understandable in view of the facts that the 1993 Constitution contains an extensive catalogue of human rights that is based on the generally recognized international human rights standards. As a result, international human rights standards are often used as a means of interpretation of the applicable constitutional provisions. At the same time, they may serve as an entirely independent basis for the Constitutional Court's decision.

The above cases also indicate that the Constitutional Court often relies not only on treaties but also on "the generally recognized principles and norms of international law." In so doing, the Court appears to regard "the generally recognized principles and norms" concerning human rights as having a higher hierarchical status than contrary domestic law. For example, in the *Case Concerning Certain Normative Acts of the City of Moscow and Some Other Regions*⁴⁷, the Court declared the local regulations requiring residence permits unconstitutional by referring not only to human rights treaties but to the "generally recognized principle and norms of international law."

From a critical perspective, it should be noted that the Constitutional Court's decisions contain very little analysis of the applicable rules of international law. Another significant drawback of all its decisions is the Court's failure to analyze the method by which it derives "the generally recognized principles and norms of international law." When dealing with "the generally recognized principles and norms of international law" the Court appears to believe that they ma

⁴⁷See *supra* note 39.

be proved by simply citing international treaties or even non-binding international instruments, in particular UN General Assembly resolutions. This approach to proving general international law is controversial because traditionally it requires the proof of *factual practice* states accepted as law. For example, in the *Labor Code Case*⁴⁸ the Constitutional Court made no effort to analyze the legislative or other real practice of states on question of termination of labor relations with persons who had reached retirement age. It is known, however, that many countries have set special procedures for terminating labor relations with such persons. If the Court, instead of being content with simple references to non-binding recommendations of the International Labour Organization, had engaged in an analysis of the real practice of states in this field, its conclusions would not have been so categorical.⁴⁹

⁴⁸See *supra* note 18.

⁴⁹For a critical commentary on the Constitutional Court's methodology, see G.M. Danilenko, *Primenenie mezhdunarodnogo prava vo vnutrennei pravovoi sisteme Rossii: Praktika Kostitutsionnogo suda* (Implementation of International Law in the Domestic Legal System of Russia: Practice of the Constitutional Court), 11 *Gosudarstvo I pravo* 115 (1995). Cf. also I.I. Lukashuk, *Primenenie norm mezhdunarodnogo prava v svete Federal'nogo zakona o mezhdunarognykh dogovorakh Rossii* (Implementation of Rules of International Law in Light of the Federal Law on International Treaties of Russia), 4 *Rossiiskii juridicheskii zhurnal* 46 (1996).

It thus appears that the Constitutional Court invents its own version of sources of international law for domestic consumption. Such an approach may lead to undesirable results. The Court should be advised to follow the recommendation on the matter issued by the prestigious *Institut de droit international*. Art. 4 of the *Institut's* 1993 resolution on application of international law by domestic judges states that “national courts, in determining the content of customary international law, should use *the same techniques as international tribunals* and should enjoy the same freedom to apply rules of customary international law in their current content, taking into account, to the appropriate extent, *developments in the practice of states, jurisprudence and doctrine*”⁵⁰ (Emphasis added - G.D.).

(c) The Concept of Self-Executing Treaties

An analysis of decisions of the Constitutional Court indicates that it makes no distinction between self-executing and non-self executing treaties.⁵¹ The *Labor Code Case*⁵² is probably the best illustration of this trend. In declaring age discrimination in labor relations unconstitutional, the Court relied, among other things, on the International Covenant on Economic, Social and Cultural Rights and International Labour Organization Convention No. 111.⁵³ It is unlikely that the courts of the majority of monistic countries would consider these treaties to be self-executing, because they are essentially programmatic. Both Art. 2 of the Economic Covenant and Art. 2 of the International Labour Organization Convention provide for progressive realization of these treaties. It appears that state parties to these treaties intended merely to assume a commitment to work toward achievement of certain policy objectives. Such programmatic commitments, by their very nature, cannot be self-executing. Therefore, they are incapable of overriding conflicting

⁵⁰65(II) *Institut de droit international, Annuaire* 257 (1993).

⁵¹For the doctrine of self-executing treaties, see generally Y. Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 *Virginia Journal of International Law* 627 (1986); Th. Buergenthal, *Self-Executing and Non-Self-Executing Treaties in National and International Law*, 235 *Recueil des cours* 303 (1992 IV).

⁵²See *supra* note 18.

domestic legislation.

It may be argued, however, that only the realization of the substantive rights guaranteed by the Economic Covenant was intended to be progressive. By contrast, the obligation of non-discrimination provided for in Art. 2(2) must be realized immediately. Even if we would agree that the essentially programmatic nature of obligations under the Covenant does not necessarily mean that the prohibition against discrimination cannot have direct effect, it is much more difficult to advance this type of argument with respect to the International Labour Organization Convention No. 111.

Be that as it may, other evidence of the non-self-executing nature of these treaties is the requirement that state parties adopt domestic “legislative measures.” The argument based on the obligation to adopt domestic legislative measures seems particularly strong with respect to the International Labour Organization Convention No. 111. Under Art. 2 of the International Labour Organization Convention, each member state undertakes to pursue a national policy designed to promote elimination of any discrimination in employment “by methods appropriate to national conditions and practice.” Under Art. 3 of the Convention, state parties assume an obligation to enact “legislation” to secure the acceptance and observance of the policy and “to repeal an statutory provisions” which are inconsistent with the policy. Express provisions of this kind seem to undermine any claim that the relevant international standard is self-executing.

⁵³See *International Labour Conventions and Recommendations* (1996).

The Constitutional Court used a slightly different approach in the *Collective Labor Disputes Case*.⁵⁴ The Court did recognize that under the International Covenant on Economic, Social and Cultural Rights the regulation of the right to strike must be effected by domestic legislation. Indeed, under Art. 8 of the Covenant, state parties undertake to ensure “the right to strike, provided that it is exercised in conformity with the laws of the particular country.” However, the Court still held that the limits of permissible restrictions established by the Covenant are directly applicable or self-executing.

⁵⁴See *supra* note 36.

While in these cases the Constitutional Court refused to draw any distinction between self-executing and non-self-executing treaties, the Russian legislature took the initiative. The 1995 Law on International Treaties⁵⁵ includes Art. 5 which states that “the provisions of officially published international 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.”

This clause is based on the idea that, as a matter of principle, there are two different categories of treaties, and that certain treaties must be transformed into the domestic legal system in order to be effective. At the same time, the clause does not tell us much about the characteristics that make a treaty non-self-executing. One thing is clear, however: Any treaty provision that expressly requires states to adopt legislative measures cannot be considered directly applicable or self-executing.

It appears that the Constitutional Court is also moving toward recognition of the distinction between different categories of treaties and of the importance of this distinction for their effective domestic implementation. In the *Chechnya Case*,⁵⁶ the Court noted that the absence of the relevant domestic regulations that would have transformed the provisions of the Additional Protocol II to the Geneva Conventions into domestic law “became one of the reasons for non-compliance with [its] rules.”

(B) Practice of Courts of General Jurisdiction

⁵⁵*Sobranie*, No. 29, item 2757 (1995).

⁵⁶See *supra* note 38.

Ordinary Russian courts have much less experience in applying international law than the Constitutional Court. However, these courts have also taken notice of the new source of law which may govern cases at hand.

The Supreme Court took the lead by issuing a special ruling on the matter the form of an “explanation.” “Explanations” of the Supreme Court are abstract opinions that are binding on all lower courts. The 1995 Ruling “*On Some Questions Concerning the Application of the Constitution of the Russian Federation by Courts*”⁵⁷ instructed all lower courts to apply international law. The 1995 Ruling provides:

When administering justice, courts shall take into account that the generally recognized principles and norms of international law, laid down in international covenants, conventions and other documents (particularly in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights) and the international treaties of the Russian Federation are, under Art. 15 para. 4 of the Constitution of the Russian Federation, an integral part of Russia's legal system. The same constitutional norm stipulates that if an international treaty of the Russian Federation establishes rules other than those established by the law, the rules of the international treaty shall apply.

In view of this, when hearing a case, a court cannot apply rules of law governing the relevant relationship if an international treaty that came into force and became binding on the Russian Federation through enactment of a federal law lays down other rules than those stipulated by the law. In those cases the rules of the international treaty of the Russian Federation shall apply.

⁵⁷*Biulleten' Verkhovnogo Suda Rossiiskoy Federatsii* (Bulletin of the Supreme Court of the Russian Federation), 1996, No. 1, at 3 (hereafter referred to as *BVS*).

In these situations the courts shall bear in mind that, according to Art. 5 para. 3 of the Federal Law on International Treaties of the Russian Federation, the provisions of officially published international treaties of the Russian Federation that do not require the promulgation of domestic acts for application, shall operate in the Russian Federation directly. In other cases it is necessary to apply, along with the international treaty of the Russian Federation, the relevant domestic legal act that was enacted for effectuating the provisions of the said international treaty.

The 1995 Ruling raises several interesting issues. First, it is important to note that the Supreme Court defines the concept of the “generally recognized principles and norms of international law” by referring primarily to international non-binding documents and treaties, in particular Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. This approach is similar to that of the Constitutional court and raises the same objections.

Second, the Supreme Court adopted a restrictive language that appears to contravene Art. 15(4) of the 1993 Constitution. The Court states that “when hearing a case, a court cannot apply rules of law governing the relevant relationship if *an international treaty, that came into force and became binding on the Russian Federation through enactment of a federal law*, lays down rules other than those stipulated by the law” (Emphasis added - eds.). While the Supreme Court gives priority over contrary domestic legislation only to *treaties that are ratified by federal law*, Art. 15(4) of the Constitution gives priority to *all* international treaties of the Russian Federation, including those that are not ratified through the enactment of a federal law.⁵⁸

⁵⁸Note that the 1995 Law “On International Treaties of the Russian Federation” (*Sobranie* No. 29, item 2757 (1995)) requires ratification of a wide category of treaties. Art. 15 of the 1995 Law provides that the Federal Assembly must ratify the following categories of treaties:

- a) the implementation of which requires modification of the existing federal laws or the adoption of new ones, as well as those treaties which set forth rules different from rules provided by a law;
- b) the subject of which is the fundamental rights and freedoms of the person and the citizen;

c) concerning the territorial delimitation of the Russian Federation with other states, including treaties on the precise demarcation of the state boundary of the Russian Federation, as well as treaties on the delimitation of the exclusive economic zone and the continental shelf of the Russian Federation;

d) on the basic principles of inter-state relations, regarding questions affecting the defense capability of the Russian Federation, regarding questions of disarmament or international control over armaments, regarding questions of ensuring international peace and security, as well as peace treaties and treaties on collective security;

e) on the participation of the Russian Federation in inter-state unions, international organizations and other inter-state associations, if such treaties provide for the transfer to them of the effectuation of part of the powers of the Russian Federation or establish the legal mandatory force of decisions of their organs for the Russian Federation.

Third, the Ruling of the Supreme Court, by referring to the 1995 Law “On International Treaties of the Russian Federation,” draws a distinction between self-executing or directly applicable and non-self-executing treaties. At the same time, the Supreme Court states that in cases of non-self-executing treaties “it is necessary to apply, *along with the international treaty of the Russian Federation*, the relevant domestic legal act that was enacted for effectuating the provisions of the said international treaty” (Emphasis added - eds). It thus appears that the Supreme Court requires *simultaneous* application of domestic laws and underlying non-self-executing treaties. It is not entirely clear whether such a simultaneous application is possible in cases on non-self-executing treaties.

In 1995 the Supreme Court also adopted a more specific “explanation” instructing the courts to apply Art. 9 of the International Covenant on Civil and Political Rights directly. The Ruling of the Plenary Session of the Supreme Court of the Russian Federation “*On the Judicial Practice Concerning Verification of the Legality and Justification of Arrests or the Extension of Periods of Detention*”⁵⁹ states:

The courts must take into account that, in accordance with Art. 9 of the International Covenant on Civil and Political Rights, which entered into force on May 23, 1976, and the rules of which, under Art. 15 para. 4 of the Constitution of the Russian Federation, are an integral part of the legal system of the Russian Federation and have priority over its domestic legislation, everyone who is deprived of his liberty by arrest or detention has the right to institute proceedings before a court in order that the court may decide, without delay, the lawfulness of his detention and order his release if the detention is unlawful.

In view of this, the complaint of anyone detained on the suspicion of committing a crime, or the complaint of her or his lawyer or legal representative, concerning the

⁵⁹BVS, 1995, No. 1, p. 3

lawfulness and well-foundedness of the detention must be considered and resolved by the court in the manner established by the criminal procedure legislation.

This Ruling significantly expanded judicial protection of detainees because under the Russian Criminal Procedure Code only persons *arrested* (not simply detained) on a criminal charge have the right to bring proceedings before a court.

The Supreme Court also relies on international treaties in individual cases. For example, in *Re Komarov*⁶⁰ the defendant challenged the decision to hold an *in camera* hearing of a criminal case. The Supreme Court upheld the decision by referring to the 1993 Constitution and Art. 14 of the Covenant on Civil and Political Rights according to which the public may be excluded from all or a part of a trial “when the interest of the private lives of the parties so requires.”

⁶⁰*BVS*, 1997, No. 2, p. 1.

The Supreme Court traditionally applies norms of international treaties in the area of private international law. For example, judicial practice indicates that Russian courts directly apply the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁶¹ and recognize and enforce foreign arbitration awards. In an authoritative book on the subject K.Hober describes several enforcement proceedings in the Moscow City Court involving foreign companies that won arbitration proceedings against Russian entities in London and Stockholm and sought recognition and enforcement in Russia.⁶² It is interesting to note that in one of the cases the defendant raised an objection concerning the merits of the dispute. The Moscow City Court rejected this argument because it did not deal with procedural objections.⁶³ The Moscow City Court and the Russian Supreme Court have adopted the approach of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards that objections touching on the merits of the dispute are excluded.⁶⁴

(C) Practice of Arbitration (Commercial) Courts

Russian arbitration (commercial) courts resolve economic disputes. Although they do not have much experience in applying principles and norms of public international law, they traditionally apply norms of international treaties⁶⁵ and commercial customs⁶⁶ in the area of private international law.

⁶¹330 UNTS 38.

⁶²See K. Hober, *Enforcing Foreign Arbitral Awards Against Russian Entities* 52-54 (1994).

⁶³ *Id.*, at 54.

⁶⁴ *Id.*, at 57-58.

⁶⁵See, e.g., *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoy Federatsii* (Herald of the Supreme Arbitration Court of the Russian Federation), 1998, No. 4, p. 38-40, 45-46 (cases referring to the 1929 Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air and the 1980 United Nations Convention for the International Sale of Goods).

⁶⁶*Id.*, at 40-41 (case referring to “commercial customs in the sphere of international trade”).

III. International Law in the Domestic Legals Systems of Other CIS States: A Survey

Other CIS countries have also made attempts to pay more tribute to international law. Several of them have adopted constitutional provisions incorporating international law into their domestic legal orders. There are, however, some states whose commitment to international norm and values remains doubtful.

A comparative analysis of the constitutions of CIS states indicates that there are three groups of states which adopted different constitutional provisions concerning international law.

The first group includes states whose constitutions expressly proclaim international treaty or customary law to be part of the law of the land but fail to establish the hierarchical status of international rules in the domestic legal system of the relevant country. Thus, the 1993 Kirghi Constitution provides that “inter-state treaties ratified by the Republic of Kirghistan and other norms of international law form a constituent and directly applicable part of the legislation of the Republic of Kirghistan” (Art. 12).

An important country in this group is Ukraine. The 1996 Constitution of Ukraine provides that “international treaties currently in force, as ratified by the Supreme Rada of Ukraine, for part of Ukraine’s national legislation.” Although at the constitutional level Ukraine did not proclaim that international treaties take priority over contrary domestic legislation,⁶⁷ it is significant that they are considered part of Ukraine’s domestic law. In contrast, the “generally recognized principles and norms of international law” are mentioned only in the clause dealing with foreign policy. Art. 18 of the Ukrainian Constitution provides that “the foreign political

⁶⁷The supremacy of certain international treaties over contrary Ukrainian legislation is established only by the 1993 Law on International Treaties of Ukraine. Art. 17 of the 1993 Law provides that “if the international treaty of Ukraine, concluded in the form of a law, establishes other rules than those provided in the legislation of Ukraine, then those applied shall be the rules of the international treaty of Ukraine.”

activity of Ukraine is oriented to protect its interests and security through the maintenance of peaceful and mutually beneficial cooperation with members of the international community according to the generally recognized principles and norms of international law.”

The second group of states not only proclaimed international law, usually treaty law, to be part of the law of the land, but also established, at the constitutional level, a higher hierarchical status of international rules. Thus, the 1994 Constitution of Moldova provides that “the Republic of Moldova pledges to respect the Charter of the United Nations and the treaties to which it is a party” (Art. 8). It also states that “wherever disagreement appears between conventions and treaties signed by the Republic of Moldova and her own national laws, priority shall be given to international regulations.” The 1995 Constitution of Kazakhstan proclaims that “international treaties ratified by the Republic of Kazakhstan have priority over its laws and are directly implemented except in cases when the application of an international treaty shall require the promulgation of a law” (Art. 4). The 1996 Constitution of Georgia states that “the legislation of Georgia corresponds with universally recognized norms and principles of international law.” It also provides that “international treaties or agreements concluded with and by Georgia, if they are not in contradiction to the Constitution of Georgia, have prior legal force over internal normative acts” (Art. 6). Similar provisions are contained in the 1995 Armenian Constitution (Art. 6) and 1994 Tadjik Constitution (Art. 11).

Belarus, at least theoretically, belongs to the second group. The 1996 Constitution of Belarus proclaims that “the Republic of Belarus recognizes the supremacy of the universally recognized principles of international law and ensures that its laws comply with such principles” (Art. 8). The 1996 Constitution also proclaims that “the state guarantees the rights and freedom of the citizens of Belarus that are enshrined in the Constitution and the laws, and specified in the state’s international obligations” (Art. 21).

The actual impact of these constitutional provisions of a large group of CIS states is still unclear. Because the “opening” to international law of this group of states is fairly recent, it is

difficult to draw any definite conclusions as to whether the constitutional clauses proclaiming the supremacy of international treaties would be implemented by domestic agencies, particularly by courts. In contrast to Russia, where the constitutional provisions concerning the supremacy of international law have already been tested in judicial practice, the newly established constitutional and ordinary courts of this group of states have yet to render judicial opinions that would directly apply international law.

The third group of states included into their constitutions only very general and vague references to international law. For example, the 1992 Constitution of Uzbekistan provides that the foreign policy of the Republic of Uzbekistan “shall be based on the principles of sovereign equality of the states, non-use of force or threat of its use, inviolability of frontiers, peaceful settlement of disputes, non-interference in the internal affairs of other states, and other universally recognized norms of international law” (Art. 17). It appears that this reference to international law is just a statement of foreign policy. It is doubtful that it will be interpreted as a rule incorporating international law into Uzbekistan’s domestic legal order. Turkmenistan falls in the same group although Art. 6 of its 1992 Constitution proclaims that “Turkmenistan shall acknowledge priority of generally recognized norms of international law.” This provision is included in a clause dealing with foreign policy. As a result, the acknowledgment of “the priority of generally recognized norms of international law” may have no domestic impact.

As far as the special machinery for guaranteeing the observance of international obligations by domestic authorities is concerned, the situation in different CIS countries is far from being uniform. A comparative analysis indicates that only some countries establish judicial guarantees for the compliance by domestic authorities with international commitments. It is well known that although international norms bind all branches of government, the most important organs of implementation of international norms at the domestic level remain domestic courts. If courts are assigned the role of guardians of the rule of law, they may also protect international rule of law. From a broad political-legal perspective, the actual role of the courts in this area depends on the independence of the judiciary. From a more technical perspective, much depends

on the power of the courts to review administrative action or legislative acts and set them aside on the grounds that they are contrary to international law.

Some CIS states provide guarantees for the right to recourse to the courts in cases of a violation of individual rights by public authorities. Thus, under Art. 55 of the Ukrainian Constitution “everyone is guaranteed the right to challenge in court the decisions, actions or omissions of bodies of state power, bodies of local self-government, officials and officers.” The Ukrainian Constitution also envisions the creation of the Constitutional Court. Although Art. 150 of the Ukrainian Constitution does not provide for the right of individuals to file constitutional complaints to the Constitutional Court, such a right envisioned by the 1996 Law of Ukraine on the Constitutional Court.⁶⁸ Under Art. 42 of the 1996 Law “constitutional petitions” to the Constitutional Court may be submitted by the Ukrainian citizens, aliens, stateless persons and legal entities. Because Ukrainian courts, especially the Constitutional Court, are designed to enforce the individual’s constitutional rights against the government, one could expect that they will also use their power to enforce international treaties, especially human rights treaties, ratified by Ukraine.

Judicial review of administrative and legislative acts is also envisioned by some other CIS states, such as Belarus (Constitution, Art. 60), Moldova (Constitution, Art. 53) and Turkmenistan (Constitution, Art. 40). It is doubtful, however, that the courts of all these countries will be able to enforce the individual’s constitutional and international human rights against governmental and legislative actions in an effective manner. There are indications that some countries of the region (such as Belarus)⁶⁹ failed to establish basic guarantees for the independence of the judiciary.

⁶⁸For an English language text of the 1996 Law, see 4 *Bulletin of the Constitutional Case Law. Special Edition. Basic Texts*, at 106.

⁶⁹See *infra* Section VI(3).

Case law on implementation of international law in the CIS countries is only emerging. Prior to the adoption of the 1995 Constitution of Kazakhstan, the Constitutional Court of Kazakhstan had the power to hear constitutional complaints filed by individuals and legal entities. Two decisions of the Constitutional Court of Kazakhstan initiated by private individuals and legal entities relied not only on the then existing Constitution but also on the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.⁷⁰ However, the 1995 Constitution of Kazakhstan abolished the Constitutional Court. It envisions the creation of a Constitutional Council. This body has been granted only limited powers of judicial review. Individuals no longer enjoy the right to file constitutional complaints directly to the Constitutional Council. As a result, it is unlikely that it will be able to continue the previous practice of the Constitutional Court.

Georgian Constitutional Court is another judicial authority that has so far managed to develop some jurisprudence concerning implementation of international law in domestic law. It has been reported that in at least one case the Constitutional Court of Georgia made references to the Universal Declaration of Human Rights and international treaties.⁷¹

IV. Policies Relating to Implementation of International Law i Russia and Other CIS States

Experience suggests that effective implementation of constitutional provisions proclaiming international law to be part of domestic law depends on various political-legal factors that favor

⁷⁰See the 1992 *Case Concerning the Ruling of the Supreme Soviet of Kazakhstan "On the Gradual Introduction of Minimal Consumer Budgets"* and the 1993 *Case Concerning the Ruling of the Council of Ministers of Kazakhstan "On the Procedure for Hiring and Dismissal of Heads of State Enterprises,"* reprinted in Zh. Baishev, *Sudebnaya zashchita konstitutsii* (Judicial Protection of the Constitution) 129-137, 159-166 (1994).

⁷¹See the *Case of Lado Sanikadze and Koba Davitashvili v. The Parliament of Georgia*, discussed in K. Korkelia, *New Trends Regarding the Relationship Between International and National Law (With a Special View Towards the States of Eastern Europe)*, 23 *Review of Central and East European Law* 227, 238 (1997).

or oppose direct application of international law. These factors include the nature of applicable international rules, the strengths of domestic democratic institutions and the rule of law, independence and professionalism of the judiciary and participation in international institutions.

1. Nature of Applicable International Rules

Nature of applicable international rules may favor or oppose direct application of international treaties or general international law. Some CIS states, in particular Russia, have embraced the idea of direct incorporation of international law primarily because they wanted to improve domestic human rights. This consideration will continue to favor direct application of international norms.

At the same time, there are political-legal considerations that may push these states in the opposite direction. Thus, Russia is trying to enter international markets and join international regulatory regimes that govern international trade. It may soon discover that some of the rules and practices established by trading nations could create serious problems for its economy. It may then try to restrict the direct applicability of the relevant trade rules in its domestic legal order by relying, for example, on a broad version of the doctrine of non-self-executing treaties.

2. Democratic Institutions and the Rule of Law

In societies which lack democratic institutions and which do not respect the rule of law there is always a discrepancy between constitutional undertakings and their practical application. As a result, constitutional provisions concerning international law may have no impact on the operation of domestic legal systems. The establishment of democratic institutions and a rule-of-law state thus becomes an essential precondition for the effective implementation of constitutional provisions proclaiming international law to be part of the law of the land.

Several CIS states have developed neo-authoritarian tendencies that may render the constitutional provisions on international law irrelevant. The situation is particularly serious in

such countries as Belarus and Turkmenistan. Belarus may become the most notorious example of a country whose constitutional provisions on the supremacy of international law are a dead letter. Under the 1996 Constitution Belarus “recognizes the supremacy of the universally recognized principles of international law and ensures that its laws comply with such principles” and “guarantees the rights and freedoms of the citizens of Belarus that are enshrined in the Constitution and the laws, and specified in the state’s international obligations.” However, there are indications that the domestic political and legal situation in Belarus hardly favors direct application of international law. In assessing the domestic situation in Belarus, the Human Rights Committee noted in 1997 that “remnants of the former totalitarian rule persist and that the human rights situation in Belarus has deteriorated significantly...”⁷² The executive branch in Belarus is not ready to recognize the principle of the rule of law. The Human Rights Committee noted in this connection that the President of the Republic failed “to respect the decisions of the Constitutional Court and to observe the rule of law.”⁷³

CIS countries which do recognize the principle of the rule of law are still struggling to establish states based on the rule of law. Thus, Russia is defined by Art. 1 of the 1993 Constitution as a “democratic federal rule-of-law state.” However, Art. 1 of the 1993 Constitution must currently be viewed as a goal rather than a description of the actual state of affairs. Although Russia has embarked upon the road toward democracy and it is clearly making progress toward becoming a state based on the rule of law, its totalitarian past and the absence of a tradition of respect for the rule of law make achieving this goal difficult. An analysis of the 1993 Constitution indicates that Russia managed to establish normative and institutional foundations for the “rule-of-law state.” However, as the Human Rights Committee noted in its Comments, it is still “necessary to overcome vestiges of the totalitarian past.”⁷⁴ It also noted that “much remains

⁷²Concluding Observations of the Human Rights Committee: Belarus, UN Doc. CCPR/C/79/Add. 86 (1997).

⁷³Id.

⁷⁴Concluding Observations of the Human Rights Committee: Russia, UN Doc. CCPR/C/79/Add. 54 (1995).

to be done in strengthening democratic institutions and respect for the rule of law.”⁷⁵ In this connection it is important to emphasize that changes in social attitudes towards law and legal institutions, in particular the lack of “legal conscience” of the population as a whole, as well as of the political and intellectual elites, cannot be achieved by even most far-reaching constitutional or legislative reforms. It is well known that as a component of any legal system the social attitudes towards law and institutions change the most slowly ⁷⁶

3. Independence and Professionalism of the Judiciary

⁷⁵Id.

⁷⁶As the Council of Europe has emphasized, one of Russia's major tasks is to develop a “legal culture” or “a broad awareness of, and respect for, the rule of law in all its aspects: political, legal and administrative - and at all levels: national, regional and local” (Resolution No. 1065 “On Procedure for an Opinion on Russia's Request for Membership of the Council of Europe” (Adopted by the Parliamentary Assembly of the Council of Europe on September 26, 1995, Doc. H/INF (96) 1, at 103)). While recognizing the dynamics and direction of many positive legal and political developments across the Russian Federation, the Council of Europe noted that Russia's progress in this field will “take many years” (Id.).

An important guarantee of the effectiveness of constitutional provisions proclaiming supremacy of international law is an independent and professional judiciary. In 1993 the *Institut de droit international* adopted a special resolution on the matter stating that “national courts should be empowered by their domestic legal order to interpret and apply international law with full independence.”⁷⁷ Discussions of the issue at the *Institut de droit international* indicate that the court’s independence is to be affirmed in relation to the executive branch which normally is responsible for foreign policy

The establishment of an independent and professional judiciary remains an important goal for all CIS states. Regrettably, some of these states fail to establish even the basic guarantees for an independent and impartial judiciary. For example, the Human Rights Committee has noted with respect to Belarus that “the procedures relating to tenure, disciplining and dismissal of judges at all levels do not comply with the principles of independence and impartiality of judiciary.”⁷⁸

However, even in countries which adopted constitutional safeguards protecting independence and impartiality of the judiciary judges cannot be absolutely immune from outside influence. Experience suggests that in all countries politics may undermine judicial independence in different indirect and subtle ways. In the CIS countries the actual independence of judges presents special problems because judges are career civil servants who often perceive themselves to be government officials. This means that it may be overly optimistic to expect all CIS judges to act as independent watchdogs of government administration. Furthermore, as career civil servants CIS judges usually seek promotion from lower courts to higher judgeships. As a result, they may be subjected to influence of their superiors who often control their promotion in rank. It is also useful to keep in mind that there is always the potential for outside direct or indirect influence b

⁷⁷65(II) *Institut de droit international, Annuaire* 256 (1993).

⁷⁸Concluding Observations of the Human Rights Committee: Belarus, *supra* note 72.

federal and local politicians, in particular legislators, powerful economic organizations, mass media and even organized crime groups.

As regards professionalism, it is important to note that in many CIS countries there are serious shortcomings in the recruitment, enumeration and training of judges. For example, the Russian judiciary has lost many experienced judges who left the bench for private practice. The competence of judges to implement the Constitution and new laws is also affected by the fact that the values of many Russian judges were formed during the Soviet era. While both “ordinary” and arbitration judges receive some training in the legal principles of a market-oriented and “open” system, experience indicates that this training is far from adequate. Because judges lack experience in applying international law, special training is required with respect to direct application of international treaty and customary law.

4. Participation in International Institutions

An important factor favoring direct application of treaties is participation in international institutions. Experience suggests that, if a country joins international institutions to which aggrieved individuals may appeal against breaches of treaty obligations on the domestic level, national authorities tend to take treaty obligations seriously. It is well-known, for example, that the jurisprudence of the European Court of Human Rights exerts a strong influence on the attitude of domestic courts of the members of the Council of Europe. As soon as the domestic authorities, including judges, realize that the European Court is emerging as a kind of Pan-European constitutional court, they start to pay much closer attention to the European Convention on Human Rights and to the case-law of the European Court of Human Rights. As a result, there is much more willingness to apply the European Convention directly.

CIS states are bound by the Optional Protocol to the International Covenant on Civil and Political Rights. Moldova, Russia and Ukraine have joined the Council of Europe. Russia has just ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms

and recognized the jurisdiction of the European Court of Human Rights.⁷⁹ One can expect that the interaction between Moldovan, Russian and Ukrainian domestic courts and the European Court of Human Rights will have a particularly significant impact on the direct domestic application of human rights treaties.

With respect to Russia, it may be appropriate to mention here that under Art. 15(4) of the Russian Constitution it is possible not only to invoke rules of treaties before domestic courts but to rely on the interpretation of such treaties by international organs. As a result, once Russia has ratified the European Convention on Human Rights, there is no bar to the domestic use of the interpretation of the Convention advanced by the European Court of Human Rights. The case law of the European Court may thus be gradually transformed into Russian domestic jurisprudence.

⁷⁹*Sobranie*, No. 14, item 1514 (1998).

In this connection, it is interesting to note that Russian Constitution includes a special clause on international institutions that may reinforce the direct applicability of international human rights standards. Art. 46 of the 1993 Constitution provides that all persons enjoy a constitutionally protected right to submit petitions to “inter-state organs concerned with the protection of human rights and freedoms” after exhausting domestic remedies. In the *Case Concerning Arts. 371, 374 and 384 of the Criminal Procedure Code*,⁸⁰ Art. 46 has been interpreted by the Constitutional Court in a way that gives the clause concerning resort to international bodies real significance. The Constitutional Court has held that Art. 46(3) of the Constitution means that “decisions of inter-state organs may lead to the reconsideration of specific cases by the highest courts of the Russian Federation and, consequently, establish their competence with respect to the institution of new proceedings aimed at changing the previously rendered decisions, including decisions handed down by the highest domestic judicial instance.”⁸¹

Because Art. 46 of the Russian Constitution does not expressly refer to international courts, it appears that a request for the reopening of the case could be successful even on the basis of “the views” adopted by the Human Rights Committee under the Optional Protocol. Although the legislature has yet to adopt new procedural codes that would add a new ground for reopening proceedings with express reference to findings of international organs,⁸² the innovative interpretation of Art. 46 advanced by the Constitutional Court established an obligation to give direct domestic effect to decisions of international human rights bodies. This provides additional guarantees for Russia’s compliance with international obligations. In practice, only a small percentage of cases could be referred to the Human Rights Committee or to the European Court of Human Rights. However, Russian judges are beginning to realize that there are international institutions that can verify their interpretation of international human rights principles and norms.

⁸⁰VKS, 1996, No. 2, p. 2.

⁸¹Id.

⁸²Under the existing Criminal Procedure Code, it is possible to request the review of a conviction following a finding by international organs by reference to a “new circumstance” or a breach of “the law,” a formula which may include violations of international law. Similar considerations may be invoked in civil cases.

Thanks to the recent holding of the Constitutional Court, Russian judges will also know that decisions of these international organs may lead to domestic reexamination of previously decided cases.

In contrast to participation of Moldova, Russia and Ukraine in the Council of Europe, their membership in the Commonwealth of Independent States will hardly have any significant impact on domestic implementation of international law. The same observations can be made with respect to all other CIS members. The major problem here is the limited powers and effectiveness of this regional organization. The CIS is a fairly loose organization of states. It does not possess any supranational powers.⁸³ Although some members of the CIS created an Economic Court of the CIS,⁸⁴ its jurisprudence and actual impact on the operation of domestic legal systems of these states is minimal.⁸⁵ Similarly, attempts at establishing a new regional human rights system within the CIS on the basis of the CIS Convention on Fundamental Rights and Freedoms⁸⁶ have not resulted in the creation of a strong enforcement mechanism. The CIS Convention contemplates the establishment of the CIS Human Rights Commission which will be monitoring the enforcement of the Convention. Regulations on the Human Rights Commission⁸⁷ provide that the Commission may “examine individual and collective applications submitted by any person or non-governmental organization concerning matters connected with human rights violations by any of the parties.” However, the Human Rights Commission has been granted only limited powers and its opinions are not legally binding. It is unlikely that this new regional human rights organ will be able to ensure successful transnational protection of human rights and thus affect domestic

⁸³For details, see studies listed *supra* note 1.

⁸⁴For details, see M.I. Kleandrov, *Ekonomicheskii Sud CNG: Status, problemy, perspektivy* (The Economic Court of the CIS: Status, Problems, Prospects) (1995).

⁸⁵Cf. I.V. Fisenko, *Praktika Ekonomicheskogo Suda Sodruzhestva Nezavisimykh Gosudarstv* (Practice of the Economic Court of the Commonwealth of Independent States), 3 *Moscow Journal of International Law* 26 (1997).

⁸⁶For an English language text of the CIS Convention on Human Rights, see 17 *Human Rights Law Journal* 159 (1996).

⁸⁷See *Id.*, at 163.

implementation of human rights standards.

5. Practical Problems

Experience suggests that reliance on international law in domestic legal systems may be impeded by some purely practical problems. One is the lack of translations of international treaties and decisions of international organs, especially courts, in local law libraries. Another is the inadequate training of lawyers and judges in international law. Many libraries of the CIS region do not have even the most important texts of international treaties and decisions of international institutions. In many CIS countries international law, especially international human rights law, is not included in the core curricula in the legal education and practical training of lawyers and judges.

Special problems in this area arise with respect to Eastern European members of the CIS who recently joined the Council of Europe. These countries will be able to incorporate the case law of the European Court of Human Rights only if local attorneys and judges had access to translations of the relevant decisions. Although translations of some decisions of the European Court of Human Rights have been published in Russian, Moldovian and Ukrainian, these countries need to make additional efforts, in cooperation with the Council of Europe, to translate a important decisions of the European Court of Human Rights and make them available to practicing lawyers and judges.

V. Conclusions

Most of the new constitutions of the CIS states contain express references to international law. Many CIS states, including Russia, adopted constitutional provisions declaring international law to be part of the law of the land. Furthermore, many CIS countries, including Russia, proclaimed the supremacy of international treaties over contrary domestic legislation.

While Russian courts have already developed an extensive jurisprudence based on international law, the actual impact of constitutional innovations concerning international law in other countries of the region remains unclear. While there are indications that in some countries the relevant constitutional provisions may remain ineffective while in others they are likely to be enforced by domestic courts, it is still too early to draw definite conclusions on whether courts of a particular country would be willing to base their decisions on international law. A more definite evaluation of the effectiveness of new constitutional provisions of individual CIS countries could be made only on the basis of their future domestic case law.