

The implementation of international humanitarian law in the Russian Federation

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The object of this article is to identify several issues pertinent to implementation of international humanitarian law in the Russian Federation. It first examines the relevant provisions of the Russian Constitution of 1993 and discusses the extent to which they provide for the incorporation of international norms. An overview of current Russian legislation is then given, focusing on some specific examples of legislative incorporation of international humanitarian law. That overview will not be confined to laws adopted solely by the Russian parliament. References to international law and more specifically to international humanitarian law can also be found in military field manuals that are binding on the Russian armed forces and other uniformed armed services. Finally, a notable case decided by the Russian Constitutional Court in 1995 with regard to the implementation of international humanitarian law is discussed. In its decision, the supreme body of judicial review in the Russian Federation made remarkable references to the Additional Protocol II of 1977 to the Geneva Conventions of 1949.¹

The Russian Constitution of 1993

The Russian Constitution of 1993 states in paragraph 4 of Article 15 that “generally accepted principles and rules of international law and international treaties of the Russian Federation shall be an integral part of its legal system. If an international treaty of the Russian Federation establishes rules, other than provided for by the law, the rules of the international treaty shall be applied.”² The Constitution stops short of declaring that international law forms an integral part of Russian legislation. It refers instead to the

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rather vague term “legal system”. The use of this term has prompted some commentators to suggest that in order to divine its exact meaning “the law-applying authorities should apparently be guided by theoretical postulates and treat it as objective law, that is, as a conglomerate of laws, the practice of application of legal norms, as well as legal ideology”.³ Assuming that the framers of the current Russian Constitution considered the term “legal system” in a conscious and enlightened manner, it might be interpreted as reflecting a transition from the cautious approach to the incorporation of international law into domestic law, which was characteristic of former Soviet doctrine and practice, to a new willingness to apply international norms more directly. The general referral to international law in Article 15(4) of the Russian Constitution is supplemented by subject-specific references in other current legislation. These include numerous laws adopted in Russia following the entry into force of the Constitution of 1993.

It may be noted that the introduction of Article 15(4) gave rise to a sense of euphoria in some Russian students of international law. Those members of the Russian international legal community seemed to conclude that international law was about to permeate the fabric of Russian law and that all courts, from the lowest to the highest, would be applying rules enshrined in international treaties along with domestic statutes. However, in this author’s opinion the Constitutional Court, when employing international law in the exercise of its powers, is properly applying that law only if it views particular questions of law brought before it through the prism of the letter and spirit of international legal decisions and if, in doing so, it analyses and interprets a norm of international law. But the Russian Constitutional Court is not authorized by the Constitution and implementing statute to do this. A mere reference to an international treaty or decision in an opinion of a domestic judicial authority does not amount to the application of international law.

The proponents of the extreme internationalist view seem to overlook paragraph 1 of the said Article 15, which clearly states that “the Constitution

1 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977.

2 An English-language version of the Constitution of the Russian Federation is available on the website of the Constitutional Court at http://ks.rfnet.ru/english/rus_eng.htm.

3 *Kommentariy k Konstitutsii Rossiyskoy Federatsii (Commentary to the Constitution of the Russian Federation)*, Moscow, 1996, p. 80.

of the Russian Federation shall have the supreme legal force (...). Laws and other enactments adopted in the Russian Federation shall not contravene the Constitution".⁴ A reader familiar with the Constitution of the United States may discover some similarities between this provision of the Russian Constitution and the supremacy clause of the US Constitution.⁵

Furthermore, Article 15(4) of the Russian Constitution implies that in the event of a conflict between a domestic law and an international treaty obligation the latter does not necessarily repeal the former. Rather, the treaty regulates a specific situation to which both the treaty and the law may apply. The domestic law remains valid and may be applied under different circumstances in which there are no applicable international treaty rules. As for "generally accepted principles and rules of international law", there are no provisions in the Constitution that could be construed as affording them a legal force superior to that of domestic laws. On the other hand the Law on International Treaties that was enacted in 1995 does state in its preamble that "the Russian Federation adheres to strict observance of conventional and customary norms".⁶ However, the very fact that customary norms are referred to only in the preamble to that law, and that it provides no further guidance as to how these norms are incorporated into Russian law, may serve as evidence of a reluctant attitude towards the integration of uncodified custom into domestic law.

In a perceived effort to make the life of courts of general jurisdiction easier, the Plenary Conference of the Russian Supreme Court in 1995 passed a resolution offering courts some guidelines for application of the Constitution. While the resolution is non-binding, the well-established pattern of the relationship between the Supreme Court and lower courts strongly suggests that the latter will follow the advice given. With regard to Article 15(4) of the Constitution, the resolution of the Russian Supreme Court suggested that courts should look for the "generally accepted principles and rules of international law" in international

⁴ Constitution of the Russian Federation, Art. 15(1), *op. cit.* (note 3).

⁵ Art. VI(2) of the Constitution of the United States reads as follows: "This Constitution and the Laws of the United States which shall be made in Pursuance thereof and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

⁶ Sobraniye Zakonodatelstva Rossiyskoy Federatsii (Collection of Legislation of the Russian Federation), hereinafter SZ RF, 17 July 1995, No. 29, Art. 2757.

documents, primarily in treaties, but also in other sources, such as the Universal Declaration of Human Rights.⁷ As for international treaties, the resolution advised lower courts of general jurisdiction that only those treaties that have been incorporated into a federal law should take precedence over national legislation.

That Supreme Court resolution in effect relieved courts of the task of identifying international customary norms that have not been codified. In this respect, if a Russian court were to look for an applicable norm in the corpus of international humanitarian law, it is likely first to search for such a rule in a codified national law, and then in international treaties to which Russia is a party. Incidentally, the said resolution in a certain sense amounted to an interpretation of the Constitution, a task which is normally the exclusive prerogative of the Constitutional Court. This observation notwithstanding, the resolution has been referred to and supported by the latter on several occasions.⁸

Incorporation of international humanitarian law into Russian legislation⁹

Russia is a party to all four Geneva Conventions of 1949, as well as to the two Additional Protocols of 1977. It is also a party to other major relevant treaties, including the Biological Weapons Convention of 1972,¹⁰ the Environmental Modification Convention of 1976,¹¹ the Conventional Weapons Convention of 1980¹² and its four protocols and the Chemical Weapons Convention of 1993.¹³ It has signed but, at the time this article is being written,

⁷ Byulleten' Verkhovnogo Suda Rossiyskoy Federatsii (Bulletin of the Supreme Court of the Russian Federation), No.1, 1996.

⁸ See, most recently: Ruling of the Constitutional Court of the Russian Federation No. 290-O of 21 December 2000, in SZ RF, *op. cit.* (note 6), No. 11, 12 March 2001, Art. 1069.

⁹ For a general discussion of the subject in Russian, see V.A. Batyr, "Aktual'niye Problemy Implementatsii Norm MGP v Zakonodatel'stve Rossiyskoy Federatsii" ("Current issues of the implementation of the norms of international humanitarian law in the legislation of the Russian Federation") *Moscow Journal of International Law*, 1999, special issue to celebrate the fiftieth anniversary of the Geneva Conventions, pp. 193-209.

¹⁰ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 10 April 1972.

¹¹ Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques, 10 December 1976.

¹² Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980.

¹³ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 13 January 1993.

has not ratified the 1998 Rome Statute of the International Criminal Court.¹⁴ Russia is not a party to the Anti-personnel Mines Convention of 1997.¹⁵

It may be recalled that the Geneva Conventions of 1949 lay down several requirements with regard to national legislation. There is a general obligation “to respect and to ensure respect” for their provisions, as stated in Article 1 common to all four Geneva Conventions and Article 1(1) of Additional Protocol I. Apart from this general requirement, all these treaties oblige the High Contracting Powers to adopt laws and regulations to ensure their application. More specifically, they impose on parties to them an obligation to enact “legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches” of the Conventions and the Protocol (respectively Articles 49, 50, 129, 146 and 85.1). The First and Second Geneva Conventions require that the High Contracting Powers, “if their legislation is not already adequate, take necessary measures for the prevention and repression” of misuse of the Red Cross emblem.

The Soviet Union ratified the four Geneva Conventions of 1949 in 1954. The Criminal Code that was adopted in 1960 and remained on the books until 1996 transformed several fundamental international humanitarian law obligations into domestic law.¹⁶ For example, inhumane treatment of prisoners of war was punishable by a prison term of up to three years (Article 268 of the 1960 Criminal Code). Pillage or despoiling of the battlefield, as well as violence against civilians committed in the zone of military operations, could result in a prison term of three to ten years or even capital punishment (Articles 266 and 267 respectively of the 1960 Criminal Code). The crime of misuse of the red cross emblem could be punishable by a prison term of up to one year (1960 Criminal Code, Article 202).

The current Criminal Code of 1996¹⁷ defines in its Article 356(1) “inhumane treatment of prisoners of war or of civilian population, deportation

¹⁴ Rome Statute of the International Criminal Court, 17 July 1998.

¹⁵ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction, 18 September 1997.

¹⁶ The original version of the 1960 Criminal Code was published in: *Vedomosti Verkhovnogo Sovieta Rossiyskoy Sovietskoy Federativnoy Respubliki* (The Official Gazette of the Supreme Soviet of the Russian Socialist Federal Republic), No. 40, 1960, Art. 591. The final consolidated version incorporating all numerous amendments is available from the ConsultantPlus© commercial database.

¹⁷ The original version of the 1966 Criminal Code was published in: *SZ RF, op. cit.* (note 6), No. 25, 17 June 1996, Art. 2954. The current consolidated version incorporating amendments is available from the ConsultantPlus© commercial database. The translation cited above is by the author.

of civilian population, pillage of national property on the occupied territory, the use in an armed conflict of means and methods prohibited by an international treaty of the Russian Federation” as a crime punishable by a prison term of up to twenty years. That provision is part of a section of the Code entitled “Crimes against peace and security of humanity”. The Code envisages four degrees of gravity of a criminal offence, and the offences listed in Article 356(1) belong to the most serious category.

The same article also defines as a criminal offence “the use of a weapon of mass destruction which is prohibited by an international treaty to which the Russian Federation is a party”. Other related offences under the 1966 Criminal Code include “planning, preparation, unleashing or waging of a war of aggression” (Article 353), “public appeals to unleashing a war of aggression” (Article 354), “production or proliferation of weapons of mass destruction” (Article 355), “genocide” (Article 357), “ecocide” (Article 358), “hiring, training, financial or other material support of a mercenary” (Article 359), and “attack on a person or an institution that enjoys international protection” (Article 360). With regard to the latter, it should be noted that such an attack falls under provisions of the Criminal Code only if it is committed “with a purpose of provoking a war or an aggravation of international relations”. The term “a person or an institution that enjoys international protection” might be misleading, but it definitely implies envoys of foreign States or officials of international organizations that enjoy such protection. However, there is no clear indication that Article 360 is applicable in time of war. It would appear from the foregoing provisions that the Russian legislator, in incorporating international humanitarian law into domestic legislation:

- firstly, squeezed the whole body of international humanitarian law into a single sentence (Article 356);
- secondly, merged together the “Geneva” and “Hague” branches of the law of armed conflict;
- thirdly, referred only to international treaty law, and only to codified “Hague” law, rather than to both treaty and custom;
- fourthly, omitted a provision on misuse of the red cross emblem.

The legislation does not make any general reference to international treaties as a source of definitions of other offences, nor does it reproduce in the Criminal Code, in contrast to other laws, the relevant provisions of the Constitution that establish the prevalence of an international treaty over a

domestic law.¹⁸ Even if the Russian Constitution's prevalence clause were to be reproduced in the legislation, because of the only partial incorporation of humanitarian law into domestic law a court would be confronted with a gap in the law, rather than with a conflict between a domestic law and an international treaty. Of course an enlightened judge, having encountered such a lacuna, could turn for example to Additional Protocol I and qualify an offence as a "war crime". But when it comes to choosing the penalty, the Protocol would be of little help.

It might seem that the easiest way of rectifying the situation would be to introduce an amendment into the Criminal Code that would refer courts to relevant international treaties in order to find elements of a war crime. Having identified an offence in that way, the court could then refer back to the Code to decide upon a penalty. Eventually, when and if Russia ratifies the Statute of the International Criminal Court, such an amendment could serve as an efficient method of incorporating elements of crimes listed in the Statute into Russian legislation.

Rome Statute of the International Criminal Court

At the time of writing this article, the President has not yet submitted the Statute to the State Duma, the law-making chamber of the Russian Federal Assembly. While the present author would rather not speculate about the reasons for such a delay in the initiation of ratification procedures, it is worthwhile, on the other hand, to discuss potential domestic constitutional repercussions of that treaty.¹⁹ Even a superficial comparative review of the Statute and the Russian Constitution reveals certain inconsistencies between the two texts. For example, under Article 50(3) of the Constitution

¹⁸ Occasionally the Russian legislators seem to be stretching the prevalence clause of the Russian Constitution a bit too far. Consider, for example, the Federal Law on Pedigree Cattle-Breeding which states in its Article 3 that "generally recognized principles and norms of international law and international treaties of the Russian Federation relative to pedigree cattle-breeding shall be, in accordance with the Constitution of the Russian Federation, a component part of its juridical system. If an international treaty of the Russian Federation provides for rules other than stipulated by a law relative to pedigree cattle-breeding, the rules of the international treaty shall be applied" (SZ RF - *op. cit.* (note 6), No. 32, 7 August 1995, Art. 3199). Author's translation.

¹⁹ For a more detailed discussion see B. Tuzmukhamedov, "Rimskiy Statut Mezhdunarodnogo Ugolovnogo Suda: Vozmozhniye Voprosy Konstitutsionnosti" ("The Rome Statute of the International Criminal Court: Possible issues of constitutionality"), *Moscow Journal of International Law*, No. 2, 2002, pp. 165-173.

every person convicted of a crime has the right to seek a pardon. The Constitution also provides for the possibility of enacting amnesties. If a grant of pardon or decree of amnesty under the Russian Constitution is considered as an indication of an inability or unwillingness to prosecute a person in the Russian courts, that person may be tried before the International Criminal Court. At the domestic level, this means that the said person's constitutional rights may be infringed upon. From the point of view of the Russian Federation, granting pardon is an exclusive power of the President. Likewise, declaring amnesty is an exclusive power of the State Duma. In essence, this means that the Rome Statute may potentially limit powers of the President and a chamber of the national legislature.

Apart from this possibility, for the International Criminal Court to act in lieu of the national judiciary the latter would have to be totally corrupt (which in the Statute's Article 17(2) is described as "unwillingness"), or to have become unworkable (to which Article 17(3) attributes the term "inability"). It would be hard to believe that German or French legislators were motivated by such gloomy prospects when they voted to amend the constitutions of their respective countries prior to ratification of the Rome Statute.²⁰ Similarly, it is hard to imagine that the criminal judiciary in Russia will ever need to be replaced by an international authority.

Nevertheless, a debate on the feasibility of legislative or even constitutional amendments in order to take advantage of the principle of complementarity in the Rome Statute is highly desirable. The problem is that the Russian Constitution sets out a very elaborate, if not cumbersome, procedure for its own amendment. In particular, there is no simple procedure for amending Chapter 2 of the Constitution that provides for human rights and liberties. If the Constitutional Assembly were to vote in favour of amending that specific chapter, then it would have to draft a new Constitution and submit it to a referendum.

A more practicable and less painful way of reconciling the Constitution and the Statute would be to amend the Concluding and

²⁰ To incorporate the obligations under the Rome Statute, the French Constitution was amended by means of Art. 53-2, which stated: "La République peut reconnaître la juridiction de la Cour pénale internationale dans les conditions prévues par le traité signé le 18 juillet 1998". In Germany, the absolute prohibition on extraditing a German anywhere outside Germany, contained in Art. 16(2) of the Basic Law (embodying the federal constitution), was qualified by adding the following: "Durch Gesetz kann eine abweichende Regelung für Auslieferungen an einen Mitgliedstaat der Europäischen Union oder an einen internationalen Gerichtshof getroffen werden, soweit rechtsstaatliche Grundsätze gewahrt sind".

Interim Provisions of the Constitution. That part of the Constitution was designed to accommodate the transition from a previous constitution to the current one, and to incorporate into it the numerous laws that were leftovers from the previous system. Introduction of a new text similar to the one France inserted in its Constitution before ratifying the Rome Statute could enable the Russian juridical system to be consistent with the Statute's provisions. Eventually that temporary measure could translate into a permanent arrangement when and if Russia decides upon a new Constitution. The main constraint here is that the Constitution does not envision any procedure for amendment of the Concluding and Interim Provisions. Is this a lacuna or an implicit prohibition? In the present author's opinion, a possible way of addressing the issue could be to petition the Constitutional Court of the Russian Federation to interpret the Constitution with regard to a possible mode of amendment of those provisions.

Obligations of international humanitarian law in other legislative acts

Besides provisions in the 1966 Criminal Code, other items of current Russian legislation oblige members of the armed forces and other uniformed and armed services, such as the Federal Border Service or the Internal Forces of the Ministry of Internal Affairs, to abide by international law. In particular, the Law on the Status of Military Service Personnel of 1998, as amended, makes it a soldier's duty "to observe the generally recognized principles and norms of international law and international treaties of the Russian Federation" (Article 26).²¹

The Service Regulations of the Armed Forces of the Russian Federation, which were promulgated by presidential decree in 1993, make that duty more specific. They state in Paragraph 19 that "every member of the armed forces must know and strictly observe the international rules governing the conduct of military operations and the treatment of the wounded, sick and shipwrecked, of the civilian population in the zone of military operations, and of prisoners of war".²² To ensure that military personnel are aware of the rules of international humanitarian law the Minister of Defence issued Order No. 333 of 29 May 1999 "On Legal

²¹ SZ RF, *op. cit.* (note 6), No. 22, 1 June 1998, Art. 2331.

²² *Ustav Vnutrenney Sluzhby Vooruzhennykh Sil Rossiyskoy Federatsii* (The Service Regulations of the Armed Forces of the Russian Federation), Military Publishing House, Moscow, 1994.

Training in the Armed Forces of the Russian Federation”.²³ The order referred to legal training and instruction in the rules of international humanitarian law as “an integral part of combat training, a most essential means of enhancing law and order within the armed forces of the Russian Federation.” In particular it provided that officers and NCOs, prior to their promotion, should pass tests to prove their legal awareness. Failure to pass a test would result in suspension of a promotion.

The armed forces of the Russian Federation continue to be bound by USSR Minister of Defence Order No. 75 of 1990, which promulgated the Geneva Conventions of 1949 and the two Additional Protocols of 1977 together with Guidelines for the Application of International Humanitarian Law.²⁴ The said order implemented the provision of the Decree of the Supreme Soviet of the USSR by which the legislative body ratified both Protocols additional to the Geneva Conventions. The decree instructed the Council of Ministers “to draft and to present to the Supreme Soviet of the USSR, within six months, proposals for the introduction of amendments to the Soviet legislation to reflect the participation of the Soviet Union in (...) the Additional Protocols.”²⁵ However, the guidelines offered only limited instructions with regard to the application of codified rules of international humanitarian law.²⁶

It was not until 2002 that the Ministry of Defence issued a new Manual of International Humanitarian Law.²⁷ It is a concise overview of major treaties that make up the body of international humanitarian law, from the St Petersburg Declaration of 29 November 1868 to the Chemical Weapons Convention of 1993. In drafting the manual, the Legal Service of the Armed Forces reviewed similar foreign manuals.²⁸ Thus the legal framework is there.

²³ Published by the Central Printing Office of the Russian Federation's Ministry of Defence.

²⁴ Prikaz Ministra Oborony SSSR No. 75 16 fevralya 1990 goda ob ob'yavlenii Zhenevskikh konventsiy o zaschite zhertv voyny ot 12 avgusta 1949 goda i Dopolnitelnykh protokolov k nim (USSR Minister of Defence Order No. 75 of 16 February 1990 promulgating the Geneva Conventions on the Protection of Victims of War of 12 August 1949 and Additional Protocols), Moscow, 1990, p. 317.

²⁵ Vedomosti S'yezda Narodnykh Deputatov i Verkhovnogo Sovieta SSSR (The Official Gazette of the Congress of Peoples' Deputies and of the Supreme Soviet of the USSR), No. 9, 9 August 1989, Art. 225.

²⁶ The Guidelines amounted to a mere eight pages of the entire 317-page volume.

²⁷ Nastavleniye po mezhdunarodnomu gumanitarnomu pravu dlya Vooruzhennykh Sil Rossiyskoy Federatsii (Manual of International Humanitarian Law for the Armed Forces of the Russian Federation), Moscow, 2002, p. 88.

²⁸ Among others, *Humanitarian Law in Armed Conflicts: Manual*, edited by the Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992, p. 154.

All members of the armed forces are aware that they are bound by international humanitarian law and that violators will be punished. They are under orders to study international humanitarian law and their knowledge is tested periodically. Promotion within the armed forces could depend in part on the results of those tests. What is not so clear is how that law would be enforced, should the need arise.

International humanitarian law in the Russian courts

So far the only notable court decision invoking the principal sources of international humanitarian law was the decision of the Russian Constitutional Court in July 1995. Earlier that year members of both houses of the Russian parliament requested the Court to review the constitutionality of several presidential decrees and a government resolution that authorized the use of the armed forces to quell the insurgency in Chechnya. In particular, petitioners claimed that the use of excessive military force led to numerous civilian casualties. In their legal arguments they drew heavily on 1977 Additional Protocol II to the Geneva Conventions.²⁹

The Constitutional Court is not bound by arguments brought before it by petitioners. Nor is it bound by a source of law other than the Constitution. It may review, subject to certain conditions, the constitutionality of a treaty. In its ruling³⁰ the Constitutional Court made only general references to Additional Protocol II rather than to particular provisions thereof. It first stated, drawing on the Protocol and on the prevalence clause of the Constitution, that a State may use its armed forces to defend its “national unity and territorial integrity”. It also stated that it lacked authority to review specific acts committed by parties to the non-international armed conflict in Chechnya. Nevertheless, the Court strongly criticized the legislator for not taking due account of Additional Protocol II when passing laws that govern the armed forces. Obviously it was referring to instances when the armed forces were to be used in domestic emergency situations. The Court explicitly instructed lawmakers to bring the relevant legislation into conformity with international legal obligations, in particular Additional Protocol II. Those instructions have not yet been carried out.

²⁹ Unpublished, on file with the author.

³⁰ SZ RF, *op. cit.* (note 6), No. 33, 14 August 1995, Art. 3424.

Conclusion

On balance it can be said that the Russian Constitution of 1993, by virtue of its prevalence clause, has created a legal environment which is fairly conducive to the incorporation of international humanitarian law, primarily that part of it which is embodied in treaties, into the Russian juridical system. Russian laws oblige the military to observe international law, albeit in general terms. The Criminal Code treats as the gravest crimes several offences that are deemed "war crimes" under international humanitarian law. But the list of those crimes in the Criminal Code is far too limited. The situation may, or in fact will, have to change when and if Russia ratifies the Statute of the International Criminal Court. If it decides to go ahead with the ratification, it might well have to amend the current legislation and perhaps even the text of the Constitution.