However, national courts may play a very important role of promotion where international law is clear but the gap between law and reality is great. Courts may help to change reality and influence society. Where severe violations of international law by a government are brought before a court, the embarrassment will be great. There have been practically no important cases where national courts have found against their own government in situations involving military or police action in a foreign country except after the fall of the regime concerned. However, the court’s ability to control the executive on the basis of international law should not be excluded. It has become a very widespread rule now that state organs, including the government, are under the control of the constitutional courts. It should be the role of the competent courts also to review the decisions of the government within the parameters of international law.

When applying foreign law, courts are aware of the restriction of _ordre public_ or public policy. May they apply a similar rule controlling national legislation on the basis of an international _ordre public_? We have already discussed the constitutional rules in many countries. It should be accepted that national courts have a role to play to promote international _ordre public_.

**REMARKS BY ERIC STEIN**

I am delighted that, right at the beginning, Professor Frowein brought out a fatal flaw in the prevailing doctrine, and that is the unbridled discretion of a state to decide whether a treaty is directly applicable or self-executing. The shining example of the United States stating that a particular treaty will not be considered self-executing, whether in a statute or in the ratification document, has now been followed in Germany. It was followed by the Council of Ministers of the European Community in their approval of adhesion by the Community to the World Trade Organisation (WTO) where the Council of Ministers said that the WTO Agreement “by its nature ... is not susceptible to being directly invoked in Community or Member States courts.”¹ This shows that the optimistic view of Antonio Cassese can be refuted by this unlimited discretion on the part of the state to eliminate direct domestic application, even of treaties whose purpose is actually to give rights and obligations to individuals.

**INTERNATIONAL LAW IN THE RUSSIAN LEGAL SYSTEM**

*by Gennady M. Danilenko*

Lawyers in the fields of international and comparative law who follow developments in Eastern Europe know that this region has become the world’s most exciting laboratory of constitutional reform. From the international perspective, the most interesting aspect of Eastern European developments is the gradual “opening” of the domestic legal systems of countries in this region to international law.

In many respects, Russia is an illustration of the Eastern European trend. Russia is particularly interesting for at least two reasons. First, the opening to international law represents a radical departure from Russia’s traditional isolationism. 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.


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When Russia engaged in constitution drafting, most participants in the debate agreed that the country needed to abandon its traditional dualistic approach. In 1992, for the first time in its history, Russia adopted a constitutional principle incorporating “the generally recognized international norms concerning human rights” into its domestic law.\(^1\) By introducing the concept of direct relevance of international law to the internal legal process, the country took a giant step away from its previous isolationist stand. It should be noted that the 1992 constitutional amendment focused on international human rights law. This is quite understandable in view of the massive violations of human rights that took place in the Soviet Union. By incorporating the whole body of international human rights law into Russian domestic law, the drafters of the 1992 amendment hoped to effect rapid changes in the legal environment.

The 1993 Constitution confirmed the trend of giving a prominent place to international legal standards in the domestic legal setting. The new Constitution contains a special clause on the relationship between international law and the Russian domestic law. Article 15 provides that “the generally recognized principles and norms of international law and the international treaties of the Russian Federation shall constitute part of its legal system.” It also states that “if an international treaty of the Russian Federation establishes rules other than those stipulated by the law, the rules of the international treaty shall apply.”\(^2\)

Two principal features of Article 15 must be pointed out. First, Article 15 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 to custom, Article 15 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, Article 15 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. Article 15 does not, however, confer such superior status on “the generally recognized principles and norms of international law.” I think 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 lawmaking. While these two considerations may have affected Article 15, “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 new Constitution includes Article 17, which provides that human rights in Russia are recognized and ensured “according to the generally recognized principles and norms of international law.”\(^3\) At first glance, this reference to international law appears to be a mere statement of policy. Yet it is still possible to interpret it as envisaging 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 Article 15. 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.


\(^2\) *Konst. RF* (1993).

\(^3\) *Id.*
I will now turn to recent Russian court decisions dealing with incorporation of international law into the Russian domestic legal system. From a broad political-legal perspective, an examination of judicial practice may indicate whether Article 15 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 its 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 by the willingness of courts to rely on that body of law.

In many countries, constitutional rules remain a dead letter. 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 skepticism as to the possible practical effect of Article 15. An example of such skepticism 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, Article 15 seems "to be more theory than practice." I will try to show that this pessimistic assessment of the situation was incorrect in 1994 and remains incorrect today.

An examination of judicial practice is also interesting from a technical perspective. It is always interesting to investigate how the courts ascertain applicable international law (and whether there is any executive intervention in the process) or whether the courts develop any judicial doctrines aimed at avoiding direct application of international norms. I will focus on only one problem—the emerging Russian doctrine of directly applicable or self-executing treaties.

Judicial practice indicates that Russian courts do rely on international law. The Constitutional Court invokes international law in almost all of its decisions concerning human rights. In fact, the court started to rely on international law even before the enactment of the constitutional provision declaring international law part of the Russian domestic law. For example, the Labor Code case was decided by the Constitutional Court before the adoption of the 1992 constitutional amendment. Yet even in that situation, the court based its decision on a variety of international instruments. In searching for a constitutional basis for the direct application of international norms, the court innovated by broadly interpreting a very general reference to international law in the Soviet-era constitution. This example indicates that, in a favorable political environment open to international standards, even vague references to international law may be interpreted by courts as requiring direct application of that body of law.

The Constitutional Court often relies not only on treaties but 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 Moscow Residence Permits case, the Court declared the local regulations requiring residence permits unconstitutional by referring not only to human rights treaties but to the "generally recognized principles and norms of international law." Ordinary Russian courts have much less experience in applying international law. However, even here there is progress. In 1995, the Russian Supreme Court issued a ruling on the matter in the

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form of a “guiding explanation.”7 “Guiding explanations” are abstract opinions that are binding on all lower courts. The 1995 ruling instructed all lower courts to apply international law directly.

The developments described above indicate that Article 15 of the new Russian constitution is not a dead letter. International law can be invoked before the Russian domestic courts.

I now turn to the emerging Russian concept of directly applicable or self-executing treaties. The issue may become crucial for the entire regime of incorporation in Russia because an extensive use of the doctrine could effectively “close” the domestic legal order and, in extreme situations, turn a monistic state into a dualistic one.

An analysis of decisions of the Constitutional Court indicates that it makes no distinction between self-executing and non-self-executing treaties. The Labor Code case is probably the best illustration of this trend.8 In declaring age discrimination in labor relations unconstitutional, the court relied, among other things, on the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Labour Organisation (ILO) Convention No. 111. I doubt that the courts of the majority of monistic countries would consider these treaties to be self-executing, because they are essentially programmatic. Both Article 2 of the ICESCR and Article 2 of ILO Convention No. 111 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 domestic legislation. However, one could argue that only the realization of the substantive rights guaranteed by the ICESCR was intended to be progressive. By contrast, the obligation of nondiscrimination provided for in Article 2(2) of the Covenant 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 ILO Convention No. 111.

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 ILO Convention No. 111. Under Article 2 of the ILO 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 Article 3 of the Convention, state parties assume an obligation to enact “legislation” to secure the acceptance and observance of the policy and “to repel any statutory provisions” that are inconsistent with the policy. Express provisions of this kind seem to undermine any claim that the relevant international standard is self-executing.

The Constitutional Court used a slightly different approach in the Collective Labor Disputes case.9 The Court did recognize that under the ICESCR the regulation of the right to strike must be effected by domestic legislation. Indeed, under Article 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.

8 Labor Code, supra note 5.
While in the cases described above 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 Treaties includes a clause 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 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 reveal 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, 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.”

It will be interesting to see whether the Russian courts apply the doctrine of self-executing treaties broadly or restrictively. Different political-legal considerations will influence further developments in this area. Russia embraced the idea of direct incorporation of international law primarily because it 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 Russia in the opposite direction. While at this stage we cannot exclude the possibility of isolationism and nationalism, Russia may encounter difficulties with domestic implementation of certain norms of international law in any political environment. For example, 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 on a broad version of the doctrine of non-self-executing treaties.

An important factor favoring direct application of treaties will be Russia’s participation in international institutions. Indeed, I think that Russia’s integration into the existing global and regional organizations will be a decisive factor. Experience indicates 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. We know, 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 than before to apply the European Convention directly.

10 Sobr. Zakonod. RF, 1995, No. 29 [Weekly], item 2757, art. 5.
Russia is bound by the Optional Protocol to the International Covenant on Civil and Political Rights and recently joined the Council of Europe. I believe that the interaction between Russian domestic courts and the European Court of Human Rights will have a particularly significant impact on the direct domestic application of human rights treaties.

It is appropriate to mention here that under Article 15 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 ratifies the European Convention on Human Rights, there will be 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.

In this connection, I would like to draw your attention to Article 46 of the Russian Constitution. Article 46 reinforces the direct applicability of international human-rights standards by providing 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 a recent case concerning the Criminal Procedure Code, the Constitutional Court held that decisions of these organs may lead to domestic reexamination of previously decided cases. Because Article 46 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, the innovative interpretation of Article 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 of 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. 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.

I would like to conclude with an observation concerning the impact of the Russian and Eastern European opening to international law on the international system. When a large group of states, which was generally considered to 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. At the same time, I do not think that we are witnessing any global trend toward a rule or principle that would require direct incorporation of international law. There are still too many dualistic states. Furthermore, we see signs of serious retrogression in some allegedly monistic states. The United States appears to be turning into a dualistic state, at least as far as human rights are concerned, as a result of the new American version of cultural relativism. Prospects for a rule requiring direct incorporation of international law appear to be better in the European context. However, even within the Council of Europe, it is difficult to envisage a rule that

13 Under the existing Criminal Procedure Code, it is possible to request the review of a conviction following a finding by international organs by referring to a "new circumstance" or a breach of "the law," a formula that may include violations of international law. Similar considerations may be invoked in civil cases.
would require all member states, including the dualistic ones, to incorporate the European Convention on Human Rights directly. It is therefore not surprising that the European Court of Human Rights is always very careful in this respect. In fact, it has declined to give any direct support to the idea of a direct-incorporation rule. This reluctance is an important indication of the difficulties we would face if we tried to create a rule of direct incorporation, even in a relatively homogeneous region of the contemporary international community.

**Remarks by Eric Stein**

Thank you, Professor Danilenko. There is no question, listening to you, that we are in the fifth phase of Cassese's progression toward the opening of states to international law and the international community generally. Now I make this statement purely on the basis of normative texts and normative provisions, but your statement indicates that Russia is moving in the direction of placing some reality behind the text. The only other remark I wanted to make concerns the interesting innovation—I’m not sure that it is an absolute innovation—of singling out human rights treaties for special treatment in national constitutions. That has now become a widely observed practice in Central and Eastern Europe. I think that the first such arrangement was in Latin America, I believe in Peru, but it has now become fairly common to single out human rights treaties and give them not only direct effect in domestic legal orders but also superiority to prior as well as subsequent legislation. That seems to indicate that the human rights field in international law is really becoming a separate field to be considered with special attention to the changing nature of the international system.

**International Law in the Japanese Legal Order:**

**Recent Developments**

*by Yuji Iwasawa*

In the past decade, Japanese courts have handed down several interesting decisions on the relationship between international law and national law. In my remarks today, I will give an overview of the relationship between international law and Japanese law, highlighting some of the recent developments.

*Domestic Force of Law*

Article 73(3) of the Japanese Constitution of 1946 provides that the Cabinet has the authority to conclude “treaties” on the condition that “it shall obtain prior or, depending on circumstances, subsequent approval of the Diet [Japanese parliament].” Article 61 provides that the streamlined procedure for approval of budgets is also to be used for approval of treaties. Thus, procedurally it is easier to conclude a treaty than to enact a statute, let alone amend the constitution. The government can also conclude “executive agreements” without Diet approval under the power to “[m]anage foreign affairs” provided for in Article 73(2).

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