

The Acceptance by the Soviet Union of the Compulsory Jurisdiction of the ICJ for Six Human Rights Conventions

Theodor Schweisfurth *

I. The Acceptance of the Compulsory Jurisdiction

Upon the suggestion of the Council of Ministers of the USSR, on February 10, 1989, the Presidium of the Supreme Soviet of the USSR adopted a decree (*ukaz*) withdrawing the reservations which the Soviet Union had previously made to six human rights conventions.¹ The conventions concerned, and the articles referred to, are as follows:

- Art. IX of the Convention for the Suppression and Punishment of the Crime of Genocide of December 9, 1948;²
- Art. 22 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of March 31, 1950;³
- Art. IX of the Convention on the Political Rights of Women of March 21, 1953;⁴
- Art. 22 of the Convention of the Elimination of all Forms of Racial Discrimination of March 7, 1966;⁵
- Art. 29 paragraph 1 of the Convention on the Elimination of all Forms of Discrimination against Women of December 18, 1979;⁶
- Art. 30 paragraph 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of December 10, 1984.⁷

The articles of these conventions to which the Soviet reservations were made all have the same substantive content, namely, they provide that any dispute between two or more parties over the interpretation or application of the respective convention that is not settled by negotiations shall, 'at the request of any of the parties to the dispute', be referred to the International Court of Justice for a decision. By the reservations made upon ratification of the treaties concerned, the Soviet Union stated that it does not consider itself bound by these provisions.⁸

The Decree of February 10, 1989, withdrawing the reservations, concluded with the declaration that the pertinent provisions of the conventions concerned will apply to disputes over the interpretation and application of those treaties with respect to cases which may arise 'after' the date the Soviet Union informed the UN Secretary-General that it withdraws its

* Max-Planck-Institute for Comparative Public and International Law, Heidelberg, Germany.

1 *Vedomosti Verchovnogo Soveta* 1989 No. 11 Article 79.

2 78 UNTS 277.

3 96 UNTS 271.

4 193 UNTS 135.

5 660 UNTS 195.

6 19 ILM (1980) 33.

7 22 ILM (1984) 1027.

8 For the texts of the reservations see *Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1988*, UN Doc. ST/LEG/SER.E/7, pp. 101, 113, 171, 180, 291, 603.

reservations. The UN Secretary-General was informed by the Soviet Minister for Foreign Affairs, Eduard Shevardnadze, by a letter dated February 28, 1989.⁹

The Soviet recognition of the compulsory jurisdiction of the ICJ, while limited to only six conventions, came as a surprise to international law specialists and the general public as well. This move marked a positive shift in the previously negative attitude of the Soviet Union towards the principle judicial organ of the United Nations since its establishment.

II. The Political Background of the Withdrawal of the Reservations

The Soviet Union's withdrawal of its reservations to the six human rights conventions is to be seen as a step towards a realization of the 'new thinking' in foreign policy conceptions and international law policies. As such, it is closely intertwined with *perestroika* – the domestic policy of reconstructing the political system of the Soviet Union. The withdrawal has two obvious implications, first, involving the Soviet Union's new attitude towards the jurisdiction of the ICJ and, second, its new approach to human rights questions.

Step by step, the changes in principal foreign policy conceptions have taken shape since the election of Gorbachev as Secretary-General of the Communist Party of the Soviet Union (CPSU) on March 11, 1985. A complete list of all of the relevant documents, speeches and statements which have formulated and expressed the Soviet Union's 'new thinking' cannot be produced here; only some of the most important ones shall be mentioned.

The programme of the CPSU, as reformulated by the 27th Party Congress in February and March of 1986, contained a new conception of the old principle of 'peaceful coexistence'. The previous definition, utilized since the 22nd Party Congress in 1961, described 'peaceful coexistence' as 'a special form of class struggle' between socialist and capitalist countries. That old definition was replaced by the universally valid formula of 'good neighbourhood and cooperation'. The 1986 Programme said that 'the transfer of ideological contradictions' into the sphere of international relations is 'inadmissible'. It pointed to the 'global problems' which are 'vital for mankind as a whole' and which can be mastered only by the 'common efforts of all states'.¹⁰ This re-defining of the principle of 'peaceful coexistence' was the first important landmark in the development of the Soviet Union's 'new thinking' in international relations. However, the importance of this ideological shift was not immediately realized by many politicians and commentators in the West.

In his book,¹¹ Gorbachev stressed the 'general human interests' and the 'general human values' common to all peoples, regardless of the social-political structures of their states. According to Gorbachev, these general human values form the core of the 'new thinking'. In substance, this meant that 'class interests' and 'class values' must play a secondary role.

In September, 1987, Gorbachev published his well-known article entitled 'Reality and Safeguards for a Secure World'.¹² In that article he linked the military security problem in the nuclear age with a campaign for human rights by noting that: 'the world cannot be considered secure if human rights are violated.' Gorbachev called for bringing the national legislation and administrative rules in the humanitarian sphere into accordance with international obligations

⁹ For Russian text of Shevardnadze's letter see *Izvestia*, 9 March 1989. For unofficial English translation of the letter see 83 *AJIL* (1989) 457.

¹⁰ For complete German text of the Party Programme in the wording as of 1 March 1986, see E. Schneider, *Moskaus Leitlinie für das Jahr 2000* (1987) 127 (143, 187-89).

¹¹ M.S. Gorbachev, *Perestroika and the New Thinking for Our Country and the Whole World* (Russian) (1987) 137 et seq.

¹² *Pravda*, 17 September 1987.

and standards. Furthermore, he pleaded for 'a system of universal law and order ensuring the primacy of international law in politics.'

In a speech devoted to the 70th anniversary of the October Revolution given in November, 1987, Gorbachev painted a picture of the 'one-world' we are living in. He interpreted the 27th Party Congress' actions as having developed 'a new foreign policy conception'. Its starting point was the principle that 'in spite of all the deep contradictions of today's world and of the basic differences between the states representing it, the world is reciprocally interconnected, states are dependent upon each other and form a determined whole.'¹³ Such a 'one-world' concept is not a new idea, but it was new that the leader of the Soviet Union proclaimed and promoted it. This fact signified the end of the previous 'three-world conception' which divided the community of states into capitalist states, socialist states and developing countries with either a capitalist or socialist 'orientation'.

In an address to the UN General Assembly on December 7, 1988,¹⁴ Gorbachev presented the 'new thinking' in Soviet foreign policy conceptions and international law policies to the world forum. 'Progress', he said, 'will be shaped by universal human interests' and world politics 'should be guided by the primacy of universal human values.' This requires 'de-ideologizing' relations among states, and a 'substantive political dialogue' instead of the threat or use of force for solving international problems.

Dealing with the question of 'a new role for the United Nations', Gorbachev directly addressed problems of international law. He said, 'our ideal is a world community of states which are based on the rule of law and which subordinate their foreign policy activities to law.' Gorbachev stated that 'democratizing international relations' means also 'humanizing those relations' and that the human being and his concerns, rights and freedoms should become 'the center of all things.' Gorbachev praised the Universal Declaration of Human Rights of December 10, 1948, and called the improvement of the domestic conditions for respecting and protecting the rights of citizens as the most fitting way to observe the anniversary of the Declaration. As we recall, the Soviet Union had abstained when that Declaration was approved by the UN General Assembly forty-two-years ago. Gorbachev also announced the Soviet Union's intention to expand its participation in both the United Nation's human rights monitoring arrangements and the Conference on Security and Cooperation in Europe (CSCE) and suggested that 'the jurisdiction of the International Court of Justice at The Hague, as regards the interpretation and implementation of agreements on human rights, should be binding on all states.'

III. Changes in Soviet Thinking on International Law

The 'new thinking' in foreign policy and international relations obviously has a direct impact on the Soviet Union's principal conceptions of international law. In this short commentary on the Soviet Union's acceptance of the compulsory jurisdiction of the ICJ for the six human rights conventions mentioned, we cannot elaborate on all of her new approaches to the manifold problems of international law. Instead, we will limit this analysis to some hints and key words.

The re-defining of 'peaceful coexistence' as a universally valid principle governing the relations between all states, including those with similar or common social-political systems as well as those with different such systems, and the spelling out of the 'one-world' idea lead to the conclusion that international law is regarded as truly universal. The old assertion that a unique 'socialist' international law and a unique 'capitalist' international law exist and that the 'socialist' international law will eventually become the universal law is now outdated. This

¹³ Quoted from German newspaper text in *Neues Deutschland*, 3 November 1987 (author's translation).

¹⁴ UN Doc. A/43/PV.72 (1988). For Russian text see *Pravda*, 8 December 1988.

kind of old thinking in 'circles' is now considered 'artificial'.¹⁵ The UN Declaration on Principles of International Law Concerning Friendly Relations and Cooperation of October 24, 1970, is no longer interpreted by the Soviet Union as being a code only between states with different social-political systems. The first international treaty based on this new understanding of the principle of peaceful coexistence was the Treaty of Friendship and Cooperation between the Soviet Union and the Republic of Cuba of April 4, 1989.¹⁶

The formula of the 'primacy of international law in politics' first contains the time-honored postulate that foreign policy must be executed within the framework of international legal rules. In essence, 'primacy of international law' means nothing more than 'the rule of law' in international legal rules. This position had already been supported in Soviet international legal theory before the 'new thinking'. However, modern Soviet international lawyers now openly criticize the Soviet Union for having 'caused detriment to international law' by failing to act in accordance with the prohibition of the threat or use of force in Yugoslavia in 1948, in Hungary in 1956, in Czechoslovakia in 1968 and in Afghanistan in 1979.¹⁷

The claim of the 'primacy of international law' has yet another element. It is no coincidence, it is said, that this formula was born together with the idea of the 'priority of general human values'. Today's international law is directed at the protection of the most important human values. The 'primacy of international law' is therefore to be understood as the 'normative expression of the priority of general human values and interests'¹⁸ over all the other (narrow) class or group interests in foreign policy actions. Therefore, compliance with international law is in the immediate and long-term interests of every state – not simply because of reciprocity deliberations, but because international law protects general human values.

The claim for the 'primacy of international law' has a direct connection with the *perestroika* within the Soviet Union, which began with restructuring the economy and progressed to the reform of the political system.¹⁹ The principal aim of the political restructuring is to replace the 'administrative-command system' with a democratic system and to build up the 'socialist *Rechtsstaat*.'²⁰ One of the core elements of a *Rechtsstaat* is the rule of law. The complete lawlessness of the Soviet Union's Stalinist years caused a total breakdown of the legal culture of pre-revolutionary Russia and of the 'socialist legality' of Lenin's NEP period. The 'legal nihilism' of the Stalinist decades was not totally cured during the 'period of stagnation' of the Brezhnev years. The present reformers in the Soviet Union realize that no orderly society can exist without a well-functioning legal system which protects the interests of the members of that society. It is an expression of the new attitude towards the importance of domestic legal thinking in terms of a *Rechtsstaat* and its extension into the international realm when modern Soviet international lawyers claim that the socialist *Rechtsstaat* must also be an

15 Vereshtshetin & Mjullerson, 'The Primacy of International Law in World Politics' (Russian), *Sovetskoe Gosudarstvo i Pravo (SGP – Soviet State and Law)* No. 7 (1989) (6).

16 For Russian text see *Izvestia*, 5 April 1989.

17 Vereshtshetin & Mjullerson, 'The Primacy of International Law', at 5.

18 Vereshtshetin & Mjullerson, 'New Thinking and International Law' (Russian) *SGP* No. 3 (1988) 3.

19 See Schweisfurth, 'Perestroika durch Staatsrecht. Die erste Etappe der Reform des Politischen Systems der Sowjetischen Gesellschaft durch die Verfassungsrevision vom 1. Dezember 1988', 49 *ZaöRV* (1984) 711. See, also, B; Meissner, *Die Sowjetunion im Umbruch*, Stuttgart, 1988.

20 T. Schweisfurth, *Die Sowjetunion im Aufbruch zum Sozialistischen Rechtsstaat*, in K. Hailbronner et al. (ed), *Staat und Völkerrechtsordnung, Festschrift für Karl Doehring*, (1989) 903 et seq.

'international law state.'²¹ Thus, the development of a new Soviet legal culture taking its bearings from the principles of a *Rechtsstaat* corresponds to Soviet preparedness to support the development of the international legal culture by a community of law-abiding states.

Building a socialist *Rechtsstaat* raises questions of domestic jurisdiction and the relationship between public international law and domestic law. A departure from the previous Soviet approach of strict sovereignty and non-intervention is now being seen. It is no longer regarded to be a violation of these principles for states to discuss questions of another state's internal order when it has been made subject to an international obligation.²²

Although Soviet doctrine maintains its former dualistic approach to the relationship between international and domestic law,²³ it is now usually called a moderate dualistic conception. Soviet theoreticians and international law practitioners now forcefully claim that in cases of contradictions between a state's international legal obligations and its domestic legal order, the state in question is obliged to bring its domestic legal order into conformity with international law. They vigorously apply this claim to their own state. The chief of the Soviet Foreign Ministry's International Legal Department expressed this claim by saying: 'The basic international attribute of a *Rechtsstaat* is the observance of international law including the reflection of its international legal obligations in its domestic law-making and their observance in practice.'²⁴ At present we can observe that the Soviet Union is endeavouring to bring its domestic legal order into conformity with its international legal obligations. This, however, is not a task which can be completed in a few weeks. It must also overcome conservative opposition as demonstrated by the protracted efforts to bring about new exit and entry visa regulations or the new legal guarantees of freedom of conscience and expression. An example of the positive result of such an endeavour can be seen in the new Law of Procedure for the Decision of Collective Labour Disputes of October 9, 1989,²⁵ which established a right to strike in the domestic legal order.

Furthermore, during the present period of constitutional reform, it is being advocated that the principle of the priority of international treaties over domestic statutes be incorporated into the Soviet Constitution.²⁶ Detailed suggestions are being made for new constitutional provisions that procedurally guarantee the priority of international law in the domestic legal system.²⁷ Article 10 of the new Soviet Law on Constitutional Supervision of December 23, 1989,²⁸ provides the Committee on Constitutional Supervision with the right to examine international treaties to be ratified by the Soviet Union for their constitutionality and the conformity with domestic statutes. The aim of this provision appears to have the Soviet Union abstain from ratification until domestic law has been brought into conformity with the international treaty under consideration.

'New thinking' also has significantly altered the traditional Soviet attitude towards human rights issues and appears to have led to a reassessment of the legal position of the individual in

21 Vereshshetin & Mjullerson in *SGP*, No. 3 (1988) 4.

22 Lomejko, 'Priority of Human Values' (Russian) in *Mezhdunarodnaja Zhizn*, No. 1 (1989) 89.

23 Rybakov, 'Material and Juridical Foundations of the Interconnection of International and National Law' (Russian) in *Pravovedenie*, No. 4 (1989) 38 (and the literature cited therein).

24 Rybakov, in a discussion printed in *Mezhdunarodnaja Zhizn*, No. 3 (1989) 10.

25 *Vedomosti SSSR* No. 18 (1989) Pos. 342.

26 Rybakov, *supra* note 24; Blishtshenko, 'International Law in the *Rechtsstaat*' (Russian) *Mezhdunarodnaja Zhizn*, No. 12 (1988) 93.

27 Vereshshetin, Danilenko, Mjullerson, *Constitutional Reform in the USSR and International Law* (Russian) *SGP*, No. 5 (1990) 13.

28 *Vedomosti SSSR*, No. 29 (1989) Pos. 572. The law took effect on 1 January 1990.

international law. This is, once again, interconnected with the reform of the domestic political system.

At the 19th All Union Party Conference in June, 1988, Gorbachev made the following astonishing statement: 'Human rights in our society are no gift by the state and no one's kindness. They are an inalienable quality of socialism.' This statement is essentially a farewell to the strict positivist approach to human rights that was characteristic of the traditional Soviet position. The new understanding could be called a systematic-natural approach. The Soviet *Rechtsstaat* under construction will grant the Soviet citizen clearly defined and procedurally guaranteed basic rights. Furthermore, in this domestic discussion on human rights, social rights are no longer being played against political human rights because both types of rights are now regarded as equally important.²⁹

Domestic procedural guarantees have not yet been established for use by the individual citizen. However, Article 21 of the above-mentioned Law on Constitutional Supervision may provide some reassurance.³⁰ The Committee on Constitutional Supervision is only empowered to give advisory opinions that carry suspensive effect. But, if the Committee concludes that a sub-constitutional normative legal act violates an individual's basic rights and freedoms as established by the USSR's Constitution 'and international acts of which the USSR is a party', under Article 21 the advisory opinion has the effect of invalidating the normative act.

This new attitude has led to a very positive assessment of the international human rights documents because those documents are an obvious expression of the principle that the function of universal international law is to protect 'core human values'. Inspired by this idea, Vereshchetin, Danilenko and Mjullerson suggest that a provision be incorporated into the Soviet Constitution whereby 'the statutes of the USSR in the field of human rights shall be applied in strict conformity with international obligations of the USSR. The authors include not only human rights treaties, but also political commitments like the Helsinki Final Act and its follow-up documents within this formulation.'³¹

We leave the reader to determine whether it is truly remarkable or merely a natural consequence that re-thinking human rights also causes a re-thinking of the international legal position of the individual. In any case, we draw the reader's attention to an article in which the author abandoned her long-standing negative stance in the controversy about the international legal personality of the individual. The author concluded with a reassurance, presumably directed at her conservative objectors, to the effect that the recognition of the international personality of the individual 'does not provoke any revolutionary changes in the theory of international law because it does not touch state sovereignty – the basis of that law.'³²

The call for the primacy of international law in politics casts a new light on questions of procedures for the settlement of international disputes. An article published by Soviet international lawyers and devoted to the role of the ICJ was presumably the last one which in the traditional manner juxtaposed 'the position of Socialist states', preferring negotiations 'as the most important institute' for the settlement of international disputes, to the 'suggestions of Western states', preferring third party settlement procedures, especially judicial procedures

29 Mjullerson, 'Peace and Human Rights' (Russian) in *Izvestia*, 10 December 1988; Tshchikvadze, 'The Universal Declaration of Human Rights and its Historical Importance' (Russian) *SGP*, No. 12 (1988) 86.

30 See note 28 and accompanying text.

31 *SGP*, No. 5 (1990) 20.

32 Zacharova, 'The Individual – a Subject of International Law' (Russian) *SGP*, No. 11 (1989) 112 (118).

before the ICJ.³³ Since Gorbachev's suggestion that the compulsory jurisdiction of the ICJ 'should be recognized by all on mutually agreed conditions',³⁴ Soviet international lawyers support the view that the weight of third party settlement procedures, including those of the ICJ, should be enhanced.³⁵ It is now being suggested that ICJ jurisdiction should be enlarged by giving recourse to the Court both to inter-governmental organizations and non-governmental organizations that have consultative status under Article 71 of the UN Charter, as well as restricting the options of making reservations in declarations accepting the optional clause.³⁶

IV. Evaluation

It may be said that the Soviet Union's acceptance of the compulsory jurisdiction of the ICJ for the six human rights conventions should not be overestimated because disputes concerning these conventions will rarely arise. Such an evaluation is welcome because it reflects an optimistic assessment of the present and future internal order and external behaviour of the Soviet Union. On the other hand, such a view would be too narrow. The Soviet step must be seen in the whole context of the 'new thinking' as outlined above. In this context, the acceptance of the compulsory jurisdiction of the ICJ is only a first step. As Mr Rybakov, the head of the International Law Department of the Soviet Foreign Ministry has commented, the Soviet Union 'is in search of new ways and approaches to a more effective use of existing international mechanisms' in order to support the rule of law within 'the world community of law abiding states which subordinate their foreign policy activities to law.'³⁷ In the area of procedural guarantees for human rights, one of the Soviet Union's next steps will presumably be the accession to the Optional Protocol to the Covenant for Civil and Political Rights. However, this step will not be taken until the Soviet Union has aligned its internal legal order with its existing international obligations.³⁸

The reader's attention is further called to the new positive attitude towards third party settlement procedures expressed by the Soviet Union when it ratified the Protocols Additional to the Geneva Conventions of August 12, 1949. On this occasion, the Soviet Union made a declaration under Article 90 paragraph 2 of protocol I by which it recognized, *ipso facto* and without special agreement in relation to any other Contracting Party accepting the same obligation, the competence of the International Fact Finding Commission to inquire into allegations by such other party, as authorized by Article 90.³⁹ The principal Soviet international law policy in the field of peaceful settlement of disputes is now formulated in the USSR Memorandum on Enhancing the Role of International Law, annexed to a September 29, 1989, letter to the Secretary-General of the UN.⁴⁰ In this document, the Soviet Union suggested the elaboration of a 'general instrument for the peaceful settlement of disputes.' As a

33 Evgenevo, Kozhevnikov, 'The Role of the International Court of the UN in the Peaceful Settlement of Disputes' (Russian) *SGP*, No. 10 (1986) 108 et seq.

34 See *Pravda*, 17 September 1987.

35 Vereshshetin & Mjullerson in *SGP*, No. 3 (1988) 6.

36 Kalamkarjan, 'The Conception of "The Rule of Law" in the System of International Relations' (Russian) *SGP*, No. 8 (1989) 127.

37 Rybakov interview, 'We Give Priority to Law' (Russian) *Izvestia*, 9 March 1989.

38 See the contributions of Stanevskij (deputy chief of the Department of International Humanitarian Cooperation and Human Rights of the USSR Foreign Ministry) and Mjullerson in a discussion on 'International Security and Law' (Russian) *Mezhdunarodnaja Zhizn*, No. 3 (1989) 119.

39 See Postanovlenie of 4 August 1989, of the Supreme Soviet of the USSR, *Vedomosti*, No. 9 (1989) Pos. 225.

40 UN Doc. A/44/585 (1989).

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final step in the procedures for peaceful settlement of disputes, this instrument should stipulate that:

[T]he obligation of States parties to a dispute, when direct negotiations or good offices, mediation or conciliation have not resulted, within a reasonable period of time, in the peaceful settlement of the dispute, to resort to procedures which entail *binding decisions*; that is, to submit the dispute, at the request of either of the parties to it, to arbitration or judicial proceedings.

In this connection, the memorandum goes on to say, 'the role of the principal judicial body of the United Nations – the International Court of Justice – will be enhanced.'

Regarding this principally new line in international law policy, the Soviet Union's acceptance of the compulsory jurisdiction of the ICJ for the six human rights conventions was a signal, a signpost at a crossroads.