Legislative Regulation of Trans-boundary Use of Armed Force: Russian Case Study

Bakhtiyar Tuzmukhamedov*

Contents
1. Introduction
2. Constitutional Framework
3. Legislation
4. Practice of Application
5. Conclusion

1. Introduction
The adoption almost two decades ago of the post-Soviet Constitution of the Russian Federation with its multiple references to principles and norms of international law and international treaties was followed by similar subject-specific references incorporated into legislation. Such references were not unknown to laws of the USSR, in fact those that appeared in the legislation of the Soviet Union shortly before its collapse laid a solid foundation for the respective provisions in the statutes of independent Russia. In particular, in a spectacular departure from the traditional secretive Soviet practice of decision-making in the realm of foreign policy and national defence, the perestroika reforms associated with the name of Mikhail Gorbachev attempted to impose transparency and accountability upon that domain of governance through profound amendments of then current legislation, including the Constitution of the Union, and introduction of new laws that were, at least on their face, striving to be in harmony with international law.¹

However, it was after the current Constitution came into force in December 1993 that such references became an integral feature of legislation, as well as of normative and executive acts passed by the President and the Government (the Executive).

* This article is based on the paper delivered at the 4th ESIL Research Forum, Tallinn, Estonia, 26–28 May 2011, Panel on “International Law in Foreign Policy and Military Doctrines of the UN Security Council’s Permanent Members: A Critical Comparison”. The author is a Professor of International Law, Vice-President of the Russian Association of International Law. Views presented herewith are solely those of the author and are not necessarily representative of the opinions of institutions with which he may be associated.

As to the regulation of foreign policy and national defence, the respective acts were filled with references to international law in general, to the UN Charter and may even include almost *ad verbum* borrowings from authoritative international documents.

This brief article shall serve as a general introduction to the interface between Russian laws and international law, and more specifically to legislative provisions regarding the trans-boundary use of armed force.

2. Constitutional Framework

The Russian Constitution of 1993 states in Article 15(4) that “universally recognized principles and norms of international law as well as international agreements of the Russian Federation should be an integral part of its legal system. If an international agreement of the Russian Federation establishes rules, which differ from those stipulated by law, then the rules of the international agreement shall be applied.”

By distant analogy with the Supremacy Clause of the Constitution of the United States, this provision could be described as the Prevalence Clause. The Russian Constitution clearly provides that an international treaty shall prevail over a statute as applicable law when there is a conflict between the two. However, the former does not repeal the latter; rather, a treaty takes precedence over a statute in regulating a specific transaction to which both a treaty and a statute may apply, while the statute will retain force under different circumstances where there is no applicable international treaty.

Unlike several others, the Russian Constitution does not declare international law a component part of the Russian legislation applying instead a rather vague term “legal system” – “*pravovaya sistema*”, and there is no further clue in the text itself as to what exactly the term could imply. According to an authoritative source, to comprehend the essence of the term “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”.

As already indicated, the general reference to international law that is found in Article 15(4) of the Constitution is supplemented by subject-specific references incorporated into current legislation including statutes regulating the conduct of for-

---

2 Official English translation of the Constitution may be found on the website of the President of the Russian Federation at <eng.constitution.kremlin.ru/>.

3 Article 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, anything in the Constitution or laws of any State to the contrary notwithstanding.”

4 *I.e.* the Constitution of the Republic of Austria which in Article 9(1) declares that “the generally recognized rules of international law are regarded as integral parts of Federal law” – available at the website of the Austrian Federal Chancellery at <www.ris.bka.gv.at/Dokumente/ErV/ERV_1930_1/ERV_1930_1.pdf>.