TITLE: IN SEARCH OF THE LAW-GOVERNED STATE

Conference Paper #9 of 17

Domestic Law and International Law:
Importing Superior Standards

AUTHOR: George Ginsburgs

CONTRACTOR: Lehigh University

PRINCIPAL INVESTIGATOR: Donald D. Barry

COUNCIL CONTRACT NUMBER: 805-01

DATE: October 1991

The work leading to this report was supported by funds provided by the National Council for Soviet and East European Research. The analysis and interpretations contained in the report are those of the author.
NCSEER NOTE

This paper is #9 in the series listed on the following page. The series is the product of a major conference entitled, In Search of the Law-Governed State: Political and Societal Reform Under Gorbachev, which was summarized in a Council Report by that title authored by Donald D. Barry, and distributed by the Council in October, 1991. The remaining papers will be distributed seriatim. This paper was written prior to the attempted coup of August 19, 1991.
1. GIANMARIA AJANI, "The Rise and Fall of the Law-Governed State in the Experience of Russian Legal Scholarship."

2. EUGENE HUSKEY, "From Legal Nihilism to Pravovoe Gosudarstvo: Soviet Legal Development, 1917-1990."

3. LOUISE SHELLEY, "Legal Consciousness and the Pravovoe Gosudarstvo."

4. DIETRICH ANDRE LOEBER, "Regional and National Variations: The Baltic Factor."

5. JOHN HAZARD, "The Evolution of the Soviet Constitution."

6. FRANCES FOSTER-SIMONS, "The Soviet Legislature: Gorbachev’s School of Democracy."

7. GER VAN DEN BERG, "Executive Power and the Concept of Pravovoe Gosudarstvo."

8. HIROSHI ODA, "The Law-Based State and the CPSU."


10. ROBERT SHARLET, "The Fate of Individual Rights in the Age of Perestroika."

11. NICOLAI PETRO, "Informal Politics and the Rule of Law."


15. WILLIAM B. SIMONS, "Soviet Civil Law and the Emergence of a Pravovoe Gosudarstvo: Do Foreigners Figure in the Grant Scheme?"

16. KATHRYN HENDLEY, "The Ideals of the Pravovoe Gosudarstvo and the Soviet Workplace: A Case Study of Layoffs."

17. Commentary: The printed versions of conference remarks by participants BERMAN, SCHMIDT, MISHIN, EN'TIN, E. KURIS, P. KURIS, SAVITSKY, FEOPANOV, and MOZOLIN
DOMESTIC LAW AND INTERNATIONAL LAW: IMPORTING SUPERIOR STANDARDS

George Ginsburgs

Executive Summary

One of the more interesting, and unusual, aspects of the Gorbachev regime's perestroika scenario centers around the role assigned in that process to the international law canon and the concomitant emergence of the Foreign Ministry apparatus in the vanguard of the pro-reform movement dedicated to the mission of setting Soviet civic mores on a sound juridical footing. The pace of domestic renovation feeds on the surge of diplomatic initiatives on various matters pertaining to human rights which has, in a short span, reshaped many of the key propositions of Soviet international law doctrine and added new dimensions to its treaty practice. Indeed, further momentum for change on the home front may well be fueled by the drive launched by the Foreign Ministry brass with Gorbachev's personal blessing and public endorsement to improve the USSR's global reputation by performing a radical face-lift on its image in the domain of civil liberties, which is now a high priority on the world community's agenda.

The accent in today's discourse is on the primacy of international law. By espousing that concept, its champions pursue twin goals: first, to sell the world on the idea that the Soviet hierarchy subscribes to the commandments tabulated in the universal bill of human rights and thus is a worthy partner in the task of managing mankind's affairs; second, to prod the custodians of internal standards into complying with the superior norms designed to
police behavior within the family of nations.

The vision of a "gentler, kinder" USSR has prompted the Kremlin to launch several major initiatives in the international arena designed to demonstrate its commitment to mainstream fare here. A touch of grand drama marks Gorbachev's medley of proposals intended to enhance the power of the United Nations in policing crises in world peace and its effectiveness in settling disputes between states. Highly encouraging, too, is the Soviet Union's recent ratification of the convention against torture, the withdrawal of reservations regarding the jurisdiction of the International Court of Justice under six international conventions on human rights, constructive contribution to the drafting of a convention on the rights of the child, positive cooperation in the solution of the problem of Afghan refugees and the organization of international humanitarian relief for Afghanistan. The Soviet Union has also joined the Standard Minimum Rules for the Treatment of Prisoners approved by the UN in 1955, ratified the supplementary protocols of 1977 to the 1949 Geneva Conventions for the Protection of War Victims and recognized the powers of the International Commission established to monitor observance of its terms. We have even heard a great deal of talk about the possibility of the USSR adhering to the Optional Protocol to the Covenant on Civil and Political Rights which grants the Committee on Human Rights authority to examine complaints against states instigated by private persons or their representatives.

Next, an appropriate mechanism must be devised to convert the norms of the USSR's international engagements into valid rules of domestic law binding upon the competent institutions and agencies of government and administration and availing individuals in the defense of the rights guaranteed by international entente vis-a-vis the fiat of the array of state
organs. The performance of the Constitutional Oversight Committee already looks quite promising in bidding to ingrain a culture of respect for the rights and entitlements of the individual as enunciated in the international law code by striking down domestic legislation in flagrant conflict with these general rules. Much more, however, needs to be done to make the pronouncements of international law routinely enforceable in the Soviet environment, especially the job of training a judicial cadre attuned to these new priorities and capable of overcoming the traumas of a long history of dispensing injustice.

What is crucial is the realization in this case that the Soviet Union cannot further afford to enter into international engagements without suitably adapting its domestic record to match these foreign pledges. The bottom-line, then, is that the USSR's current desire for full acceptance in the company of civilized states dictated by the desperate need to obtain outside help to deal with its domestic crisis also operates to compel the ruling circles to overhaul the domestic legal repertory to prove such credit worthiness. For the sake of consistency and plausibility, substantial congruency between domestic and international practices must be achieved and this imperative works to improve the quality of Soviet law in order to erase the credibility gap which has hurt its picture up till now.
Domestic Law and International Law: Importing Superior Standards

By George Ginsburgs
Law School
Rutgers University, Camden

One of the more interesting, and unusual, aspects of the Gorbachev team's bid to engineer a "law-based" state in the Soviet Union centers around the role played in that process by the Foreign Ministry apparatus. To the surprise of many, that institution has emerged in the vanguard of the pro-reform movement pursuing, inter alia, the mission of setting Soviet civic mores on a sound juridical footing and deserves credit for substantial contribution to whatever progress has so far been recorded en route to that goal.

Mind you, such forays by the foreign policy branch into the national scene had also occurred earlier, although in a different guise. A Soviet source paints the following picture of the precedent deployed here:

Our enthusiasm for international affairs, almost making a cult of foreign policy, the special status of the Foreign Ministry and the personal authority of the Minister himself are incentives enough for human rights-oriented legislation at home. In this sense the Soviet Foreign Ministry has always acted in a broad-minded fashion: after almost every important international meeting or negotiations, Soviet ambassadors or heads of delegations would send a coded message to Moscow suggesting that someone be released from a labor camp or issued an exit visa...

This, of course, did help some people, and the diplomats who intervened deserve every praise. But nonetheless the practice of granting amnesties and visas to "refuseniks" made people pawns in the diplomatic chess game. The fates of "dissidents" and "refuseniks" depended not on a just court verdict or humane approach by the authorities, but on the political or economic situation. A good trade deal could also help secure someone release or permission to emigrate. The practice was never advertised, naturally, but everybody knew about it. This approach not only spoiled the immediate participants in quid pro quo arrangements but made any human rights measure seem forced in the eyes of the public. We can't sell machines and hardware
yet, so we are trading "dissidents.""

Concededly, these ad hoc incursions served a positive purpose and particular individuals benefitted from a perceived need occasionally to stage a public relations coup in the world arena. However, the vagrant style presumably no longer fits the current atmosphere dominated by official professions of commitment to a rule of law canon on a routine basis through suitable overhaul of the domestic repertory instead of reliance on the effect of isolated improvisations to convince the foreign audience that the regime shared its concern for these values. So, while the Ministry for Foreign Affairs has not totally abandoned its old habits of doing special favors for whoever it wishes to impress at the moment in its diplomatic dealings by bending the applicable domestic norm, the primary emphasis in this sector has shifted to instructing the law-makers on desired alterations in the script in order to persuade the global constituency that the quality of the Soviet legal inventory is seriously striving to match the fare of the common law of mankind.

Looking at the report card to date, one cannot help but be struck by the realization that the pace of domestic renovation in this area is overshadowed by the surge of diplomatic initiatives on various matters pertaining to human rights which has, in a short span, reshaped many of the key propositions of Soviet international law doctrine and added new dimensions to its treaty practice. Indeed, if the pattern persists, further momentum for change on the home front may well be fueled by the drive launched by the Foreign Ministry brass to improve the USSR's public reputation by performing a radical face-lift on its image in the domain of civil liberties which is now a hot entry in the popular diet.

The accent in today's discourse is on the primacy of international law.² By espousing
that concept, its champions pursue twin goals: first, to sell the world on the idea that the Soviet hierarchy subscribes to the commandments tabulated in the universal bill of rights and thus is a worthy partner in the task of managing global affairs; second, to prod the custodians of internal standards into complying with the superior norms designed to police behavior within the community of states. Both objectives are commendable. Nevertheless, a problem with this approach is that it tends to elevate the role of the state in securing these benefits. The engagements assumed by the contracting parties, i.e., the sovereign states, register on the scale of their mutual relations. Visaing the by-laws of the international fraternity means that members owe each other a duty to act in accordance with the set rules and can, in fact, be held liable at that jurisdictional level. What is missing from the picture is a concomitant obligation to answer to one's own population for the manner in which these promises are kept on the intramural scene. In dealing with the citizenry, the state plays the unilateral donor whose etiquette can be challenged by peer states, but not by the recipients themselves and, in the Soviet case, the absence of any established mechanism enabling the individual effectively to wage a contest against the state's interpretation of the terms of the "gift" has a crippling impact on the project. While this is not to say that exposure to the glare of the international search-light might not work to impose constraints on a state's flair for a perverse translation of its foreign pledges vis-à-vis the domestic consumer, failure to provide a sanctioned means by which the de cujus can successfully defend himself against a miscarriage of justice seriously weakens the system by preventing those with a primary stake in its mission to safeguard their interests from mounting the barricades in self-protection.

Why the proponents of liberalization through the international route have neglected
this vital element in the equation is not clear. Among the possible reasons for the "oversight," one could list subjective bias reflecting professional expertise in diplomacy rather than national politics, a sense perhaps that the conservative faction at home could best be outflanked through the mobilization of international resources instead of confronting the die-hards on their own ground where they enjoyed a certain positional advantage, a desire to score points in the high visibility of center court, if you will, coupled with an aversion to get mired in the dreary chore of shepherding bills through the legislative labyrinth and supervising the shuffling around of administrative furniture.

However, even before worrying about how well the individual is equipped to challenge the treatment he receives at the hands of his own authorities pursuant to their mode of application of local norms, the acid test here is how sincerely the state apparatus intends to work to convert the prescriptions of the international agreements which the government has concluded into formal mandates of national legislation. If Soviet accounts are to be trusted, a total policy reversal marks the situation in this precinct. In the bad old days, we now learn, the cynical view prevailed that signing a treaty carried with it no obligation to edit the domestic law books accordingly—to reflect the results of the international deal and to harmonize the contents of the two normative packages. Or, to quote directly, "hitherto, we frequently said one thing, and did another. We lied to the whole world when signing the Helsinki agreement, at the same time that we were not at all inclined to implement the 'third basket'—on human rights." A participant in those events confirms the charge:

When the Helsinki Final Act was being drafted and signed, the Soviet side declared its readiness to adopt that unique document in its entirety. In
reality, I will be blunt, our then leaders reacted very warily to the ententes on humanitarian law themes. They said, as though joking, but more likely seriously: "cut the bottom out of the third basket." Only in the last years has the leadership of the country managed to overcome the nihilistic approach to international law and human rights.  

Indeed, a stark contrast is drawn between the past and the present as a way both of criticizing previous mores in this department and praising the current credo, but the sober tone is revealing:

Frankly speaking, we assumed far-reaching obligations at Vienna, well knowing that our legislation and internal order were far in many respects from the agreed requirements. It was not the first time that we had agreed to the laying down of "anticipating" obligations: much of what was confirmed at Vienna had already been written into the International Covenant on Civil and Political Rights ratified by the Soviet Union in 1973. Yet we have never complied to the full with the covenant provision concerning the right to leave one's country and return to it. This is also true of many of the humanitarian accords forming part of the Helsinki Final Act. At Vienna, however, we deliberately gave far-reaching pledges for the first time, meaning really to honor them and not to pigeonhole them as we had mostly done in the past.  

At least we are spared wholesome clichés and the audit points to a mix of pluses and minuses which falls short of the perfect rating Soviet practice usually earned from native assessors before glasnost made credibility fashionable. Soviet legislation may be getting better; still, no claim is made that the gap between its stock and the competing international law models is anywhere near being bridged.

Two features distinguish the Gorbachev concept of "law-based" state from its predecessor's mode of conduct in these matters. First, the Soviet brass has always shopped in the international law market--mostly, perhaps, for the sake of appearance and out of ulterior political motives--but clearly did so in a selective and discretionary manner. No sense of duty animated those operations, whereas at this stage of the game the notion being
bandied about is that no self-respecting member of the international community can afford not to subscribe to the ensemble of "peremptory" rules associated with civilized culture as articulated in the "constitutional" documents of humankind and, to justify that status, must in fact join the compact. A compulsory mood has replaced the erstwhile voluntary style. We will return to the topic of what specific "purchases" are expected of a candidate to the club to meet the criteria of eligibility, but suffice it to note that contemporary Soviet rhetoric makes it sound as though a minimum investment in legal staples is a sine qua non.

Second, during the Brezhnev dark ages ratification of an international charter did not guarantee that appropriate revisions would next be effected in the corresponding domestic law texts to create a uniform procedure whereby the norms crafted on an international scale served as a yardstick for the home medium and thus compelled the latter to improve its performance in order to keep abreast. We are assured that this schizophrenic affliction has been cured and that a paramount concern of the Gorbachev cabinet is precisely to raise the grade of domestic law to the rank of its international counterpart. Gorbachev himself assigned top priority to this job in signaling that "it is necessary that national legislation and administrative rules in the humanitarian sphere be brought into accordance with international obligations and standards everywhere." Although the "humanitarian" phenomenon was singled out for attention on that occasion, the message has general import and clearly calls for achieving congruency in quality between legal fare bearing a universal seal of approval and the analogous Soviet brand.

Gorbachev's words have become a refrain and spokesmen in his entourage have since seized every opportunity to make the same pitch. Both senior diplomatic personnel and
academic analysts rush to proclaim that one of the main attributes of a law-based state is "respect for international law, which implies full reflection of international legal obligations in internal legislation and compliance with them." To quote a typical sample of this genre of pronouncement:

By forming a state governed by law in our country, we are proceeding on the assumption that primacy in solving all problems must pertain to international obligations. We are keying our own domestic processes on the international obligations which have been adopted by us; they are functioning in the role of a unique kind of standards to which our domestic legislation has been catching up in the process of perestroika. We are attempting to bring our legislation and practice into line with international norms, to achieve a commensurate quality of the transformations taking place in our country in the political, cultural, economic, and other spheres with those of the world-level experience. Examples of this are furnished by our adoption of the obligations with regard to the Helsinki Concluding Act and those of the Vienna Agreements. All this is in our interests and the interests of the international community.

However, as often happens in the Soviet environment, the scenario suffers from a serious slippage between ends and means: the will and desire certainly seem to be there, but the machinery for fitting the pieces together into a coherent whole has yet to be designed. Earlier policy either ignored the problem of possible asymmetry between the regime's legal engagements abroad and at home or escaped the dilemma by the simple expedient of postulating that Soviet law was intrinsically superior to international law and so adjustments could be skipped because the domestic product was already ahead of the international merchandise. Technical rules devised to steer foreign traffic were treated as lex specialis which possessed a separate jurisdiction carved out of the heartland of the Soviet legal domain and kept quarantined from infecting the complexion of the Soviet legal canon in policing the
private and public liaisons that spun society's fabric and shaped local routine.⁹

Once again, the taste for compartmentalization which warped past Soviet practice here no longer squares with current exigencies and prompts various proposals to restructure the existing system so as to prevent such discrepancies from occurring in the future to fuel questions about the Soviet Union's entitlement to a seat at the rule of law table. How the problem will eventually be solved cannot be predicted since a consensus on the subject still appears to elude the learned discussants. Meanwhile, the following excerpt offers a good indication of what issues are at stake in this case and spells out the views of at least one school of thought concerning the best medicine for the malaise:

---

We have now assumed obligations pursuant to many documents, in particular those relating to the Vienna meeting. But it turns out that we now have this document and we have internal legislation, but a mechanism to hitch these two systems does not yet exist. In our country there just is no mechanism for registering what we have done in the international law arena, what must find reflection in our internal legislation, what must be watched, and in these conditions contradictions ensue... And the next question: we must inscribe in our Constitution and establish as a principle the primacy of international law. In this connection, too, we must develop our own approach. In the world, different solutions are applied, e.g., the recognition of commonly recognized principles of international law, or the recognition, as in the constitution of the Federal Republic of Germany, of the norms of international law, or the recognition only of the treaties concluded by the state, say, as is done in France. Clearly, we must work out this approach in fine detail since it is imperative to understand what is the primacy of international law. Clearly, we are talking here about those treaties which are concluded on matters of principle and have gone through the Supreme Soviet; everything else probably ought not be recognized in the Constitution as binding upon us.¹⁰

A method of validating the Soviet government's international obligations for internal use definitely awaits elaboration and, indeed, is sorely overdue. Rectifying the omission is
merely a question of time, even if the contours of the final blueprint remain wrapped in mystery. On the other hand, should the above recommendation for a constitutional amendment to let certain entries in the country's international law repertory feature as the law of the land win favor, the effect will be quite restricted. No wholesale admission of international law prescriptions into domestic circulation is envisaged under this scheme and, instead, the influx of foreign imports shrinks to a bare trickle of individual items that the authorities had previously screened. With this sort of tight control at the border, not much was apt to slip in to pose a challenge to the status quo and chalk up how well the local legal mores tested on a general scale.

In addition to ideas for opening channels to allow the flow of international law principles into the Soviet legal stream, projects have been floated for institutional innovations charged with monitoring this mode of osmosis. Thus, according to one source, a proposal has been making the rounds that

a competent agency be established to ensure the conformity of enacted laws to international obligations and standards. The opinion was expressed that the constitutional supervisory committee proposed by the 19th Party Conference should be a body independent of any influences, including departmental ones.¹¹

As noted by a western observer, this "radical" sounding suggestion "shows how far-reaching and constructive is the influence that peaceful competition in East-West relations has exerted on the development of perestroika within the Soviet Union."¹² What substantive changes will be made in the structure of the Soviet administrative apparatus to procure this
custodial service cannot be pinpointed at this stage of exploration, except that a first step in
the proper direction was registered upon the enactment of the statute on constitutional
oversight. The committee entrusted with that mission verifies, inter alia, whether the
international treaties and other obligations of the USSR and union republics submitted for
ratification or confirmation comply with the Constitution and the laws of the USSR passed by
the Congress of the USSR People's Deputies and the USSR Supreme Soviet. More
important for our purposes is a companion clause which instructs that:

A ruling of the USSR Constitutional Oversight Committee affirming
that some normative legislative instrument or individual provisions thereof
violate the basic rights and duties of the individual enshrined in the USSR
Constitution and in international instruments to which the USSR subscribes
tein the invalidity of this instrument or individual provisions thereof from
the time the committee's ruling is adopted.\textsuperscript{13}

The potential inherent in this mandate to regenerate the Soviet repertory by infusing
its contents with the values billed by international consensus is enormous. Again, however,
no safe prognosis can yet be ventured of what use will be made of this opportunity to
orchestrate a peaceful revolution in the sphere of legal protection of human rights in the
USSR.\textsuperscript{14}

Of course, none of this precludes the Foreign Ministry branch from taking an active
hand in the legislative process and, in fact, its involvement in that operation marks a major
distinction between today's agenda here and the preceding track record. Further calls are
regularly heard for diplomatic personnel to play a vanguard role in the campaign to upgrade
the Soviet statutory stock. The latest attitude is that:
"The Foreign Ministry should under no circumstances stay out of the drafting of laws relating in one way or another to our country's external commitments. Our legislative system was urged to hasten the democratic drafting of laws on trips to and from the Soviet Union, migration within the country and freedom to believe, think, publish and receive information."\(^{15}\)

To pursue these lobbying interests, the Ministry for Foreign Affairs of the USSR set up in 1988 an

administration for international humanitarian cooperation and human rights (UGPCh). Its functions include helping the law enforcement institutions to work out legislation matching international standards and obligations of the Soviet Union, decide humanitarian problems that arise vis-à-vis other countries, foremost in connection with family unification, exit. Another important task of the administration is to secure the positions of the USSR, organize mutual entente and cooperation with other countries in international organs dealing with human rights—the Third committee of the UN General Assembly, the Economic and Social Council, the UN Human Rights Commission, the Sub-commission to prevent discrimination and defend minorities, the Commission on the status of women, the Commission on social development, and others.\(^{16}\)

Remember, though, that the determination to graft onto the domestic legal model the salient principles of the international law canon, while laudable in itself, makes sense only when a suitable slate of international law norms has been tapped for such implantation. Little will be accomplished if the sanction of procedural rapprochement is in practice stalled by the dearth of substantive fare visaed for conversion. Without a doubt, the Gorbachev administration has staged several raids on the international cupboard to publicize its devotion to the cause of elevating the quality of the Soviet legal script to meet universally recognized standards. Only time will tell whether or not this grab bag of foreign "trophies" will suffice to bankroll the desired renaissance on the home front.
I do not wish to minimize the importance of recent Soviet overtures in the international arena. There is a touch of grand drama in Gorbachev's medley of proposals intended to enhance the power of the United Nations by, among other things, vesting the world organization with an expanded role in establishing criteria in matters pertaining to family reunification and visa regulations, enlarging on the pronouncements of the Helsinki entente which apply to Europe. The notion is intriguing and the call could usher in a new phase in the Soviet Union's treatment of the United Nations. Given the latter's performance to date, one remains quite skeptical about its ability to produce a package with real teeth to deal with these topics, but the siren song nonetheless tempts.

Since then, several initiatives have followed in rapid succession, prompting Soviet commentators to praise their government for its share in brokering the switch from confrontation to warm rapport in the operations of the main UN agencies for human rights. Some of the credit for this progress, in their opinion, goes to such milestones as the ratification of the convention against torture (March 3, 1987) and our active participation in the work of the committee concerned, our withdrawal of reservations regarding the jurisdiction of the International Court of Justice under six international conventions on human rights (1989), our constructive contribution to the drafting of a convention on the rights of the child, which will probably be adopted at the 44th Session of the UN General Assembly, our cooperation with the UN in the solution of the problem of Afghan refugees and the organization of international humanitarian relief for Afghanistan.

On August 4, 1989, the USSR Supreme Soviet ratified on the proposal of the Foreign Ministry the supplementary protocols of 1977 to the Geneva Conventions of 1949, for the Protection of War Victims. The Soviet state announced its recognition of the powers of the International Commission concerned on the basis of reciprocity, a step which is bound to make international standards more effective.

Add to the catalogue that in January 1989, the Soviet Union joined the Standard Minimum
Rules for the Treatment of Prisoners approved by the UN in 1955.\textsuperscript{19}

The willingness \textit{per se} to submit to compulsory litigation before an international tribunal on disputes over the manner of implementation of the norms of a treaty snaps a tradition of opposition to third-party techniques of conflicts resolution that harks back to the roots of the regime. To be sure, the World Court cannot enforce its judgments, but those who agree to resort to its services incur intense legal, political and moral pressure to abide by its rulings.

In similar vein, we now hear accounts that the Soviet Union is seriously contemplating the possibility of adhering to the Optional Protocol to the Covenant on Civil and Political Rights which grants the Committee on Human Rights authority to examine complaints against states instigated by private persons or their representatives. The concept of allowing Soviet citizens appeal to an international body against actions of their own government boggles the mind, yet, apparently looms as a distinct likelihood—once stubborn bureaucratic resistance to this unprecedented coup is overcome. Explanations for the delay range from the rather tactful confession that “differences of opinion between Soviet government agencies so far have prevented our country from joining the protocol”\textsuperscript{20} to tough talk about the accession “being blocked by the refusal of certain of our government departments to allow Soviet citizens to lodge with the UN Human Rights Committee complaints against violations of their rights.”\textsuperscript{21} Given the magnitude of the phenomenon, a forecast of smooth sailing would have been excessively sanguine.

Interestingly enough, due notice is taken in this context of the discrepancy between the pronouncements of the pacts and the absence of matching rules in the Soviet Constitution
and legislation on, for instance, immigration and emigration procedures. The question is then raised as to how these dissonances will be handled if formal objections are filed and whether the principle of the primacy of international law over national law must here prevail. Again, the optimistic response is that the weight of public opinion has on numerous occasions induced states to introduce "changes into legislation, Constitutions included," that the Soviet Union would be prepared to follow suit if presented with "convincing arguments" on the need to upgrade its score because, as Shevardnadze reminded the UN General Assembly at its 43rd session, "international control in the domain of human rights is the imperative of our time."

Remember that the state still cannot be compelled to rewrite its legal repertory to enshrine universal categoratives and the operation can do nothing more than focus sufficient attention on a state's transgressions to persuade the offender to mend his ways. Ultimately, the culprit himself is left to opt whether to defy the common will or toe the line and so the role of the state in effecting the conversion or sticking to the old credo remains primary, but an extra channel is opened to influence its behavior that hitherto had not entered the picture.

Let me append a second caveat. When the Soviet hierarchy indulged its appetite for international extravagances without any thought of footing the cost of appropriate domestic reform by either ignoring the resulting discrepancy between the two columns or by promulgating matching laws for the sake of appearance only and without the slightest intent of doing what it preached, affixing a signature to any compact whatever was child's play since the paper gesture carried no price tag. Presumably, this type of "immunity" has now lapsed. The latest story is that "the legislative organs of the country no longer practice the
proclamation of such rights and freedoms for the realization of which the material conditions have not matured.” Similar logic would serve to estop subscription to an international project whose terms could not be fulfilled on the domestic scene because they were not compatible with local mores. If the injunction is taken seriously, a sense of greater selectivity should henceforth mark Soviet activities in negotiating and/or assenting to international treaties, which means that a more critical appraisal of Soviet capacity to live up to its international obligations could well spell extra caution in incurring these liens. In a way, of course, it is a pity since the upshot will be to shorten the yardstick by which to measure Soviet compliance with international standards, except where universal norms are at stake which can dispense with express adherence. A more limited enrollment equals fewer grades to judge the level of literacy, even when the remaining tests give a more accurate picture of accomplishments in the narrower frame.

The current scorecard tallies the Soviet Union as participating in 14 of 23 “cornerstone” international treaties on human rights. Apart from the priority task of stepping up efforts to bridge the existing gap between domestic legislation and foreign commitments, the feasibility of accession to additional agreements of that genre attracts considerable attention among those who champion the present trend. To be sure, they claim not to favor collecting for its own sake, but attach a “principled significance” to such affiliation on the grounds that the phenomenon “confirms our striving to take international standards into account in building a legal state at home.” The ratification in January 1987 of the Convention prohibiting torture and the signature in January 1990 of the Convention on the rights of the child are cited as cases in point. Asked about what else deserved to be
adopted, a department director in the Foreign Office opined that what still had to be done was to collate a list of those international agreements which the USSR needed to join:

There are not many: the Optional protocol to the International covenant on civil and political rights, the 1951 Convention and 1967 protocol relating to the status of refugees, the Convention on consent to marriage, minimum age for marriage and registration of marriages, the 1926 Convention on slavery and the protocol amending the convention.

Of particular importance, in my view, is the Optional protocol envisaging the possibility of individual petitions to the UN in instances of violation of human rights. I would think that recognition by us of this procedure would procure Soviet citizens supplementary guarantees of their rights. Isn't that the whole purpose of perestroika? And it seems to me that in this matter we should not be watching those countries which distance themselves from the Optional protocol and, generally, from international pacts on human rights. Of course, to each his own. The civilized world is nevertheless gravitating toward the elaboration of uniform, commonly acceptable standards in this sensitive sphere.

The same can be said on the question of refugees. Evidently, it is about time that we, too, should ponder the prospect of the USSR adhering in some form to the search for a solution to this most acute humanitarian problem—in the world today there are more than 12 million refugees. 24

Note that no target date is fixed for completing the rounds. Nor is it clear what precedence this entry commands on the regime's agenda in light of its daily encounters with real emergencies. At some juncture, the Soviet brass will probably decide to follow this route and augment its international portfolio, but exactly when and how it might take the plunge defies prediction.

The multilateral medium is just one of the data-banks that the Soviet regime is scouting for know-how to improve its legal performance. Regional and bilateral markets are also mined for useful products to deploy on the USSR's legal shelves. Both types of liaisons afford the USSR occasion to acquaint itself with an array of superior legal goods from which
a suitable sample can be picked for shipment home and to manufacture new brands in concert with foreign partners tailored to the needs of its own environment.

A medley of specimens from each batch will illustrate what sort of experiments are here being discussed or applied. On the premise, for instance, that "international cooperation in the field of law is not an end in itself, but an essential part of our domestic reform process," the view is expounded that

we do not have to invent things. More often than not we can simply borrow existing legal norms and, if necessary, adjust them to our reality. These norms have been elaborated in the West with utmost care and thoroughness. For example, the Council of Europe, which unites 23 European states we are currently establishing close contacts with, has accumulated very rich legislative experience from which we are welcome to borrow. Some Soviet experts believe that joining the European Council's conventions could be a major practical step towards the rule of law in the Soviet Union. Various practical aspects of harmonizing the European legal space are becoming the subject of international conferences of legal experts. These subjects will figure prominently at the humanitarian forums to be held in Copenhagen this coming summer [1990] and in Moscow next year [1991].

Among the items singled out as worthy of "acquisition" is the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. Although conceding that the covenant is only open to members of the Council of Europe, the optimistic prognosis was voiced that "there is no reason to believe that this obstacle cannot be overcome in the future." A warning was also issued not to "underestimate the experience of legal integration within the EC in a number of areas, especially economic legislation, in which the EC are now far ahead of the Council of Europe." Indeed, a preliminary nudge in this general direction has already been posted as Soviet analysts positively assess "the entente to plug
Soviet representatives into the work of drafting new European conventions."

The glancing reference to the "European legal space" in the above-quoted passage involves a grander venture whose contours remain somewhat nebulous, but which seems to bid for nothing less than a metamorphosis of the continent's legal complexion. Jointly adumbrated by the Soviet Union and France, the idea has won the backing of Austria, the Federal Republic of Germany, Poland and Czechoslovakia. Behind the scheme lies a version of Europe as a cultural unit whose fracture must be mended by reverting to its shared patrimony, such as the canon of Roman law, the ethos and morality of the great religious movements, the values of the Renaissance, and so forth. A good place to start calls for organizing an exchange of experience in the domain of national legislation with the object of "its maximum rapprochement and, where possible, unification as well.""

The Conference on Security and Cooperation in Europe has emerged as the venue of choice in whose precincts to pursue a program of "comparative juxtaposition of national legislations, parliamentary, executive and judicial structures of the participating states with the goal of their adaptation on the basis of common standards." The findings would serve towards "harmonizing as far as possible legislation, administrative regulations and judicial practices and eventually working out and codifying international standards covering the whole range of relations between the parties to the European process." Meantime, as architects of the original proposal, the Soviet Union and France continue to explore ways and means of furthering this vision of a legal convergence in the European setting across the old ideological and geopolitical barriers. Periodic meetings of high-ranking functionaries have looked for new opportunities to expand cooperation in legal matters between the two
countries, "including questions of bringing internal legislation in concert with international obligations."  

Despite strong gusts of enthusiasm for this ambitious enterprise, the package has yet to take substantive shape. Its contents are likely to evolve through a suite of ad hoc investigations which presumably will signal areas where enough advance consensus exists to let the parties tackle the issues with a modicum hope of success. Until then, all we have is theoretical ruminations which paint a thoroughly abstract perspective:

We have already convened with the European Institute and discussed these questions, and we are now drawing up plans of cooperation with the French. But I must say that this is still very uncharted terrain, and here we must think in what direction to go. Apparently, today in the field of the European legal space it is most convenient to follow two tracks: first, as regards ecology, in that here we can elaborate common norms, sign common conventions, and, second, in the sphere of economic legislation so that our systems can move closer and proctor our economic ties. That is why we would wish to get help for this undertaking.  

Finally, there is the study not only of international, but also of European law. In our milieu, this sphere of legal regulation now occupies a back seat, even though the problem of European law and cooperation with European organizations is very important for us and, I must say, the initiative at present comes precisely from the West. Furthermore, we have received an invitation from the European Parliament to cooperate with it in working out these problems and conduct joint projects.

What is interesting is that the air of pervasive uncertainty does not seem to weaken the faith which Soviet spokesmen publicly profess to harbor for this skimpy scenario or the eagerness they display in attributing assorted virtues to the rough sketch. Some of the reasons for the upbeat tone can be pinned down: A European focus, which assures the Soviet Union a major role in that company; a piecemeal and pragmatic approach to
assembling a mosaic recording a synthesis of disparate views; a horizontal procedure operating on the peer principle designed to outfit a common chassis housing a polymorphic superstructure. Or, as local exponents prefer to interpret the score:

A definite alternative of harmonizing the internal legislations of states by bringing them into line with agreed European standards in the sphere of human rights and humanitarian cooperation has already shaped up within the framework of the Helsinki process. The advantages of this path are obvious. Without imposing concrete standards on countries, substituting international for national standards or institutions or encroaching on the identity of legal systems (distinctions persist even in Western Europe, where they manifest themselves between the Anglo-Saxon and the continental legal systems), it establishes definite minimum standards of democracy below which no state may allow its legislation to go. The idea of a common legal space can lend a more consistent and purposive character to this process, which is virtually on.

While the comments are addressed to the human rights dimension of the blueprint, they fit the rest of the script as well. Rapprochement, at least in this estimate, does not mean homogenization or the overlordship of a particular ethos at the expense of other cultural strains, but a base alloy where the elements combine without losing their "personality." At this stage of evolution, it would be unrealistic to expect more, given the stark civic differences between the members of the cast and the trail of doctrinal scars left by recent history of bitter confrontation. Plain logic dictates that a prolonged stretch of case-by-case liaisons must precede any eventual plunge into matrimonial union.

Bilateral arteries pump similar traffic. For instance, a Soviet-American document was approved on mutually acceptable conditions concerning recognition of the jurisdiction of the International Court of Justice. The entente has been submitted to permanent members of the
Security Council for study. At the moment, the dialogue in the humanitarian sphere, characterized in Russian accounts as “calm and substantive,” hogs the spotlight in hostage to the belief that a breakthrough here will unclog the routes of collaboration elsewhere. The talks are being conducted on a regular basis both at top level and at the level of ministers as well as at a working diplomatic level and at meetings between experts (lawyers, physicians, officials in charge of “entry and exit”) and spokesmen for social organizations. In the course of these contacts, we inform the American side of the democratization of every sphere of life in our country, the drafting of laws designed to extend individual rights and apply the standards of ensuring the citizen’s rights and freedoms, measures for the preservation and advancement of the cultural heritage of Soviet peoples, and so on. Participants in the dialogue with American representatives and with representatives of our country raise specific humanitarian questions concerning the legal system and guarantees for human rights in the United States and their correspondence to international standards of legal defence.

According to Soviet sources, no effort is spared to find further partners for such intercourse.

Note that in the above context what is being imported comprises not only international, but also foreign and comparative law gear. Nevertheless, international channels serve the purpose of introducing these novelties into the Soviet home market and frequently the accessories themselves are crafted jointly with a foreign partner and then formally protocoled, so that in a material as well as a procedural sense international law media play a key role in brokering this symbiotic relationship. How well this grand design will fare once the authorities apply themselves to the job of overhauling the contents of the Soviet legal cupboard is hard to predict. The reforms instituted so far rate as a mixed bag at
best. That the latest statutory projects and products display noticeable stylistic improvement is undeniable. Quantum substantive leaps are harder to spot—at least in these early innings. Conscious attempts to match international standards on various occasions, e.g., in the revised regulations concerning the procurement of psychiatric treatment, the citizenship law, the bill on emigration and immigration, have drawn praise from local analysts for good intentions, tempered with criticism for inadequate performance. Consistent failure to afford institutional means that would effectively allow the interested individual to defend his rights against executive/administrative malpractice has provoked particular ire within the liberal constituency and, on that score, the objections are indeed quite valid.

Intense impatience marks the tone of the dialogue here in terms of the slow pace of the progress recorded in renovating the Soviet legal inventory and the quality of the work done up till now. I must say that while I sympathize with those who wish that the regime would push faster in modernizing the nation’s legal stock, their expectations about how quickly and well the job can be done strike me as extremely unrealistic. By their own admission, the obstacles are legion and the problems they themselves cite should put a lid on fits of excessive optimism. The set of hurdles includes a low sense of popular appreciation for the value of human rights, a conservative apparatus fearful of losing its privileges and power to control the civic calendar, mass “legal illiteracy” both as to common knowledge of what the law prescribes and routine reliance on legal media to vindicate personal entitlements vis-à-vis the omnipresent officialdom, a primitive culture of legal craftsmanship, a crisis atmosphere which prompts calls for vigorous leadership and collective discipline and relegates concern for libertarian “luxuries” to some distant future when normalcy has been
restored and top priorities duly fulfilled. Even the courts, which are often invoked as the ultimate guardians of civilized mores in a "law-based" state, lack trained personnel with the courage and professional integrity to pass the test.\textsuperscript{36}

Given the conditions on the home scene, the bid to import state-of-the-art legal hardware to further the goals of glasnost and perestroika in the Soviet environment is a stroke of genius—if the operation succeeds and the recipient organism does not reject the graft. I tend to be pessimistic about the prognosis, but, I realize, a more upbeat reading of the medical chart will appeal to a sizable segment of the Kremlin-watching community in the west.
NOTES


2. See, e.g., "Zadachi konsul'skoj služby SSSR v usloviakh perestroiki v svete reshenii XIX Vsesoiuznoi partkonferentsii," *Vestnik Ministerstva Inostrannykh Del SSSR* 1989, No. 1, 38 (hereafter abbreviated as *Vestnik*).

   Occasional reports suggest that the newfound love for international law does not always work out right. The piece by Alla Glebova, "Who's to foot the bill?," *Moscow News* 1990 No. 17, 10, describes the following incident:

   I have in mind what is perhaps the sorest point in joint ventures-the conversion of roubles earned by foreign partners into hard currency. The new agreements provide for radical solutions. The agreement signed last year between the USSR and the FRG proposes that permission be granted foreign investors to freely convert all the roubles due to them from their investments. The old legislation permits foreign partners to take out only their hard currency profits. This is sensible, since it would be sheer madness to exchange our "wooden" roubles for dollars at the current rate of exchange authorized by the USSR State Bank.

   The contradiction has been resolved simply. Without repealing the legislation, the Council of Ministers ruled that international laws take precedence over Soviet laws in such cases. But most important, it was specified that to convert roubles into hard currency, foreign partners can use not only the hard currency funds of joint ventures, but also the profits of their Soviet partners or even their sponsors--ministries or other government agencies.

   This obviously discriminates Soviet partners. Not only in joint ventures. Having guaranteed the conversion of roubles into hard currency, the ministries may be cutting off all hopes of modernization of other enterprises under their authority--these enterprises may find there is no hard currency left for their needs.

   The author goes on to categorize the whole approach as a potential disaster for plans to use the joint venture route to earn hard currency profits for the USSR and fuel the Soviet Union's economic recovery, accusing the Ministry of Finance of engaging in outright deception by lobbying for legislative approval of a large package of international agreements without caring about the fiscal consequences back home.

Likewise, Iu. Kashlev, "Net nichego aktual'nee prav cheloveka," Izvestiia 2 March 1990, 5:

An organic part of the new political thinking championed by the Soviet Union is our firm resolve to bring our legislation and practice in the field of human rights into complete concert with international obligations (which, by the way, were already assumed by us long ago, but, frankly speaking, were for a long time not fulfilled by us).


8. Interview with V.F. Petrovskii, JPRS-UIA-89-017, 13 November 1989, 4.


10. B.N. Topornin, in "Vneshniaia Politika i Nauka," Mezhdunarodnaja zhizn_' 1990 No. 2, 39-40. The subject of how to give effect to international treaty commitments on the domestic scene was discussed at a round-table hosted by the Institute of State and Law of the USSR Academy of Sciences on September 22, 1989, with special reference to the Vienna Final Act as well as in a more general guise. The views reportedly expressed on that occasion varied widely. See SGiP 1990 No. 1, 133-134.

11. Adamishin, op.cit. note 7, 47.


14. The Committee has taken the first steps to consider various questions involving the compatibility of Soviet domestic legislation with the "international obligations of the USSR" or "international acts on human rights" or "international acts." The subjects
include: normative acts on propiska, legislation barring judicial procedure for hearing individual labor disputes, legislation on compulsory medical treatment and labor reeducation of persons suffering from alcoholism and drug addiction, legislation on deprivation and loss of citizenship, rules sanctioning the entry into force of unpublished normative acts on the rights of citizens. Ved. SSSR 1990 No. 23, Items 418 and 419; No. 40, Items 798, 799 and 800.

15. Adamishin, op.cit. note 7, 47.


We believe 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.


20. Survey, 43.


22. "'International control? Can Soviet people appeal to international organizations in case their rights are infringed upon?,'" New Times 1989 No. 4, 29-30; A. Adamishin, op. cit. note 7, 47.

23. V.M. Chkhikvadze, "'Vseobshchaia deklaratsiia pravy cheloveka i ee istoricheskoe znachenie (K 40-letiiu priniatiia),'" SGiP 1988 No. 12, 91.

24. Reshetov, op. cit. note 9, 32-33.


28. Ibid.


34. *Survey*, 86.

35. Cf. *Vestnik* 1990 No. 3, 39: In the course of Soviet-British consultations on questions of humanitarian cooperation and human rights, A.L. Adamishin, at the request of the British side, informed his British counterpart "of the major work being pursued in the Soviet Union to create a legal state, perfect Soviet legislation and existing practice in questions of human rights. Detailed explanations were furnished on the basic drafts of laws discussed at the session of the USSR Supreme Soviet, at the IIInd Congress of people's deputies of the USSR. Their correspondence to the Vienna final act, other international standards, was noted."

36. Note that even the Ministry of Foreign Affairs personnel who have been pictured here as prime advocates of the present campaign to graft international law standards onto Soviet domestic practice are not immune from slippage. At one point, the USSR Supreme Soviet was compelled to draw the attention of the USSR Ministry of Foreign Affairs to the need to eliminate serious shortcomings in furnishing documents and materials to the USSR Supreme Soviet and the responsibility of official persons to furnish these materials. *Ved. SSSR* 1990 No. 41, Item 817.