NORMS OF INTERNATIONAL LAW AND INTERNATIONAL TREATIES AS PARENT LEGSLATION FOR RUSSIAN CRIMINAL PROCEDURE LAW: SOME PROBLEMS

ANTON LIUTYNSKII *

1.

The relationship between international standards and national laws is very important for the Russian legal science and practice. It was common in the Soviet legal culture to consider the national standards as the only source of law. The international rules of law were not actually taken into account and were not applied in practice. Major changes in the governmental and legal systems of the country in the past twenty years have somewhat changed the situation but not completely. In many aspects the inertia of the previous legal culture still remains.

The Russian Constitution, adopted in 1993, declared: "The universally recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation establishes other rules than those envisaged by law, the rules of the international agreement shall be applied" (Part 4 of Article 15).[1] This rule has created a principal legal basis for including international law into the Russian legislation. This article is devoted to the criminal procedural aspect of the problem, so a closer look can be taken at the implementation of Art. 15 of the Constitution of the Russian Federation, especially at criminal proceedings.

The Criminal Procedure Code repeated almost verbatim the above-mentioned constitutional norm (Part 3 of Art. 1 of the Code).[2] The Plenum of the Supreme Court – an assembly of the judges of the superior courts of Russia, authorized to give explanations to all the lower courts to ensure the unity of legal practices – published a special decision on the application of the generally recognized principles and norms of international law and the international treaties of the Russian Federation by the courts of law in 2003.[3] To better understand the specific problem of the relationship of international principles of justice and the Russian criminal justice system, it is necessary to outline some important provisions that are relevant not only for Russia but also for many other countries, especially in Eastern Europe.

These observations are the followings:

1. One ought to distinguish between the terms "*generally recognized principles and norms of international law*" and "*international treaties of the Russian Federation*". The Plenum of the Supreme Court has pointed out that the generally recognized principles of international law should be understood as the fundamental peremptory norms of international law accepted and recognized by the international community of States as a whole, the deviation from which is unacceptable. The generally accepted rule of international law must be understood as a legally binding rule of conduct accepted and recognized by the international community of States as a whole (Paragraph 1, Resolution of the Plenum of the Supreme Court of 10.10.2003 No. 5).[4] In our view, the major international instruments of the United Nations such as the Charter of the United Nations of 1945, the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights of 1966 can be referred to the regulations containing the universally recognized principles and norms of international law. In addition to the written norms, legal scholars consider the

* Assistant professor of the chair of criminal procedural law, the North-West Institute (branch) of Moscow State Law University (O.E.Kutafin). Email: anton040677@gmail.com.

[1] *Constitution of the Russian Federation*, www.constitution.ru/en/10003000-02.htm. (15 March 2013).

[2] The *Criminal Procedure Code of the Russian Federation* of 2001 (18 December). Help legal system "ConsultantPlus".

[3] *Resolution of the Plenum of the Supreme Court of the Russian Federation* on October 10, 2003 No. 5/. http://www.vsrf.ru/vscourt_detale.php?id=1177 (15 March 2013).

[4] Ibid.

traditional legal practices established by the recognized courts, such as the European Court of Human Rights, as universally recognized norms and principles of law.[5] This was also confirmed by the decision of the Plenum of the Supreme Court, under which the Vienna Convention on the Law of Treaties clarified that both the context and the subsequent practice in the application of the treaty which establish the agreement of the parties regarding its interpretation must be taken into account during the interpretation of an international treaty. Thus, the Russian Federation as a member of the Convention for the Protection of Human Rights and Fundamental Freedoms recognizes the binding jurisdiction of the European Court of Human Rights on the interpretation and application of the Convention and its Protocols. That is why it is considered necessary to take the practice of the European Court of Human Rights into account.

2. "*The international treaty of the Russian Federation*" means an international agreement concluded by the Russian Federation with a foreign state (or states), with an international organization or with any other entity having the right to enter into international agreements in written form and regulated by international law. International treaties become a part of the Russian legal system only in case of adoption and ratification, in accordance with a specific procedure established by a special law.[6]
The provisions of the officially published international treaties of the Russian Federation which do not require the publication of internal regulations for their implementation operate in the Russian Federation directly. The Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, ratified by Russia in 1998, is an example of such international treaties.[7] An international treaty which became a part of the Russian legal system has the highest legal force in relation to the applicable law, including the Criminal Procedure Code. The correlation of legal powers of the generally recognized norms of international law and the Constitution of Russia is an issue of significant practical and theoretical interest. To cut a long story short, we would like to join the opinion of the priority of the international law if it establishes a wider range of individual rights than the Constitution of Russia.

A considerable amount of the international treaties relating to criminal proceedings are the treaties prescribing the rules of cooperation in criminal matters between the individual states and the Russian Federation, for instance: the *European Convention on Extradition* of 1957 or the *European Convention on Mutual Assistance in Criminal Matters* of 1959 (both ratified in 2000). In our opinion, the international agreements that secure human rights in criminal proceedings are of more practical and theoretical interest.

On the one hand, the inclusion of international legal rules into the Russian legal system contributes to its improvement and development. Ratification of an international treaty itself may encourage the bodies of legislative powers to adopt changes and amendments to the existing criminal procedure legislation in order to eliminate the emerged contradictions. On the other hand, the presence of the implemented norm of an international law in the Russian legal system allows the participants of proceedings to directly apply these rules in criminal case practices. However, as it is noted in the literature, the legal culture of Russian law enforcement officials does not always contribute to this. For example, according to some estimates, 63% of judges prefer the norms of national law while making a decision.[8]

2.

Having described the general theoretical basis of co-relation of the international standards of criminal justice and the national legislation, we would like to examine some problematic aspects of the topic of cooperation of the Russian Federation and the Council of Europe.

The Council of Europe is an international organization, an important institution of cooperation among all countries of Europe within the field of legal standards, rule of law, human rights, democratic development and rapprochement of European countries. The most important international standards of justice are being implemented into the legislation of European countries, including non-EU countries. As a member of the Council of Europe, Russia has assumed to sign and ratify all the conventions of the Council of Europe in addition to the main document (the Convention for the Protection of Human

[5] Lazarus, V. A. – Tarasova, A. A. (eds.): Criminal Procedure. Actual Problems of Theory and practice: a Textbook for Masters. Moscow, 2012, 60.
[6] *Federal Law of 15.07.1995* (N 101-FZ) as amended on 25 December 2012. "On international treaties of the Russian Federation", Collection of laws of the Russian Federation. 17 July 1995, N 29, Art. 2757.
[7] Convention for the Protection of Human Rights and Fundamental Freedoms (signed in Rome)
[8] Lazarus-Tarasova: *op. cit.* 64.

Rights and Fundamental Freedoms), as well as to implement principles concerning fundamental human rights in criminal proceedings into its national law.

However, some problematic issues on the matter can hereby be indicated:

1. *Many conventions on human rights in criminal proceedings are still not signed and ratified by the state authorities of Russia*, though Russia, being a member of the Council of Europe, has assumed obligations to ratify the main international acts and to include the relevant principles in the Russian domestic legislation. As a result, important principles remain unimplemented (e. g. the European Convention on the Compensation of Victims of Violent Crimes.The preamble of the Convention refers to social solidarity and the need to compensate for the harm caused by crime, especially when the offender is not identified or is without resources. The damage caused by crimes can be different: i) physical, ii) property and iii) moral. The given Convention (Article 2) provides that those states-members of the EU which have adopted the agreement must take compensation for the most serious harm – the physical harm, as well as they must help dependents of the crime victim. This is consistent with an international legal act (however, a non-binding soft law document) of another level - the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (adopted by the UN General Assembly on November 29, 1985),[9] which defines the terms "restitution" (compensation of damages by the offender) and "compensation" (help from the community and the state). In our opinion, these are the absolutely morally sound principles based on humanism, concerning people and the State responsibility of citizens and taxpayers.

Many domestic legal systems have long ago included the provisions under which victims of crimes have the right to claim compensation from the state, no matter whether the offense is solved or not. It is interesting to see the experience of France, for instance, where a number of articles of the Criminal Procedure Code are devoted to the management of this problem and the principle of subrogation works (the state finds the guilty party and charges it with the expenses). Such practice can be seen not only in Europe but also for example, in the U.S.

There one can observe the laws and practice of state compensation to the crime victims and their families regardless of whether the guilty party is found or not, working both at the federal and at state level. For this purpose, special funds have been established.

Up to now, Russia remains a country where the state is not obliged to compensate a citizen for damages caused by crimes and, as a rule, it does not do it. Some time ago attempts were made to address this issue at state level. The draft law "On the victims of crimes" providing the right to state compensation for some categories of victims (serious bodily injured, victims of sexual assault, etc.) and their families was developed. The law also defines the financial basis for compensation in the form of a special fund generated by fines and other similar sources.

The victim has the right to legal and social assistance as well as to fair and reasonable compensation for the harm caused by an offense, and (or) to state compensation. The draft law sets the aims of compensation for the state: 1) restoration of social justice; 2) availability and fairness of compensation to the victim, including cases when the guilty person is not established, disappeared, cannot be prosecuted or punished, and 3) efficiency in providing victims with compensation.[10]

In particular, in accordance with the idea of the draft law, the state guarantees the provision of specified cash compensation: to the victim, who as a result of committing a crime against him was seriously bodily injured, or became infected with HIV/AIDS, became a victim of sexual violence, is in a difficult financial situation, became a victim of theft, fraud, extortion, property damage by fraud or abuse of trust. Compensation is also provided to the dependents of the victim who died as a result of crime. It was planned to establish The State Federal off-budget fund for victims to provide these benefits. The draft law defines the fund's sources as follows: criminal fines; means from property confiscation; public funds received from the sale of physical evidence of criminal cases, bails, rendered to the state budget, voluntary contributions of citizens and legal entities, etc. The draft law sets the limits of state compensation. However, this law has not been adopted yet.

[9] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the UN General Assembly Res. No. 40/34.

[10] Draft Federal Law "*On the victims of crime*" Published on February 24, 2012 at the website of "Российская газета (Rossiyskaya gazeta)", http://www.rg.ru/2012/02/24/poterpevshie-site-dok.html.

2. *The inclusion of international standards of justice in the Russian criminal procedure law is not always complete*. For example: the right to fair and public hearing within a reasonable time, set forth in Art. 6, Para. 1 of the Criminal Procedure Code of Russia, in some spheres (period of detention) is not actually implemented.

In 2010, the Russian criminal procedure legislation reflected such an important principle of international justice as the right to trial within a reasonable time. It is formulated in such international legal acts as the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6), the International Covenant on Civil and Political Rights of 1966 (Article 14, the right to trial without undue delay). The inclusion of this principle in the Russian Criminal Procedure Law and the adoption of a separate law "On compensation for the violation of the right to trial within a reasonable period of time" can be considered as a reaction to the existing problems of judicial red tape and inefficient proceedings, which are taken into consideration by the European Court of Human Rights during examination of the complaints of Russian citizens. This situation is especially dangerous when it comes to criminal justice when a person under prosecution is held in custody (under arrest). According to the Russian law being in effect, the period of detention during the investigation process in some cases may take up to 18 months, and the defendant shall appear in court only after that. Judges may extend the period of detention for defendants in every three months. In our view, this principle needs to be more specified in certain norms, limiting possible time of criminal prosecution because the concept of "reasonable time" is not being understood the same by different representatives of court and law enforcement authorities.

3.

The study of the relationship of the generally recognized international norms and principles and the national legislation on criminal proceedings is *very important from theoretical and practical points of view*. The direct applicability of the international legal norms in specific situations is the issue of particular interest.

The state participation within the international agreements *contributes to the development of its national legal system, promotes humanization and rapprochement* with the generally accepted legal principles.

The delay in ratification of important international legal acts may have a negative impact on the realization of fundamental human rights.

The development and improvement of national legislation should be thoroughly examined *with relation to generally accepted rules of international law*.