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The Future of International Human Rights Law — Lessons from Russia

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I

INTRODUCTION

This volume raises two broad and closely related questions. What do we mean when we talk about international human rights law? How should researchers investigate international human rights law? One is a matter of subject, the other of object. The papers in this symposium indicate multiple approaches to both. Rather than synthesizing these contributions or adjudicating among them, this intervention both embraces and challenges them. My main point is commonplace to the point of banality, that what you see depends on where you stand. The perspective I offer to make this point is Russian.

Russia matters because the foundational moment for international human rights law — the *lieu de memoire* of the field, with apologies to Pierre Nora — occurred in the context of the U.S.-Soviet relationship through enactment of the human rights provisions of the Helsinki Final Act.¹ Russia later became a place for testing the claim that international human rights law has its greatest impact in the disassembly of authoritarian regimes. Finally, the work of economists who sought a rigorous explanation for their failures in Russia in the 1990s gave an enormous boost to the empirical turn in the study of the effect of legal institutions on societal outcomes — a close relative to the empirical study of the impact of international human rights law. A reconsideration of the Russian context thus brings to light ways to think about the origins of international human rights law, and what its consequences — more unintended than not — have been.

The first part of this paper reviews the Russia experience, drawing shamelessly on my own adventures. Personal narrative presents challenges, not the least being the high likelihood that the audience does not find the author's life as fascinating as he does. I will try to overcome these hurdles. The second part proposes ways of understanding this experience that can shape our approach to both the subject and object of international human rights law. I argue in particular that local knowledge based on deep understanding of the society affected is indispensable to the human rights project, and that the specifics of local histories and values may defeat the expectations of the promoters of human rights. Although agnostic as to the future of this field, I hope to enrich the agenda of human rights workers and researchers going forward, whatever their methodological commitments.

II

Russia and the Concept and Practice of International Human Rights Law

Specialists in international human rights law will find a focus on Russia odd, if not off-putting. Western human rights workers tended to see the Soviet Union as a negative space, embodying an antithesis of human rights. During the flowering of this field in the 1970s and 1980s, mainstream activists and

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¹ Conference on Security and Cooperation in Europe: Final Act, Aug. 1, 1975, 14 I.L.M. 1292 [hereinafter *The Final Act*], reprinted in 73 Dep't State Bull. 323 (1975); SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 148-55 (2010).

academics typically sought to establish their anticommunist credentials as a predicate to launching critiques of what they framed as human rights abuses in the West.² Since the end of the Soviet Union in 1991, they have paid little attention to Russia except as a somewhat backward place, a rival with Turkey for the greatest source of complaints brought to the European Court on Human Rights. They see Russia as peripheral, not central.³ But Russia has been, and remains, more interesting than the mainstream view allows. The concept of international human rights law — human rights as a set of obligations resting on international law, not simply as an expression of values — was forged in the postwar struggle for hegemony between the Soviet bloc, with Russia at its center, and the so-called capitalist world. The supposed triumph of the West in turn put the ideological claims to the test, as the struggle's losers, first and foremost Russia, purported to assimilate the practice of human rights through international law enforcement. The many-sided disappointment of Western liberals with the results, especially in Yel'tsin's Russia, energized a new body of empirical scholarship exploring the relationship between legal institutions and economic development. The empirical turn in international human rights scholarship is not exactly a direct offshoot of the legal-origins literature, but it bears a strong family resemblance.

A. Helsinki and the Soviet-American Competition

A turning point — Samuel Moyn has argued convincingly that it is the turning point — in the history of international human rights law was the Helsinki Final Act, signed in the summer of 1975⁴. A legal formalist might find this observation surprising: By its terms, the Final Act was a political declaration, not a legal instrument. Its signatories proclaimed merely “their determination to act in accordance with the provisions contained in the above texts.”⁵ The principal purpose of the Final Act was to ratify the borders of postwar European states, in particular the western extension of the Soviet Union approved at Tehran and Yalta but thereafter deplored by the West.⁶ The human rights provisions, denominated as Basket III, became the price for Western accession to the Final Act. Stipulating that the Final Act was a political, but not legal, commitment allowed the Western states to give political comfort to the Soviet Union with respect to its borders without requiring these states to accord legal recognition to the absorption of the Baltic states or the revision of borders with Finland, Germany, Poland and Romania.⁷ Symmetrically, its political status meant that the Final Act imposed no new legal obligations regarding human rights on the Soviet Union or its satellites.⁸

Yet, as Moyn demonstrates, this legal formalism proved no obstacle to a transformation in the prestige and practice of the field of international human rights law.⁹ Especially — but not only — in Central and Eastern Europe, activists elided the distinction between political and legal commitments to advance a new agenda of international human rights. The Carter Administration, which took office in 1977, elevated this movement to U.S. policy and further blurred the line between the political and the legal. What previously had been strands of thought in postwar Western liberalism became an international legal movement.¹⁰

My involvement in these events was as a fly on the wall. In 1975, I worked as a specialist in Soviet politics in the Soviet Internal Branch of the Central Intelligence Agency's Office of Current Intelligence. This Branch had functioned since the Agency's founding as the home of the U.S. government's close expert study of the Soviet Union's internal dynamics.¹¹ At that time, its leader and a plurality of its analysts had worked there since its creation. During the late spring and early summer of 1975, the Branch was asked to assess the likely domestic impact in the Soviet Union of the human rights provisions of the Final Act.

² Moyn finds this anticommunist grounding in western human rights practice even earlier. *Id.* at 44–45.

³ Alternatively, they locate Russia as the home of a backlash against international human rights law. See Lauri Malksoo, *Introduction — Russia, Strasbourg, and the Paradox of a Human Rights Backlash*, in *RUSSIA AND THE EUROPEAN COURT OF HUMAN RIGHTS: THE STRASBOURG EFFECT* 3, 5 (Lauri Malksoo & Wolfgang Benedek eds., 2018).

⁴ MOYN, *supra* note 1, at 148–49.

⁵ The Final Act, *supra* note 1. The Final Act also stipulated that it was not eligible for registration with the United Nations pursuant to Article 102(1) of the UN Charter, further indicating that it lacked the status of a treaty under international law. *See id.*

⁶ *Id.*

⁷ Japan was not a party to the Final Act, which therefore did not address the issue of the Soviet Union's eastern borders.

⁸ *Id.* § 1-a-VII.

⁹ MOYN, *supra* note 1, at 122.

¹⁰ *Id.* at 121.

¹¹ Sibling branches focused on Soviet foreign policy (Soviet External) and the Eastern bloc, making up a division within the Office.

I do not recall the specifics of the Central Intelligence Agency's ultimate assessment of the Final Act. Like most official pronouncements, it was forged through negotiations among the various clusters of experts (an internal interagency, if you will), with hard edges rounded off and strong claims muted. Given the preeminent position and, to put it gently, self-confidence of then-Secretary of State Henry Kissinger, one may doubt whether anything coming out of the Agency would have had much impact on the U.S. posture toward the Final Act. What I do recall, however, are the views of the Branch, delivered in oral form in the course of the interagency negotiations.

The Branch, comprising the government's best experts on Soviet politics, was deeply skeptical about the enterprise.¹² It predicted that foisting on the Soviet regime a set of concepts for which they lacked an intellectual vocabulary would breed resentment and reaction. Internal critics of the regime — the dissidents — would likely suffer, rather than be empowered, as the rulers sought to demonstrate that the new words do not mean any change in power relations. It was beyond the Branch's remit to consider whether the human-rights concept might function as a wedge between the Soviet Union and Central and Eastern Europe. I do not recall whether the Branch predicted that the regime would create its own human rights vocabulary, establishing institutions to build counternarratives about international human rights law.¹³ The Branch was clear, however, as to the bottom line: Foisting human rights obligations on the Soviet Union would degrade the quality of dissident life in the short term and would probably accomplish nothing over the long term.

I am not sure if I ever knew, and I certainly do not recall now, whether the Branch's views were incorporated into the reports prepared at a higher level of the bureaucracy and ultimately delivered to the agency's clients, namely the country's political leadership. One might dismiss this episode as an example of the inherent conservatism of experts. People who have invested in the mastery of a complex system do not like to see their human capital depreciate. Yet the core insight of the Branch's position deserves consideration. The experts believed that Soviet society as a whole lacked a way of understanding human rights in the forms propounded by the West. The few individuals in that society who embraced these concepts were radical exceptions, outliers who worked beyond the boundaries of acceptable public discourse.¹⁴ As the experts understood it, Soviet state structure had not suppressed an inherent longing for western-style liberties in the Soviet population. Rather, it had succeeded in making these liberties incomprehensible for the vast majority of the population.

Thanks to Helsinki, once the idea of international human rights came into play in the Soviet Union, it branched into two streams. The first involved the official public sector. There the idea functioned as an empty vessel into which approved thinkers could pour content that served the status quo. Individual freedom — according to the approved thinkers — meant belonging to a society that realized economic justice in the form of full employment, guaranteed housing, health care, and education, suppression of economic inequality, and repression of social relations that led to exploitation. Accordingly, speech or political action that frustrated the fulfillment of these goals as administered by the approved technical elite (as selected by the Party) represented attacks on human rights.

The second stream involved everyone else in the Soviet Union. For the small and embattled sector that might be called civil society, human rights represented whatever existing Soviet reality was not. For the large disillusioned majority, both the official and unofficial sectors seemed beside the point. The Russian silent majority lacked the means to distinguish international human rights from other Western imports, such as Marxism-Leninism, that seemed to promise so much yet delivered so little. Exhausted and alienated, Russian society as a whole did not offer fertile soil for new idealisms rooted in Western rationalist traditions.

¹² When I say "best," I mean people with both great experience and access to sources of information not widely available elsewhere (and in some instances not available at all), either within government or in the public domain. They still suffered from blind spots. In particular, they lacked access to knowledge gained by their political masters in the course of direct dealings with Soviet leaders. At the time, the Secretary of State conducted an especially personal form of diplomacy and held closely to his own impressions. My colleagues described briefing the Secretary to an oral defense of one's graduate thesis, with the briefee assessing how well the briefer did in capturing what he already knew.

¹³ Shortly after the signing of the Final Act, the U.S.S.R. Academy of Science's Institute of State and Law created an international human rights section under the leadership of Viktor Mikhailovich Chchikvadze, a former head of the Institute famous for his conservatism.

¹⁴ Cf. KAI T. ERIKSON, *WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE* (1966). Soviet dissidents had begun to invoke the term "human rights" in the late 1960s as a means of capturing their comprehensive opposition to the Soviet status quo. In many cases they had learned the vocabulary from Western sources, to which they had intermittently privileged access. The Soviet landscape, however, denied them a context for envisioning what implementing these ideas would look like in their lived world. Rather, the concept took on the character of a negative identity, meant to describe exactly what Soviet reality excluded.

B. International Human Rights Law and the Dismantling of the Soviet System

Fast forward fifteen years. International human rights law had become a “thing.” Within the legal academic community, a cottage industry had emerged, replete with clinics, chairs, and NGOs devoted to publicizing, lobbying and litigating. Especially, but not only, in Central and Eastern Europe, the idea of human rights had become a node for opposition to Soviet domination. In the Western Hemisphere, a distinct human rights tradition served as a channel for organizing the surrender of authoritarian, mostly military regimes and the restoration of democratic, but not necessarily liberal, states. Human rights also became part of the vocabulary of opposition to the apartheid regime in South Africa, which was beginning to unravel in tandem with events in the Soviet Union.

Human rights talk did crop up in the Soviet transition, which one might arbitrarily date from the 1986 adoption of *perestroyka* (reconstruction) as the official policy to the closing down of the Soviet Union at the end of 1991.¹⁵ The dominant discourse, however, differed significantly from that heard further west. The establishment reformers (Gorbachev and those who attached themselves to him) propounded the concepts of law-based state and universal values, rather than the particularities of human rights enshrined in the Helsinki Final Act. Although some Western audiences mistook the aforementioned concept of law-based state for the Anglo-American concept of “rule of law,” what the establishment reformers had in mind was the German *rechtsstaat*, a commitment to transparency and stability rather than to the liberty of the subject.¹⁶ As for “universal values,” the reference to values rather than rights had the effect of separating reconstruction from international legal obligation. For radical reformers, many of whom aligned with Boris Yel'tsin and his team — in power as leaders of the Russian Federation from the middle of 1990 — human rights again served as a means to distinguish their aspirations from the status quo but mostly lacked concrete programmatic content. What joined the radicals to Yel'tsin was a shared desire to be done with the Soviet Union, a goal accomplished sooner than anyone anticipated.

Two private conversations with leading Russian legal figures at this time illuminate some of the peculiar roles of international human rights law in these events. The first conversation concerned the pronouncements of the U.S.S.R. Committee on Constitutional Supervision, the Soviet Union's first stab at a constitutional court.¹⁷ Several of its initial cases addressed issues that came within the ambit of international human rights law. One considered the right of access to courts to review job dismissals, another the assignment of the burden of proof in criminal cases, and the third the publication of secret decrees governing individual rights and duties.¹⁸ In each instance, the Committee principally relied on

¹⁵ An alternate translation is “restructuring,” suggesting more of a corporate work-out and less of a society's fundamental reform. I prefer the translation in text. I first wrote about the concept in Paul B. Stephan, *Perestroyka i Sovetologiya* [*Perestroyka and Sovietology*], 3 SS&A – EKONOMIKA POLITIKA IDEOLOGIYA [USA – ECON. POL. AND IDEOLOGY] 30 (1989) (journal of the Institute for United States and Canada Studies of the U.S.S.R. Academy of Sciences). An excellent overview of the period can be found in WILLIAM TAUBMAN, *GORBACHEV: HIS LIFE AND TIMES* (2017).

¹⁶ See Paul B. Stephan, *Further Thoughts on the Rule of Law and a New World Order*, 26 J. MARSHALL L. REV. 739, 739 (1993) (explaining the distinction between the Soviet concept of law-based state and the Anglo-American concept of “rule of law”).

¹⁷ Like the Appellate Committee of the British House of Lords (transformed into a Supreme Court only in 2009), the Committee on Constitutional Supervision was a component of the legislature and thus lacked the capacity to issue mandates on its own behalf. Whether it would have acquired a reputation for integrity and authority that would have obligated the legislature to automatically implement its judgments, as British tradition required with respect to the Appellate Committee, will never be known. See Herbert Hausmaninger, *From the Soviet Committee on Constitutional Supervision to the Russian Constitutional Court*, 25 CORNELL INT'L L.J. 305 (1992).

¹⁸ Zaklyucheniye Komiteta Konstitutsionnogo nadzora SSSR, 0 nesootvetstviu norm zakonodatel'stva, isklyuchayushchikh dlya ryada kategoriy rabotnikov sudebnyy proyadok rassmotreniya individual'nykh trudovykh sporov, polozheniyam Konstitutsii SSSR zakonov SSSR, mezhdunarodnykh aktov o pravakh cheloveka [Conclusion of the USSR Committee for Constitutional Supervision, on the insufficiency of legislative norms that exclude categories of workers from judicial review of individual labor disputes, based on the Constitution of the USSR, the laws of the USSR, and international acts on human rights], VEDOMOSTI S"EZDA NARODNYKH DEPUTATOV SSSR I VERKHOVNOGO SOVETA SSSR [VED. SSSR] [Bulletin of the Congress of People's Deputies of the USSR and Supreme Council of the USSR] 1990, No. 27, Item 524; Zaklyucheniye Komiteta Konstitutsionnogo nadzora SSSR, 0 nesootvetstviu norm ugovornogo i ugovorno-protsessual'nogo zakonodatel'stva, opredelyayushchikh osnovaniya i poryadok osvobodzheniya ot ugovornoj otvetstvennosti s primeneniym mer administrativnogo vyzskaniya ili obshchestvennogo vozdeystviya, Konstitutsii SSSR i mezhdunarodnym aktam o pravakh cheloveka [Conclusion of the USSR Committee for Constitutional Supervision, on the insufficiency of norms of criminal and criminal-procedure legislation involving release from criminal responsibility conditioned on the application of measures of administrative punishment or social pressure, based on the USSR Constitution and international acts on human rights], VEDOMOSTI S"EZDA NARODNYKH DEPUTATOV SSSR I VERKHOVNOGO SOVETA SSSR [VED. SSSR] [Bulletin of the Congress of People's Deputies of the USSR and Supreme Council of the USSR] 1990, No. 39, Item 775; Zaklyucheniye Komiteta Konstitutsionnogo nadzora SSSR, 0 pravilakh, dopuskayushchikh primeneniye neopublikovannykh normativnykh aktov o pravakh, svobodakh i obyazannostyakh grazhdan [Conclusion

international treaties as the basis for invalidating the domestic legislation at issue, although it also cited domestic constitutional provisions to complement the international rules.

In early 1991, I met with Sergey Sergeyevich Alekseyev, the chair of the Committee, in Moscow. I asked him about his tribunal's reliance on international human rights treaties as a means of invalidating domestic legislation, when the formal provisions of the U.S.S.R. Constitution might have provided a sufficient basis for these decisions. One-on-one he was disarmingly frank. "We cannot rely on our domestic law," he explained, "because it has no legitimacy within our society. Only international law gives us hope that people will respect our decisions."¹⁹ He seemed to believe that the function of judicial review, by which experts nullified acts of the legislature, required sources of legitimacy located abroad. At least at this critical juncture, norms did not migrate from international law, rather internationalism empowered specialists to enact outcomes that otherwise were beyond their reach.

A second encounter occurred a year later, after the Russian Federation had superseded the Soviet Union. At a cocktail party I chatted up Vadim Konstantinovich Sobakin, a man I had first met when he served in a senior position in the Central Committee apparatus and then worked with when he became a member of the Committee on Constitutional Supervision. In 1992, he had migrated to the staff of the new Constitutional Court of the Russian Federation. The time was near the anniversary of the 1941 German invasion, perhaps the Soviet Union's greatest trauma. As he was a veteran of that conflict, I asked him which was worse, then or now. He answered immediately and emphatically that now was worse. "Then we had an enemy."²⁰

What I took Sobakin to mean is that the crisis that had overtaken and then ended the Soviet Union was deeply disturbing precisely because there was no external actor that could serve as a way of relieving Russians of the responsibility for their current confusion and disarray. Sobakin believed that the other nations of the former bloc had it easier, because they could blame the Russians for their troubles. But Russians had to look to themselves to understand how they had fallen, a much harder task.

I regard these anecdotes as authentic, although certainly incomplete. Both men, as leading legal actors, managed to find important roles in the Yel'tsin regime, but they had made their careers under Soviet power. What these encounters reveal is part of the story of international human rights law and the reconstruction of a superpower. What the men expressed was an understanding of international human rights law as the face of the other. For Alekseyev, the content of international law did not matter so much as the fact that it was not domestic law, and therefore not associated with the discredited and disillusioning status quo. For Sobakin (and perhaps this is a stretch), it served as an anchor for opposing an adversary. Because Russia's tragedy was internal, international human rights law did not help organize ways of thinking about the situation, much less mapping the way out.

There were other voices in the legal community, including those that talked in ways that seemed congenial to the West. Invitations to travel to, and publish in, the West came readily to these people. In particular, Soviet specialists who were lucky enough to have a Baltic identity managed to migrate to, and then flourish in, societies that had closer ties with the West, including its human rights discourse. Within Russia, however, the ways of talking about human rights law that seemed so sensible in Europe proper remained largely peripheral, both politically and intellectually.²¹

The grave diggers of the Soviet state did not completely ignore the concept of human rights. In the interval between the August 1991 failed coup that destroyed Gorbachev as a political force and the formal seizure of the main strands of Soviet power by the Russian Federation in December, the Russian legislature adopted a "Declaration of the Rights and Freedoms of Person and Citizen."²²

of the USSR Committee for Constitutional Supervision, on rules for issuing unpublished normative acts with respect to the rights, freedoms and obligations of citizens], VEDOMOSTI S"EZDA NARODNYKH DEPUTATOV SSSR I VERKHOVNOGO SOVETA SSSR [VED. SSSR] [Bulletin of the Congress of People's Deputies of the USSR and Supreme Council of the USSR] 1990, No. 50, Item 1080. For my contemporaneous discussion of these decisions, see Paul B. Stephan, *Revisiting the Incorporation Debate: The Role of Domestic Political Structure*, 31 VA. J. INT'L L. 417, 433–35 (1991).

¹⁹ Of course, there is no transcript; this is the best that my memory offers.

²⁰ Again, fallible memory is my only source.

²¹ For an extension of this cultural incomprehension argument from human rights to property rights and other legal concepts associated with liberal markets, see URIEL PROCACCIA, *RUSSIAN CULTURE, PROPERTY RIGHTS, AND THE MARKET ECONOMY* (2007).

²² Postanovlenie Verkhovnogo Soveta RSFSR o Deklaratsii prav i svobod cheloveka i grazhdanina [Resolution of the RSFSR Supreme Soviet on a Declaration of the Rights and Freedoms of Persons and Citizens], VEDOMOSTI S"EZDA NARODNYKH DEPUTATOV RSFSR I VERKHOVNOGO SOVETA RSFSR [VED. RSFSR] [Bulletin of the Congress of People's Deputies of the Russian Soviet Federal Socialist Republic and Supreme Council of the RSFSR] 1991, Issue No. 52, Item 1865. See also Gennady M. Danilenko, *The New Russian Constitution and International Law*, 88 AM. J. INT'L L. 451, 461 (1994). Five months later, in April 1992, the extant constitution was amended to give the Declaration constitutional status. *Id.*

This declaration drew heavily on international law and stated in particular that “the generally recognized international norms concerning human rights” had priority over the content of domestic legislation.²³ The 1993 Constitution authorized a Commissioner for Human Rights who would serve as an ombudsman for enforcing the Declaration.²⁴ Accession to the European Convention on Human Rights followed in 1998. But none of these measures can be linked to specific steps taken by or against the Russian state to change concrete aspects of social life. Rather, they served to dress up Russia, to declare and confirm a break with the past but not to establish a program for social or political change.²⁵

For someone steeped in Russian history, the flirtation with international human rights law in the 1990s seems another instance of the enduring tension in Russian culture between admiration of, and a desire to belong to, the West, and the Slavophile assertion of a unique national identity rooted in Byzantium and periodic triumphs over foreign invaders, whether Mongol, Lithuanian-Polish, French, or German. The nod toward international human rights law was a westernizing gesture. By the latter half of the 1990s, however, influential Russian specialists in international relations recast international human rights as an example of Western animus toward Russian ideals. For these critics, international human rights law was simply another club wielded by the West to thwart Russia’s realization of its unique historical destiny.²⁶

C. The Blunders of Shock Therapy and Empirical Research into Legal Institutions

The latter-day Slavophiles returned to prominence in the 1990s largely because the Western-backed restructuring of the Russian economic system had become, in popular perception at least, a disaster. The so-called Washington consensus, at the time simply the popular wisdom but today considered the neoliberal fallacy, prescribed rapid privatization as the precondition to the creation of markets.²⁷ As a contract consultant to the U.S. Treasury, the OECD, the IMF and the World Bank, I spent these years bumping heads with the Western specialists (economists, accountants, and lawyers) who implemented the shock therapy program, the dismantling of Soviet-era economic institutions in advance of the creation of public and private institutions that a liberal economic system needs to function. Many of these figures seemed to assume that those institutions would arise spontaneously, as if private property and free markets represented a state of nature rather than a particular cultural and historical artifact.

Most Russians then and since saw the 1990s as a time of troubles (*Smutnoye Vremya*), a term with deep historical resonance.²⁸ The term refers specifically to the collapse of the Muscovite state in the early seventeenth century and the occupation of its territory by the Lithuanian-Polish kingdom. That Russians compared the social and economic disruption and omnipresent Western presence in the 1990s to Russia’s historical nadir and national humiliation indicates how badly the reforms went. Life expectancy dropped alarmingly and social inequality exploded. Many Russians perceived the improbable reelection of Yel’tsin as President in 1996 as evidence of corruption of the electoral process funded in part by the West, rather than as a legitimate expression of the popular will. The civil war in Chechnya, with

²³ VED. RSFSR, *supra* note 22.

²⁴ KONSTITUTSIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 103(1)(f) (Russ.).

²⁵ The closest thing to a concrete change in social practice associated with international human rights law was the abandonment (but not the abolition) of the death penalty. Russia signed but did not ratify Protocol 6 of the European Convention and hence had no binding international legal obligation to stop executing people. The Constitutional Court of the Russian Federation nevertheless referred to Protocol 6 in the course of interpreting domestic law as barring future use of capital punishment. Bakhtiyar Tuzmukhamedov, *Doing Away with Capital Punishment in Russia: International Law and the Pursuit of Domestic Constitutional Goals*, in *COMPARATIVE INTERNATIONAL LAW* 353 (Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier & Mila Versteeg, eds., 2018).

²⁶ See e.g., Sergey Vladimirovich Kortunov, *Kholodnaya Voyna: Paradoksy Odnoy Strategii* [*The Cold War: The Paradoxes of One Strategy*], *Mezhdunarodnaya Zhizn’* 23 (No. 5, 1998), translated in *Is the Cold War Really Over?* 44 *INT’L. AFF.* 142 (No. 5, 1998). I discussed the significance of Kortunov’s views (he was one of Yel’tsin’s senior advisors) in Paul B. Stephan, *The Cold War and Soviet Law*, 93 *AM. SOC’Y. INT’L L. PROC.* 43, 50 (1999). I returned to this topic, and pointed out Kortunov’s affinity with President Putin, in Paul B. Stephan, *The Impact of the Cold War on Soviet and US Law: Reconsidering the Legacy*, in *THE LEGAL DIMENSION IN COLD WAR INTERACTIONS: SOME NOTES FROM THE FIELD* 141, 156 (Tatiana Borisova & William B. Simons eds., 2012). For a more recent framing of Russian attitudes toward international human rights in terms of the westernizing-Slavophile dyad, see Mikhail Antonov, *Philosophy Behind Human Rights: Valery Zorkin v. the West?*, in *RUSSIA AND THE EUROPEAN COURT OF HUMAN RIGHTS: THE STRASBOURG EFFECT*, *supra* note 3, at 150.

²⁷ For more on this, see Umut Ozsu, *Neoliberalism and Human Rights: The Brandt Commission and the Struggle for a New World*, 81 *LAW & CONTEMP. PROBS.* No. 4, 2018, at 139 (2018).

²⁸ See ALLEN C. LYNCH, *HOW RUSSIA IS NOT RULED REFLECTIONS ON RUSSIAN POLITICAL DEVELOPMENT* 85–127 (2005).

terrorist consequences for Moscow and other heartland Russian cities, added another level of torment and dismay.

One of the principal architects of the shock therapy program was Andrei Shleifer, a rising star on the Harvard economics faculty. Shleifer worked in Russia through the Harvard Institute for International Development (HIID) and was funded through U.S. AID, then an independent agency of the U.S. government. That something was wrong with the shock therapy project must have been clear to Shleifer by 1997, when U.S. AID shut down the HIID program in Russia because of alleged misconduct by him and his principal aide, Jonathan Hay.²⁹ In 1998, Shleifer published the first of the pathbreaking papers on legal origins, an econometric inquiry into the effect of legal institutions on economic development.³⁰ These papers transformed the study of the behavioral consequences of law. As Samuel Moyn indicates in his paper, the legal origins literature frames, even if it did not directly bring about, the quantitative analysis of international human rights law that appeared at the beginning of this century and that several of the papers in this symposium explore.³¹

I can only speculate on what led to this shift in Shleifer's research. It seems plausible, however, that the principal premise of shock therapy — that legal structures necessary for the functioning of a liberal society will emerge spontaneously in response to privatization of state assets — was seriously incomplete, and that this deficiency had become clear to him. I imagine him coming out of the Russian experience recognizing that institutions could not be assumed, but rather rested on specific conditions that required intense empirical study to be understood, much less created. In other words, I believe, although I cannot prove, that Russia gave the impetus for an intellectual inquiry that led the way to the quantitative analysis of international human rights law, just as it provided the *lieu de memoire* for the field itself.

After the 1990s, Russia enjoyed, if not a Thermidor, at least a restoration. Vladimir Putin, as President and, intermittently, Prime Minister, emerged as a strong leader in place of the exhausted, decrepit Yel'tsin. An oil price boom, coupled with brutal but definitive resolution of the Chechnya conflict and political stability based on recentralization of power in the Kremlin, brought Putin to new heights of domestic popularity.³² Without expressly disavowing international human rights law, the Russian state increasingly distanced itself from the concept. A defining moment came when the European Court on Human Rights determined that Russia's nationalization of Yukos, what had been the country's largest energy company, transgressed the European Convention.³³ In response to what was the largest judgment in the European Court's history in favor of a human rights victim, the Russian Federation empowered the Constitutional Court to review such judgments for their constitutional validity. The Constitutional Court obligingly ruled that Russia was constitutionally barred from honoring the European Court's judgment in this case.³⁴ Without denouncing the Convention, Russia has effectively disavowed its obligations under it.³⁵

²⁹ These events imperiled a program I had put together to bring Russian judges to the United States. HIID had agreed to fund the trip before the ax fell on its Russian work. At the last minute U.S. AID agreed to release money for my event, allowing several members of the High Arbitrazh Court to spend a week at the U.S. Tax Court. The U.S. government initially brought criminal charges against Shleifer and Hay, accusing them of abusing their positions in the federally funded program for private gain. It then dropped those charges but obtained a substantial civil settlement from Shleifer, Hay, and Harvard. JANINE R. WEDEL, *SHADOW ELITE: HOW THE WORLD'S NEW POWER BROKERS UNDERMINE DEMOCRACY, GOVERNMENT AND THE FREE MARKET* 144 (2009).

³⁰ See Rafeal LaPorta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON., no. 6, Dec. 1998, at 1113.

³¹ See Samuel Moyn, *Beyond the Human Rights Measurement Controversy*, 81 LAW & CONTEMP. PROBS. No. 4, 2018, at 121.

³² ALLEN C. LYNCH, *VLADIMIR PUTIN AND RUSSIAN STATECRAFT* 53–64 (2011).

³³ OAO Neftyanaya Kompaniya Yukos v. Russia, App. No. 14902/04, Eur. Ct. H.R. (2011). Whenever I discuss that dispute, I am constrained to disclose that I have participated in multiple proceedings as an expert witness on behalf of Yukos and its investors, although I did not take part in the case before the European Court. One should discount my views accordingly. See Paul B. Stephan, *Taxation and Expropriation — The Destruction of the Yukos Oil Empire*, 35 HOUSTON J. INT'L L. 1 (2013).

³⁴ Konstitutsionnyy sud Rossiyskoy Federatsii Postanovlenie ot 19 yanvarya 2017 g. N. 1-P [Resolution No. 1-P of the Constitutional Court of the Russian Federation of January 19, 2017], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federal Collection of Legislation] 2017, No. 1-P, 180, http://www.ksrf.ru/en/Decision/Judgments/Documents/2017_January_19_1-P.pdf [<https://perma.cc/G7HX-4H5Q>] (official English translation).

³⁵ The judgment provoked Bill Bowring, otherwise a vigorous defender of Russia's engagement with European Convention and the Strasbourg Court, to admit that "it may be that the recent Yukos judgment of the Russian CC provokes a final rupture in relations between Russia and the [Council of Europe]." Bill Bowring, *Russia's Cases in the ECtHR and the Question of Implementation*, in *RUSSIA AND THE EUROPEAN COURT OF HUMAN RIGHTS: THE STRASBOURG EFFECT*, *supra* note 3, at 188, 221.

International Human Rights Law in Light of the Russian Experience

This episodic account of Russian encounters with international human rights law has four purposes. First, it illustrates the importance of case studies that draw on intensive local knowledge. Second, it supports a characterization of international human rights law as both geographically and temporally contingent. Third, and in connection with the second purpose, it indicates ways in which international human rights law can be used instrumentally for purposes other than the advancement of human dignity. Fourth, it suggests some challenges to quantitative analysis of national practice with respect to international human rights law.

A. The Importance of Local Knowledge

One of the collateral effects of the end of the Cold War was the sudden unfashionability of area studies as an academic approach to international relations. This has not been a complete loss: Area-studies experts suffered from insularity and too often resisted making connections between what they knew well and broader social issues. But the bundling of historical, cultural, and political knowledge that the best area-studies people deployed could deliver insights that other methodologies could not. There may be such a thing as too much context. But the use of resonance as a means of making sense out of discrete observations gave us something that fancy theory and quantitative analysis do not. I do not mean to disparage either theory or empirical work. Scholarship without theory is journalism, an unreflective and uncritical account that engages neither other scholars nor the world at large. Empirical work makes it possible to challenge and revise theory. My concern is that the turn against area studies in the early 1990s in the United States, if not elsewhere in the academy, abandoned an essential element of empirical work and foreclosed a particularly important theoretical move — local variation. At its best, deep local knowledge complements and extends what we can get from fancy theory and quantitative analysis. It brings authenticity and additional possibilities for falsification of theory-driven claims. It can also guide quantitative inquiries, as I discuss below. Deep local knowledge is, in sum, a useful and perhaps indispensable means for studying any significant social phenomenon, the societal effects of international human rights law included.

B. The Contingency of International Human Rights Law

The Russian story serves another purpose. It represents one piece of evidence undermining the more grandiose claims for international human rights law. It indicates that international human rights law does not represent a widely accepted consensus on fundamental principles about good societies. Rather, at least for Russia, what gets put into the international human rights basket depends a great deal on the place and time.

This finding opens the door for further references to local knowledge: What about China, India, Brazil, South Africa, Japan, Indonesia, and Malaysia (just to focus on large countries outside the traditional West)? How thin is the cloak of words ascribing human rights law, and how thick are the local interpretations and implicit understandings of these words? What changes over time, and in what direction? Is the conception of international human rights law as universal norms — widely understood if not necessarily widely honored — misleading, perhaps even a mystification?

As someone who has spent too much time in Russia, both physically and intellectually, the idea that international law often, and perhaps largely, represents local claims rather than universal norms comes naturally to me. Long before the human rights moment of the 1970s, Soviet and U.S. specialists advanced fundamentally different visions of what constitutes international law and what results from the existence of an international legal obligation.³⁶ The collapse of the Soviet Union led some triumphalists to assert that a new era of universal liberal values, largely inscribed in international law, had emerged. A quarter century on, liberal internationalism seems a passing impulse, no longer dominant even in the western capitals (first and foremost Washington) where it originated.

Reflecting these changes, a new field has emerged, comparative international law, that explores the foundations of variation in claims about international law among states and regions. Research has uncovered both systematic differences in the claims and striking contrasts in the cultures and training of international lawyers.³⁷ Much work remains, but it seems clear that both structural state incentives of the sort that rational-interest international-relations scholars investigate and cultural structures of the sort that constructivists explore have much to do with what passes for international-law claims in various parts of the world.

³⁶ See e.g., Leon Lipson, *Peaceful Coexistence*, 29 *LAW & CONTEMP. PROBS.* No. 4, 1964, at 871; Leon Lipson, *The Rise and Fall of "Peaceful Coexistence" in International Law*, in *PAPERS ON SOVIET LAW* 6 (Leon Lipson & Valery Chalidze eds., 1977).

³⁷ *COMPARATIVE INTERNATIONAL LAW*, *supra* note 25; ANTHEA ROBERTS, *IS INTERNATIONAL LAW INTERNATIONAL?* (2017); Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier & Mila Versteeg, *Exploring Comparative International Law*, 109 *AM. J. INT'L L.* 467 (2015).

This general phenomenon has particular significance for international human rights law. Much of the normative pull of this body of norms rests on its aspirations to universality. The claim that these rights derive ultimately from natural law or deep moral commitments seems hollow if what we observe in the world is not simply a dispersion of legal rights but systematic differences in how states not only apply, but conceive of these institutions. The Russian story fits into a larger narrative that unmask universalism as pretentious, and perhaps hegemonic.

As I have argued elsewhere, proponents of international human rights law need not be dismayed by this news.³⁸ Divergence in the content and conception of this body of law indicates its importance, not its irrelevance. If international human rights law had no bite, states would have no difficulty embracing it and would have no need to adapt it to local conditions. That adaptation occurs suggests that states take the law seriously.³⁹

This argument, however, is inferential rather than empirical. It may be that states, even as they adapt, also circumvent or ignore these obligations. The results of comparative international law, to which my Russian story adds an exclamation point, underline the importance of serious study of how international human rights law manifests itself in different societies.

C. Instrumental Uses of International Human Rights Law

The Russian story suggests another side to advocacy of international human rights. Between 1990 and 1993, a fierce political struggle unfolded over control of the state and its resources. The first stage involved a contest between those wielding authority under the auspices of the U.S.S.R. (led by Gorbachev) and those associated with the reconstructed R.S.F.S.R. (led by Yel.tsin). This contest ended in December 1991 with a deal under which Yel.tsin relinquished claims to the non-Russian part of the U.S.S.R. in return for the agreement of ten other components of the Soviet state to leave the Union and thus surrender their claims on Russia (four other Republics already having declared their independence). The second stage fit into a long tradition in Russian history, as the prevailing group in Russia fought amongst itself for suzerainty over what it had wrested away from the U.S.S.R. The conflict reached its climax in October 1993, when the presidential administration carried out an armed attack on the parliament that resulted in hundreds of deaths and the political (but not physical) liquidation of Yel.tsin's adversaries.⁴⁰ International human rights law did not play a major role in these battles, but it did appear on the periphery. As noted above, in the first stage the U.S.S.R. Committee on Constitutional Supervision, on the one hand, and the Russian legislature, on the other, signaled their loyalty to the idea of international human rights law. These signals were more conceptual than programmatic. They reflected an intuition that embracing an "other," however incompletely understood and however undefined the embrace, would work better than using illegitimate domestic practice to make particular reform programs more attractive. The question became which side could more credibly claim to have broken with the past, with a supposed submission to international human rights law serving as an indicator of the break.

The second stage of the struggle put these claims in a new and darker context. One dimension of the conflict between Yel.tsin and his opponents was the rule of law, an idea laced with human-rights implications. The Soviet legacy was one of arbitrary fiat, of legality serving to dress up assertions of power. The new regime promised that it would adhere to a Western notion of law-based governance. The problem, however, was that the extant Russian Constitution, although amended many times since 1990, still subordinated presidential authority to parliamentary control. The Constitutional Court, which was supposed to embody this new approach to legality, sided repeatedly with the parliament in opposing presidential seizures of power. In response, Yel.tsin shut down the Court just as he sent in the tanks to oust the parliament. He allowed the Court to reopen only in 1995, with a new chair and now suitably chastened. Twenty-two years on and counting, the Court has yet to pose a serious barrier to actions that the executive has indicated to be important.⁴¹

³⁸ Paul B. Stephan, *Comparative International Law, Foreign Relations Law and Fragmentation: Can the Center Hold?*, in *COMPARATIVE INTERNATIONAL LAW*, *supra* note 25, at 53.

³⁹ *Id.* at 67.

⁴⁰ Narratives about the 1993 uprising vary radically. For the United States, it represented a commendable suppression of reactionary forces by well-intended reformers in tune with U.S. policy. A more critical view is expressed in LYNCH, *supra* note 28, at 136 ("[T]he distinguishing mark of Yel.tsin's presidency is his use of Russian tanks in October 1993 to destroy the Russian parliament, thereby resolving Russia's most important dispute over policy and the nature of the regime by the bullet rather than the ballot. Russia's authoritarian constitution, which vests highly concentrated powers in the hands of the (elected) executive, is a direct consequence of that failure of policy.").

⁴¹ In one of the paradoxes of history, Valeriy Dmitriyevich Zor'kin, the Constitutional Court chair whose ouster Yel.tsin procured in 1995, was restored to the chair under Putin and has become an articulate proponent of the idea that Russian legal thought represents national exceptionalism to which Western legal thinking is inimical. Antonov, *supra* note 26, at 155–59.

Perhaps one need say nothing more about this episode than that transplanting of international human rights law into Russia in the early 1990s was sincere but incomplete. Yet it has an air of bait-and-switch, of opportunistic invocation of abstract foreign ideals as a way of smoothing a regime change. Although only a datum, it is consistent with the feint hypothesis about international human rights law, namely that states may undertake human rights obligations to deflect outside scrutiny of their authoritarian practice.⁴²

This raises the possibility that international human rights law might, in particular contexts, have perverse effects and that state actors could use them for their own purposes. The task of the scholar becomes connecting the misdirection to the intended effect. Establishing intentionality can be difficult, even with thick description. Quantitative analysis also poses difficulties, given the significant gap between correlation and causation. Work that focuses on talk to the exclusion of behavior confronts especially great challenges.⁴³

Perhaps one can dismiss the Russian story as an outlier. States that act in bad faith may be rare and uninteresting. Perhaps such conduct gets caught sufficiently often to make the payoff of its discovery too slight, in light of the damage that the bad-faith narrative does to the project as a whole. Yet this loose end remains troubling, especially if one entertains the possibility that conventional human rights claims serve largely as distractions from more fundamental questions of social and economic justice.

D. Challenges for the Quants

Like any methodology, empirical work can have its shortcomings. Its practitioners can fall in love with deep dives into rich data sets and lose track of the reasons for interrogating the data. They can let the ease of coding drive their agenda, thereby neglecting critical but difficult-to-measure phenomena. They may focus on irrelevant results simply because they are obtainable. Yet for all this, quantitative tools, used wisely, can unlock secrets and upend our beliefs about social life. The arguments for quantitative analysis fall into two categories. First, there is the compared-to-what point. Nonquantitative analysis has its own problems. Scholarship is, in essence, a way of talking, and talk about talk seems to me unsatisfyingly circular. This is what academics do when they write about each other. War, misery, and indignity deserve more.⁴⁴ The practice of war and degradation, and not how we talk about it, merits our attention.⁴⁵ Second, quantitative empirical work at its best is democratic and egalitarian in a way that talk scholarship is not. To be sure, there can be biases in what one chooses to observe and how one defines an observation. But once one lays out one's approach, others can test it for replication.⁴⁶ There is something satisfying in imposing this discipline on even the most exalted and honored of scholars. As well as democratic, empirical work can also be egalitarian. Studying talk necessarily favors the articulate and arresting; observations, by contrast, can focus on the mundane but meaningful. There is no question that quantitative empirical work can hide behind equations and numbers as a means of intimidating critical responses. The garbage-in-garbage-out risk is ever present. But, if done with care and imagination, it can expose the lives and concerns of those that, exactly because they are inarticulate, drop out of talk scholarship.

That said, the Russian story remains a cautionary tale for those seeking to apply quantitative analysis to law, especially international human rights law. How does one code for the chasm between formal commitments (constitutional commitment to international human rights law as a source of higher-order,

⁴² See Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 935 (2002). As Moyn notes, this is a leading article in the field of quantitative analysis of human rights practice. Moyn, *supra* note 31, at 3.

⁴³ See e.g., Hyeran Jo & John Niehaus, *Through Rebel Eyes Rebel Groups, Human Rights, and Humanitarian Law*, 81 LAW & CONTEMP. PROBS. No. 4, 2018, at 101. To be clear, establishing what significant actors say is an essential part of any study of legal institutions. But without some way of linking expressions to actions, one can miss a great deal.

⁴⁴ I am unclear, for example, as to the constitution of the dependent variable in Cosette D. Creamer & Beth A. Simmons, *A History of Self-Reporting: The Impact of Periodic Review on Women's Rights*, 81 LAW & CONTEMP. PROBS. No. 4, 2018, at 31. Is the point that periodic reporting leads to better reporting, or that better reporting translates into an increase in enforcement resources and better life opportunities for women? How are better life opportunities measured, and how does one segregate the effects of reporting from other variables such as income growth, restructuring of the labor market, educational opportunities, etc.? Better reporting alone is simply talk; life outcomes are, I would have thought, what we want to measure. Perhaps the data sets they use get at this, but a reader, at least, goes away uncertain.

⁴⁵ Thus, as much as I admire Oona Hathaway and Scott Shapiro, I regret the arc traced from Hathaway, *supra* note 42, to OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW THE WORLD* (2017). The first work, however controversial, made a stab at getting past talk to identify the revealed preferences of particular regimes. The new book, by contrast, equates talk about remaking the world with remaking the world itself. No doubt both projects are contributions, but the former seems to me invaluable in a way that the latter is not.

⁴⁶ Barbara A. Spellman, *Science in Spite of Itself*, 544 NATURE 414 (2017).

judicially enforceable norms) and the institutional enforcement structure (housebroken judiciary, including the Constitutional Court)? Does resistance to Western conceptions of human rights norms count as a violation, or instead expose the complexity and indeterminacy of the international regime?⁴⁷ In the field of human rights, is Russia a scofflaw or a norm entrepreneur?

These questions suggest at least two challenges for quantitative empirical analysis. First are coding issues that arise when official actors adopt a Potemkin-village response to legal obligations. Astute observers may be able to swap out action (what lurks behind the facade) for talk (the facade), but knowing when and how to do so requires considerable local knowledge. Second, and even more problematic, is the possibility that local conditions so completely dominate a country's outcomes as to make comparative analysis irrelevant. Local knowledge might lead us to conclude that observations made at a particular time and place represent outliers that do not belong in a respectable data set.

None of these points should be seen as rejecting quantitative empirical work as such. To say that it can be hard to do this kind of research well is not to say that it should not be done. At the end of the day, much good can come out of assembling well-conceived data sets and then addressing them with smart questions. It all depends on what we consider well-conceived and smart.

This provokes a final point. There is an argument, in this symposium most clearly stated by Samuel Moyn, that quantitative empirical work can distract the researcher from the really important questions.⁴⁸ The satisfaction gained from elegant exploration of the world as we find it may substitute for thinking about what a good society should look like. We must be clear about the preconditions and constitution of justice, the argument goes, before we consider whether the marginal effects of our legal instruments make the world a better place. Studying these effects, in the absence of an inspiring vision of the good, becomes a waste of valuable intellectual energy.

I take Moyn's argument as more about the political economy of the academy in rich countries than a categorical claim about the pursuit of knowledge as such. Justice-imaginers and bean-counters compete for scarce academic resources. Academic bureaucrats may be lulled into a false comparison of quantitative empirical social science work with the more prestigious accomplishments of hard science. These bureaucrats also may resist supporting really challenging inquiries into the fundamentals of justice, as that work raises uncomfortable questions about the status quo that entrenched academics prefer to ignore.

I have no doubt this is true. But I wonder to what extent the rich world's academies are the right place to look for transformative visions and compelling new politics. For those of us who work in the Russian tradition and the upending of social relations and the creation of a new kind of politics that have occurred there, the contribution of university professors seems sparse indeed.⁴⁹ Herzen, Marx, Engels, Bakunin, and Kropotkin, as well as Plekhanov, Zasulich, Martov, Trotsky and Lenin, did journalism and published articles and books, but to my knowledge none ever held an academic position. They were members of the intelligentsia, but not of academia.

Of course, it very well may be that this observation demonstrates a poverty of imagination about the academia. Whatever the role of the academy in the late nineteenth century West, the contemporary university serves as a pillar of the information economy. Exactly because of the academy's importance in serving the status quo, it has the capacity to challenge and even transform the knowledge-based global society. Yet I wonder.

IV

CONCLUSION

As to how the academy should proceed in the study of international human rights, I am agnostic. Perhaps the future of international human rights law is to open up new visions of a just and human global order, to transcend both talk-about-talk and bean-counting and to provoke concrete action across many dimensions. Perhaps academic researchers will play a leading, or at least helpful, role in all this. It remains my conviction, however, that local knowledge will be indispensable to this enterprise. By this I do not mean that it won't be dispensed with, but rather that without confronting, embracing, and extending local knowledge the enterprise is not likely to end well.

⁴⁷ Cf. Kevin L. Cope, Charles Crabtree & Christopher J. Fariss, *Conceptualizing Repression*, 81 LAW & CONTEMP. PROBS. No. 4, 2018, at 185.

⁴⁸ Moyn, *supra* note 31, at 3.

⁴⁹ See generally YURI SLEZKINE, *THE HOUSE OF GOVERNMENT* (2018) (documenting the transformation and the transformers).