THE PERESTROIKA OF INTERNATIONAL CRIMINAL LAW: SOVIET REFORMS AND THE PROMISE OF LEGAL PRIMACY IN INTERNATIONAL GOVERNANCE

*Mikkel Jarle Christensen**

This article examines how the perestroika gave rise to a new legal thinking that helped spark a broader transformation of international law and governance. Building on the sociology of Pierre Bourdieu, the article analyzes the emergence and short-lived influence of the professionals behind the new legal thinking of the perestroika. This elite operated at the crossroads between international and domestic law and politics. At this juncture, and in an attempt to safeguard and solidify their own position, they promoted the primacy of international law over politics by calling for, among other things, the establishment of an international criminal court. Building on the thinking of this elite that coexisted with concurrent streams of investments into international law from both East and West, a geopolitical window for new criminal law initiatives beyond the state was opened. It was in this brief window of opportunity that the field of international criminal justice was developed as a reflection of a wider universalist promise of establishing legal primacy in international governance.

Keywords: *perestroika, international criminal law, sociology of law, sociology of elites*

*Professor WSR, University of Copenhagen, Faculty of Law, mjc@jur.ku.dk

This project has received funding from the European Research Council under the European Union's Horizon 2020 Research and Innovation program and from the Danish National Research Foundation, Grant no. DNRF105, and was conducted under the auspices of iCourts, the Danish National Research Foundation's Centre of Excellence for International Courts.

I would like to thank the Russian-speaking friends and colleagues who have provided assistance, advice, and critique in the process of researching this article. Any errors or omissions remain, of course, mine.

New Criminal Law Review, Vol. 23, Number 2, pps 236–270. ISSN 1933-4192, electronic ISSN 1933-4206. DOI: https://doi.org/10.1525/nclr.2020.23.2.236.

Besides pushing for a wide domestic reform agenda aimed at restructuring especially the economic and political sector of the Soviet Union (USSR), the perestroika program begun in the mid-1980s aspired to strengthen international institutions. Linked to an attempt to fortify the position of perestroika and its elite at home and abroad, this internationalist ambition softened the opposition between the West and East that had characterized the Cold War. Taking the impact of this aspiration on international criminal justice as its main objective, this article investigates the social and political transformations that enabled a small elite around Gorbachev to build a new legal thinking that impacted the domestic reform agenda as well as USSR investments into international law. In the space of international law, the new legal thinking of the perestroika helped initiate and accelerate a wider surge of support for legal innovations that included international criminal courts. However, the perestroika of international criminal law was brief. Support for the universalist idea that law had primacy over politics in international relations, as promoted by the new legal thinking of the perestroika and supported by similar movements in the West, dissipated soon after it moved onto the international scene.

To investigate how the elite of new legal thinking affected domestic and international relations, this article unfolds in four main sections. Firstly, it briefly provides a theoretical blueprint for the investigation and presents the sociological tools, inspired mainly by the work of Pierre Bourdieu, used to analyze specific elite generations of international law thinking in the USSR. Secondly, the article outlines the political situation in the USSR leading up to the perestroika. This section focuses especially on the relation between law, international law, and politics within this system. Thirdly, the article examines the new legal thinking crafted by a small elite of diplomats and international lawyers whose career became intimately connected to the perestroika, as well as the impact of this new thinking on USSR position-taking regarding international criminal law. Finally, the article analyzes international legal thinking after the perestroika and connects it to wider social and political transformations in the domestic Russian setting as well as on the geo-political stage. These transformations also affected scholarly and political position-taking on international law and criminal law, and altered the social conditions behind the push for legal primacy. The conclusion will highlight the impact of the short-lived perestroika of international criminal law and situate it in a larger socio-historical context.

I. A SOCIOLOGY OF LEGAL PROFESSIONALS AND HISTORICAL CHANGE

The idea that the Cold War led to the "impotence of international law"[1] spans several academic disciplines. Following this line of thinking, scholars of international criminal law have often begun their analyses with the 1993 foundation of the International Criminal Tribunal for the former Yugoslavia (ICTY),[2] if they have not searched for the roots of this form of law in the interwar period[3] or at Nuremberg.[4] Not much attention has been given to the period between Nuremberg and the creation of new international criminal courts that began in the 1990s. Especially the linkages between these innovations and socio-political transformations in the 1970s and 1980s have been overlooked. As a result, the social structures and transformations that paved the way for the legal innovations of the 1990s have rarely been critically investigated. This has the further consequence that both the surge of support that established international criminal law as linked to a wider "justice cascade"[5] of the 1990s and early 2000s and the end of this era of widespread support, or the end of the international criminal law "honeymoon,"[6] becomes difficult to make intelligible. When divorced analytically from the, admittedly complex, socio-genesis of international criminal justice in the 1980s, the current pushback against international criminal courts (as geopolitical powers such as the United States, Russia, and China opted out of the International Criminal Court [ICC], and African states voiced strong criticism of this institution)[7] appears as

1. Jürgen Habermas, *The Divided West*, ed. Jürgen Habermas and Ciaran Cronin (Cambridge: Polity, 2006), 167.

2. John Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal* (Chicago: University of Chicago Press, 2003).

3. Mark Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919–1950* (Oxford: Oxford University Press, 2014).

4. Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2011).

5. Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*, Norton Series of World Politics (New York: W. W. Norton & Co., 2011).

6. David Luban, "After the Honeymoon," *Journal of International Criminal Justice* 11, no. 3 (2013): 505–15.

7. Kamari Maxine Clarke, *Africa and the ICC, Perceptions of Justice* (Cambridge: Cambridge University Press, 2016); Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge: Cambridge University Press, 2018).

a dysfunction rather than as a field effect. The current criticism of international criminal courts must be analyzed as a product of the dynamics of politics, law, and power that was written into the very genesis of this field. In other words, to properly assess current pushbacks, we need first to critically investigate and understand the particular political and ideological window in which international criminal law was created.

Although the analysis covers the same period, this article does not investigate the factors that caused the end of the Cold War.[8] Scholarship on the termination of bipolarity has pointed to diverse reasons for this transformation, ranging from the impact of US policies, to the breakdown of the Soviet economy, its loss of pace in the arms race, the effects of the war in Afghanistan, and the change of leadership at the top of the USSR.[9] As part of this wider literature, international relations scholars have also investigated how the end of the Cold War affected international law[10] and, conversely, have studied the role of specific international law networks, ideas, and elites in the monumental transformation of state socialism. With its focus on the elite of international law thinking during the perestroika, this article is related most closely to the latter literature. In this scholarship, Matt Evangelista investigated the impact of networks in the specific areas of arms control and disarmament,[11] and Daniel C. Thomas analyzed the crafting of new international norms of human rights around the Helsinki Accords and how they helped create a language of human rights that was used to strengthen and legitimize social protest movements behind the Iron Curtain.[12] Moving closer to the professionals who shaped the new thinking of the perestroika, Robert D. English has contributed a sociology of elites that highlights the crucial role of the different professionals recruited by Mikhail Gorbachev that helped build his policies on

8. John Lewis Gaddis, "International Relations Theory and the End of the Cold War," *International Security* 17, no. 3 (1992): 5–58; Ted Hopf and John Lewis Gaddis, "Getting the End of the Cold War Wrong," *International Security* 18, no. 2 (1993): 202–10.

9. Pierre Allen and Kjell Goldmann, *The End of the Cold War: Evaluating Theories of International Relations* (Amsterdam: Nijhoff, 1992).

10. Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton, NJ: Princeton University Press, 2014), 142–60.

11. Matt Evangelista, *Unarmed Forces: The Transnational Movement to End the Cold War* (Ithaca, NY: Cornell University Press, 2002).

12. Daniel C. Thomas, *The Helsinki Effect, International Norms, Human Rights, and the Demise of Communism* (Princeton, NJ: Princeton University Press, 2001).

perestroika and glasnost.[13] English provides a convincing explanation of how the social and professional constitution of a new elite, and its contacts with the West, helped shape the reform agenda of the USSR by crafting the new thinking written into the ideas of restructuring (perestroika) and openness (glasnost). However, while English outlines the role of different types of academics in the development of a new thinking, he does focus specifically on the role of lawyers in this process.

The present article builds on these perspectives, but takes on an object that is very different from diagnosing and understanding the end of the Soviet Union, namely, how the practices of a specific perestroika elite, a small group of international lawyers and diplomats, were able to shape a new policy that became an important force in the wider transformation of global governance that gathered momentum in the 1980s and 1990s. It was in this period that the USSR and other global stakeholders briefly invested in international law and institution building, one of the clearest examples of which was the creation of international criminal justice and its courts. This specific form of law was built around the grand promise of ending impunity, itself a reflection of the wider universalist plight of establishing the primacy of law over politics that characterized the perestroika, and was built into the normative expectations of international law innovations in the 1990s.[14] During the perestroika, such universalist thinking was tied to a small elite who were brought into the entourage of Gorbachev and from this position impacted USSR thinking on international law and criminal law.

To study this elite and their impact, the article deploys particular thinking tools and methods, inspired by C. Wright Mills' idea of the importance of studying how historical transformations influence individual trajectories, and how such trajectories collectively, under the right structural circumstances, embody and affect historical change.[15] Building

13. Robert D. English, *Russia and the Idea of the West, Gorbachev, Intellectuals, and the End of the Cold War* (New York: Columbia University Press, 2000); Robert English, "The Sociology of New Thinking: Elites, Identity Change, and the End of the Cold War," *Journal of Cold War Studies* 7, no. 2 (2005): 43–80.

14. Antonio Cassese, *Realizing Utopia, the Future of International Law* (Oxford: Oxford University Press, 2012). For a more critical perspective on the norms of international criminal justice, see also Immi Tallgren, "The Sensibility and Sense of International Criminal Law," *European Journal of International Law* 13, no. 3 (2002): 561–95.

15. C. Wright Mills, *The Sociological Imagination* (New York: Oxford University Press, 1959), 143–64.

on Mills' ambition, the analysis herein deploys sociological research tools inspired by Pierre Bourdieu to study the social space in which USSR perspectives on international law were produced, focusing on the career trajectories and legal thinking of different generations of international lawyers and diplomats. A core concept in Bourdieu's research is his conception of a field as a social space structured by the relation among the agents active in it,[16] as studied for instance, in the French fields of law and academia.[17] As also highlighted by Bourdieu, national fields have very distinct ways of judging worth and prestige, something highlighted in a brief essay on how political capital in the USSR had subjugated economic capital.[18] "Capital" is used here in Bourdieu's sense, as a concept that captures the concentration of different forms of expertise that have social and symbolic value in a given field,[19] individual fields of practice structured by and malleable to national dynamics of power.

Defined by specific forces and balances within the national context, the concentration of capital is structured by specific social and political dynamics, in particular by the existence of a state.[20] The historical emergence of the state (the power and role of which differ) coexisted with the creation of a meta-capital (or state capital) that has power to (at least partly) determine the value of other forms of capital.[21] Depending on the pervasiveness of state power, this meta-capital can be mobilized to have both material and symbolic effects. Materially, this power can be directed to weaken or intensify particular economic, political, social, and professional activities driven or shaped by the state, for instance through legislation. Symbolically, the state apparatus can be deployed to set the agenda for how to talk about and find solutions for society's problems, and is often dominant in defining what constitutes a societal problem

16. Pierre Bourdieu, *Raisons Pratiques: Sur La théOrie De L'action* (Paris: Seuil, 1994), 71–72.

17. Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field," *Hastings Law Journal* 38 (1987): 805; Bourdieu, *Homo Academicus*, trans. Peter Collier (1988; repr. Stanford, CA: Stanford University Press, 2000).

18. Pierre Bourdieu, *Raisons Pratiques: Sur La théOrie De L'action* (Paris: Seuil, 1994), 31–35.

19. Ibid., 108–23.

20. Pierre Bourdieu and Loic Wacquant, *An Invitation to Reflexive Sociology* (Chicago: University of Chicago Press, 1992), 114.

21. Pierre Bourdieu, *Sur L'état: Cours au Collège de France 1989–1992* (Paris: Seuil, 2012), 311–13.

—something that is embedded, for instance, in its bureaucratic practices of counting and measuring specific activities and thus building state-controlled knowledge about society. Through its power over the value of other forms of capital, meta-capital shapes distinct fields as well as the valuation of particular forms of professional expertise. Though such dynamics, it also affects the path of individual career trajectories and which types of professionals have access to influence the state apparatus at specific historical junctures.

The dynamics and direction of meta-capital takes on different forms and levels of concentration in specific social systems. As underlined by the last Secretary General of the Communist Party of the Soviet Union (CPSU), Mikhail Gorbachev, Soviet society was characterized by "supercentralization."[22] In this system, power and meta-capital was concentrated at the very top of the system in a small communist and state elite. As pointed out by Roger D. Peterson, this system itself was characterized by very weak links between different levels of society. Peterson's conceptual framework was designed to investigate under which circumstances individuals engage in rebellion or resistance by analyzing the relations (or lack thereof) between the micro-level of the individual, the community to which the individual belongs, as well as between the macro-level of the state and the international. Evaluating the USSR using this matrix (individual/community/national/international), Peterson pointed to the forms of atrophy that characterized the relationship between the international and the national levels as well as between the national and the community levels.[23] Used here to study a very different object, the weak links between the international/national and national/-community levels also structured the ways in which international legal thinking was developed and catered to state-centered meta-capital. Seen through the tools of Bourdieu, the atrophic effects of (hypertrophic) centralization were visible in the concentration of meta-capital in very few positions at the top of the system, where the state coexisted with the CPSU, especially as condensed in the Politburo. Combined with Peterson's concepts, Bourdieu's perspective on meta-capital enables a critical

22. Mikhail Gorbachev, *Gorbachev, on My Country and the World* (New York: Columbia University Press, 2000), 21.

23. Roger D. Petersen, *Resistance and Rebellion, Lessons from Eastern Europe* (Cambridge: Cambridge University Press, 2001), 25–27.

study of the changing valuations of legal expertise in the USSR system and how such transformations were structured by centralization and weak linkages between societal levels. Concretely, in a context where the perestroika elite was relatively isolated with respect to other levels of society and was facing opposition from within the Kremlin itself, new thinking on international law supported by the meta-capital of the state elite was used to solicit support from the international level as well as to cater symbolically to the community level, where for instance human rights norms were being used to resist repression.

The empirical material on which the article builds is based on the collection and coding of 140 career trajectories of Soviet international lawyers and diplomats (as well as a handful of foreign interlocutors, n=4), focusing on professionals active in the field of international law from the creation of the USSR in the years after World War I to current elites working with international law. These trajectories were collected via academic literature on international law scholars and USSR elites[24] (and includes professionals mentioned in the publications referenced in this article), as well as by collecting names from public positions (for instance, foreign ministers and deputy ministers, judges of the International Court of Justice, and members of the International Law Commission). After locating these individuals, their career trajectory was mapped using a coding scheme that allowed easy comparison between individual trajectories and the construction of distinct groups of professionals. On the basis of this collective elite biography,[25] the article analyzes the different generations of agents involved in USSR international law. In total, seven generations are identified, separated by specific events in the history of the USSR: [1] The revolution generation (n=17) ended with the Moscow processes between 1936 and 1938 (during which important members of this generation were executed). [2] The following generation characterized by the rule of Stalin (n=29) ended with his death in 1953. [3] The thaw generation (1953–1964) was characterized by new openings to international law. This period ended with [4] the rule of Breznev (1964–1982) and another generation of

24. Michael Stolleis, *Juristen, Ein Biographisches Lexikon, Von Der Antike Bis Zum 20. Jahrhundert*, 1. Aufl. (dieser Ausg.) ed. (München: Beck, 2001); Alex Pravda, *The Tauris Soviet Directory, the Elite of the USSR Today* (London: Tauris & Co, 1989).

25. Yves Dezalay and Bryant G. Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (Chicago: University of Chicago Press, 2002), 9–11.

international lawyers (n=28). [5] The perestroika professionals active between 1985 and 1991 (n=9) at the top of the USSR system were followed by [6] new agents (n=17) that moved into important positions under Yeltsin and Putin (1991–2002) in an era characterized by weak international law training that affected especially younger generations. [7] Finally, from 2002 to the present, a new generation of legal scholars was identified (n=10). The perestroika generation [5] and the new generation [7] are the smallest, the former due to the brevity of the USSR reforms around Gorbachev, and the latter due to the emergent characteristics of this elite.

The biographical data contains information about social background, education, and professional positions held over the span of individual careers, as well as details the most important publications of agents (mostly, but not exclusively, relevant for scholars). As such, the biographies allow for analysis of both individual career developments and, by grouping and comparing biographies, of the generations themselves, as well as social, political, and professional fault lines within them. As a collective elite biography, individuals were coded as belonging to a specific generation by identifying the time of promotion into influential positions, for instance as professor, international judge, or deputy minister. To supplement the data in the collective biography, especially in the smaller generations, interviews were conducted. In total, twenty semi-structured and qualitative interviews were performed with professionals who held specific knowledge of the perestroika or its aftermath, or had been active in the field of international law in Russia over the past decades. Conducted between 2014 and 2018, some of these interviews were part of a larger research endeavor focused on the building of international criminal law,[26] while more targeted interviews were performed in Moscow in the autumn of 2017. These interviews yielded important data, particularly on how the new group of legal scholars and practitioners view the theoretical innovations that took place during the perestroika and how it still formats position-takings within the small space of international law thinking in Russia. Interviews focused on the background, education, and professional

26. Mikkel Jarle Christensen, "From Symbolic Surge to Closing Courts: The Transformation of International Criminal Justice and Its Professional Practices," *International Journal of Law, Crime and Justice* 43, no. 4 (2015): 609–25; Christensen, "Preaching, Practicing and Publishing International Criminal Justice: Academic Expertise and the Development of an International Field of Law," *International Criminal Law Review* 17, no. 2 (2017): 239–58.

trajectory, as well as on perceptions of the role and status of international law thinking in the USSR and Russia. Supplementing the collective biography, legal scholarship was consulted to investigate legal thinking in these eras, as was official USSR position-taking on international law. This position-taking was evidenced, for instance, in voting records on international criminal law treaties and the minutes of the International Law Commission (ILC).

The legal thinking of the different intellectual generations was affected by changing balances between the meta-capital tied to the centralized state and the particular forms of legal capital embedded in the careers of legal professionals. The state had a strong monopoly on the distribution of prestige and professional value in distinct social domains such as politics, economy, and law, but counter-currents were also developed in these fields. As such, whereas Lauri Mälksoo's book on Russian approaches to international law points mainly to the continuities of scholarly legal thinking and consequently focuses less on the perestroika era,[27] the generations constructed for the present article build on the political discontinuities that helped shape this thinking. To investigate these discontinuities, this analysis will focus on emblematic battles of definitions related to international law thinking to highlight how they reflect changing valuations of legal expertise that characterized different generations working within and around the state and, sometimes, carefully challenging its supremacy. As the analysis shows, besides intra-generational battles, there were also important alliances across generations as legal and scholarly ideas were introduced to and reproduced by new generations. The analysis will focus on how the deployment of meta-capital from a state and party, cut off both internationally and socially from other influences and forms of power, structured the space in which international law was perceived, produced, and valued, and how different generations of international lawyers reacted to reorientations of this meta-capital. Before investigating the perestroika elites and how they used international law and international criminal law to solidify their own position, the article will briefly investigate the main tenets of the USSR political system, in particular how law and international law were perceived and worked within it.

27. Lauri Mälksoo, *Russian Approaches to International Law* (Oxford: Oxford University Press, 2015).

II. LAW AND POLITICS IN THE USSR

Created in the wake of the October Revolution in 1917, the Soviet Union was formed in 1922[28] and existed until the end of the perestroika era in 1991. The union was formalized by the Treaty on the Creation of the USSR that joined post-revolutionary Russia to Ukraine, Belarus, and a federation of Georgia, Azerbaijan, and Armenia (Transcaucasia). Other members would join the union, although often not voluntarily. The Baltic states, for instance, were folded into the USSR as a result of the occupation of their territories in 1940.[29] Politically, the USSR was a highly centralized entity, as underlined by the Gorbachev quote above, and formed around the explicit goal of furthering class interests and consequently doing away with Tsarist governance structures as well as more generally with capitalist forms of production and domination. Ideologically, this meant a complete break from all Tsarist forms of organization and rule. In practice, however, the new communist state system inherited specific elements of the former systems of rule. This was also the case with regard to the role of law in the new system.

The role of law in this new USSR system was the object of dispute, especially in the aftermath of the revolution. Under his rule, Lenin famously repudiated all treaties signed by the Tsarist government, considering them relics of a bourgeois system.[30] The symbolism of this rejection of the legal obligation of the previous political system was visible also in intellectual debates about the role of law in the new system. However, despite the ideological effort to distance the communist system from the legal arrangements of the bourgeois state, its law being perceived as a reflection of its exploitative means of production, few answers on how new types of law or regulation would look in the communist state were found in socialist writings. Although Lenin himself held a law degree from St. Petersburg, he did not devote particular attention to the idea of socialist legality he took part in building. Answers to how law related to socialism were not found in the writings of Marx or Engels either. Their contribution

28. Richard Pipes, *The Formation of the Soviet Union: Communism and Nationalism, 1917–1923*, vol. 13 (Cambridge, MA: Harvard University Press, 1964).

29. Lauri Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR* (Leiden: Brill Nijhoff, 2003).

30. Eugene A. Korovin, "Soviet Treaties and International Law," *The American Journal of International Law* 22, no. 4 (1928): 753–63.

was oriented around critique of capitalist legal arrangements rather than construction of new forms of legality. Also a lawyer, Marx twice promised to write a comprehensive socialist theory of state and law, but never did.[31] Instead, after the October revolution and the establishment of the Soviet Union in 1922, legal scholars took up the task of fusing socialism with law. In a period characterized by the building of a new system amid competing factions of communists, different interpretations of how law fit into the workings of the new state were developed. Revolutionary thinking on law and the state included prominent Marxist scholars of law such as Evgeny Pashukanis, Evgeny A. Korovin, and Pēteris Stuckha (all included in the biographical material of this article). One of the main manifestations of the emerging socialist thinking of law was the creation of the journal *Revolution of Law*, founded by Stuckha[32] and his pupil Pashukanis, and the 1924 publication of the latter's *The General Theory of Law and Marxism*.[33] Pashukanis also became the first director of the Institute of State and Law, created in 1925.

Building new theories of socialist law, these scholars created conceptual connections between unfolding political events and domestic and international rules, regulations, and legal principles. Pashukanis' thinking, in particular his attempt at fusing the commodity theory of economic relations with legal ideas, was emblematic for the period and attempts at deploying law to further develop socialism. In line with utopian thinking that had its roots in Marx and Engels, Pashukanis theorized that the superstructure of law would lose its relevance once communism was accomplished,[34] a parallel to Engels' idea that the state would wither away under communism.[35] However, to create this communist system, what was mainly a Bolshevik skepticism toward law was overtaken by the creation of a new form of law that built partly on inherited legal formats. This socialist law was tied, for instance, to Lenin's idea that a new

31. Piers Beirne, Robert Sharlet, and Peter B. Maggs, eds., *Pashukanis: Selected Writings on Marxism and Law*, Law, State and Society (London: Academic Press, 1980), 3; John. N. Hazard, "Foreword," in ibid.

32. Evgenij Bronislavovič Pašukanis, *Law and Marxism—a General Theory* (London: Pluto Press, 2015).

33. Beirne et al., *Pashukanis* (see n. 31), 40–125.

34. Ibid., 348–61.

35. Friedrich Engels, *Anti-Dühring, Herr Eugen Dühring's Revolution in Science*, 3rd ed. (Moscow: Foreign Languages Publishing House, 1962).

proletarian state would serve as an interim stage before the state would become obsolete.[36] This instrumentalist view of law was mirrored in legal academic writings that tried to lay out a socialist law, for instance in the work of Korovin.[37] The need to distance the new system from the bourgeois state coexisted with the need to develop new ways of exerting control over the population to ensure correct behavior toward the realization of communism.

Despite the initial theoretical skepticism toward law as a socialist technology, legal frameworks were increasingly deployed to deal with a host of different problems in the public and economic spheres, as well as to regulate interpersonal relations. The union was driven by a specific legal order that played a pivotal role in the creation and development of the USSR (and the relations among its states) as well as in the daily lives of its citizens.[38] This legal order was formed on the basis of previous forms of law, the transformation or replacement of which was carefully watched at the political level, despite the actual reach of this level being stifled by the atrophy and disconnection between societal levels highlighted by Peterson.[39] Under the supervision of the political level, centralized in the Kremlin, new forms of law were built, including the development of a bar of Soviet lawyers to replace the former elite.[40] Outside of this elite, the early Soviet justice system was mainly operated by untrained personnel and experienced high turnover.[41] However, in the supercentralized system of the USSR, where the distance between the Kremlin and local administration of justice was significant also in terms of social and professional culture and practices, the actual reach of political preferences about how new legal arrangement should work was often limited.

The turn toward law as a tool for social engineering included criminal law. In the early years of the Soviet Union, criminal law became

36. Harold Joseph Berman, *Justice in the USSR: An Interpretation of Soviet Law*, vol. 740 (Cambridge, MA: Harvard University Press, 1963), 25.

37. Hazard, "Foreword" (see n. 31).

38. Scott Newton, *Law and the Making of the Soviet World, the Red Demiurge* (New York: Routledge, 2015).

39. See text at n. 23.

40. Eugene Huskey, *Russian Lawyers and the Soviet State, the Origins and Development of the Soviet Bar, 1917–1939* (Princeton, NJ: Princeton University Press, 1986).

41. Peter H. Solomon, *Soviet Criminal Justice under Stalin* (Cambridge: Cambridge University Press, 1996), 36–37.

a governance tool that could be directed at class enemies as well as deployed to socialize the masses. As analyzed by Peter H. Solomon, criminal justice was both the modus operandi through which a range of normative ambitions flowed and, when these ambitions were disappointed, the source of frustration for political leaders and reformists.[42] Legal regulation—or "revolutionary legality," to return to a catchphrase from Lenin's own playbook—was relied upon as part of the effort to design, by force where necessary, a new political and economic system. The frustration with the role of law in this context often stemmed from the previously mentioned disconnective atrophy, meaning that political preferences did not always seep through the system and local courts and legal agents often had significant, *de facto*, power over how justice was carried out. In a centralized system that aimed to use criminal justice as a tool to create a new society, this local rule was the source of vexation in Moscow. Reproducing the atrophy that separated different levels of Soviet society, this disconnect between centralized ideals and local power seems to have remained at play under the different iterations of communism adopted by political leaders in Moscow. This also seems to be the case for criminal justice immediately before and during the perestroika. As Todd Foglesong's work on the politics of judicial independence in the administration of criminal justice shows, although some cases still garnered political interest in this period, judges upheld a certain level of independence in standardized casework despite the influence of the cadres of the CPSU, the Ministry of Justice, and regional soviets.[43] Legal practice retained a certain independence, while different levels of the political system sometimes intervened in the field of law, especially in cases that had political interest. This appears to have parallels in contemporary Russia, where citizens pursue litigation, but selectively avoid it in more sensitive cases.[44]

42. Ibid., 19.

43. Todd S. Fogelsong, "The Politics of Judicial Independence and the Administration of Criminal Justice in Soviet Russia, 1982–1992" (PhD diss., University of Toronto, 1995).

44. Freek van der Vet, "'When They Come for You': Legal Mobilization in New Authoritarian Russia," *Law & Society Review* 52, no. 2 (2018): 306–08; Kathryn Hendley, "Resisting Multiple Narratives of Law in Transition Countries: Russia and Beyond," *Law & Social Inquiry* 40, no. 2 (2015): 531–52. See also more generally, Marina Kurkchiyan and Agnieszka Kubal, eds., *A Sociology of Justice in Russia*, Cambridge Studies in Law and Society (Cambridge: Cambridge University Press, 2018).

These patterns of law and politics in the USSR, partly inherited from the old Tsarist system and partly reproduced in later iterations of the Soviet system of justice, built on the disconnection between supercentralized political structures and highly localized practices of administration of criminal justice. Law, and criminal justice in particular, was a structuring force in Soviet society, but rarely in the way envisaged in Moscow. At the same time, criminal justice coexisted with extra-judicial practices (especially prevalent during the terror of Lenin and Stalin),[45] and political interventions into the domain of law and justice were not uncommon. Neither were they all-pervasive. Law as a technique was reproduced even when the specific political valuation of law (and especially international law) fluctuated as a result of its linkage to the meta-capital controlled by the state and party.

A. International Law and Politics Before the Perestroika

Soviet skepticism to law was also visible in the particular domain of international law. Pashukanis, for instance, remained open to the use of international treaties to formalize the relationship between communist and bourgeois states, albeit with the caveat that new revolutionary developments could overturn established legal relationships as communism progressed. As the idea that law would itself wither away substituted by ideas of revolutionary legality, international law remained perceived as the product of the imperialist struggle between capitalist states, but was theoretically counterpoised by an emerging socialist law. Making political tensions between communist and capitalist systems visible as a tool that regulated relations to other states, international law was very different from national law (or criminal justice specifically). Always part of the political and even geopolitical gamut, international law was a political project driven by particular elites. At the top of the system, international law remained a vocabulary that connoted specific practices and universalist norms tied to communism that could be used as foreign policy tools.

The relatively open scholarly exchange of new types of legal thinking that characterized the years after the revolution, also with regard to international law, ended with Stalin's rise to and centralization of power that terminated the careers, and in some cases the lives, of central members of the revolution generation who had first conceptualized the role of law and

45. Solomon, *Soviet Criminal Justice under Stalin* (see n. 41).

diplomacy in the Soviet system. Pashukanis, for instance, was executed during the purges initiated by Stalin between 1936 and 1938. Replacing Pashukanis as director of the Institute of State and Law, Andrey Vyshinsky became the main proponent of Stalinist legal theory that carefully shadowed political priorities.[46] He also served as state prosecutor in the Moscow trials, head of delegation at the Nuremberg trials, and Foreign Minister 1949–1953. Vyshinsky built his theory of international law on the primacy of socialist law over international legal norms and the bourgeois systems it reflected. Consequently, international law was seen as relevant only if it was in line with socialist law. Especially after the purges, the social distinctions that determined the value of different forms of capital (including legal capital) were characterized by a strong centrifugal force that originated at the top of the USSR, where Stalin incarnated the power of the system and Vyshinsky translated political perspectives into legal theory. In practice, however, the Soviet approach to international law remained flexible, and the union retained an openness to international law when it fit larger foreign policy objectives. For instance, although some interwar initiatives were driven by the League of Nations,[47] the USSR was active in the 1933 Convention on the Definition of Aggression signed July 3 in London, and played a prominent role in reimagining international criminal law in the aftermath of World War II.[48] Malleable to the foreign policy of the union, investments in international criminal law remained relevant under specific political circumstances throughout the dominance of Stalin.

The death of Stalin in 1953 led to a discreet change of international law thinking in the USSR. The de-Stalinization of Nikita Khrushchev's thaw was officially based on an idea of peaceful co-existence of nations, symbolized by his visits to China in 1953, Yugoslavia in 1954, and finally the United States in 1959. Although the political and economic system remained deeply centralized, the small opening of the thaw era had effects on political position-taking, on the value attributed to legal capital, and on the perception of international law as a governance tool. This was visible both

46. Andrey Yanuaryevich Vyshinsky and Hugh W. Babb, *The Law of the Soviet State* (New York: Macmillan, 1948); Andrey Yanuaryevich Vyshinsky and Jessica Smith, *The U.S.S.R. and World Peace*, Essay Index Reprint Series (Freeport, NY: Books for Libraries Press, 1969).

47. Lewis, *The Birth of the New Justice* (see n. 3).

48. George Ginsburgs, *Moscow's Road to Nuremberg: The Soviet Background to the Trial*, Law in Eastern Europe, No. 47 (Leiden: Brill Nijhoff, 1996).

practically and theoretically. In terms of the practice of the USSR in international relations and diplomacy, the thaw period coincided with an acceleration of international criminal law initiatives. In this period, while still defending humanitarian ideals perceived as being different than those promoted by the United States,[49] the Soviet bloc engaged actively in building new international criminal law frameworks. One example was the Single Convention for Narcotic Drugs in 1961. The USSR supported and signed the convention, but championed weak international enforcement mechanisms during negotiations. Over the following decades, and beyond the thaw era as such, the USSR supported a range of conventions and initiatives from racial discrimination (1963) to the taking of hostages (1979), from nonapplicability of statutory limitation to crimes against humanity and war crimes (1968) to piracy (1982).[50] This period also included the signing of the two additional protocols to the 1949 Geneva Convention.[51]

However, while the Eastern bloc supported the development of international criminal law as long as it did not interfere with national affairs or geopolitical goals, it also used international legal diplomacy around international criminal law as a forum for voicing criticism of capitalism and imperialism driven by the West. For instance, the Soviet bloc used the ILC to scold the imperialism of the West and call for criminal responsibility for the crime of aggression, particularly tied to the use of nuclear arms, crimes against humanity, and war crimes. While negotiating the Draft code on offenses against the peace and security of humankind, Soviet representatives also called for the inclusion of crimes such as apartheid, colonialism, and slavery (all seen as tied to capitalist modes of production), and the enforceability of such crimes through the establishment of international jurisdiction.[52] The focus on these crimes clearly

49. Mälksoo, *Russian Approaches to International Law* (see n. 27), 70.

50. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1963); International Convention Against the Taking of Hostages (1979); Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968); Convention on the Law of the Sea (UNCLOS), Article 101 (1982).

51. Boyd van Dijk, "'The Great Humanitarian': The Soviet Union, the International Committee of the Red Cross, and the Geneva Conventions of 1949," *Law and History Review* 37, no. 1 (2019): 209–35; Michael Bothe, Karl Josef Partsch, and Waldemar A Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Leiden: Martinus Nijhoff Publishers, 1982).

52. See, for example, ILC, *Yearbook of the International Law Commission 1984*, (1984), 23.

mirrored Cold War divisions and the perspective on international law as another vehicle for ideological opposition that was also evident in scholarly productions of the period.[53]

At the level of legal theory and thinking, the thaw opened up new pathways for considering the law as a system whose existence was both related to and independent from politics. The careers of the generation of thinkers active during the thaw exhibits a cautious crafting of new ideas. The most emblematic exponent of this reimagined legal thinking was Grigory Tunkin. After a career in the USSR diplomacy, Tunkin moved into an academic career as professor of international law at Moscow State University in 1965. His theory of international law, published in English in 1974,[54] was one of the few Soviet studies of international law translated and read abroad.[55] While the socialist system was still subtly highlighted as legally and normatively superior to bourgeois law, the main point of Tunkin's theory was that international law was created in the meeting between nations—between the two superpowers, the United States and the USSR, in particular. This subtle change had important consequences. It allowed for a valuation of international law that moved far beyond the previous orthodoxy of Stalinist scholarship as represented by Vyshinsky.

However, despite the thaw and a recalibration of the balance between political and legal capital, Tunkin's theory only very carefully tested out the boundaries it tried to push. For instance, the English edition of his *Theory of International Law* featured a chapter on state responsibility under international law that disavowed the existence of criminal responsibility,[56] but supported the existence of state responsibility for aggression and the crimes of colonialism and racial oppression. Tunkin also identified a tendency of the category of international crimes to expand.[57] By investigating an international law that was seen as constantly evolving without being controlled specifically by East or West, and referring to Lenin as part of a liturgy

53. Y. Reshetov, "Criminal Essence of Apartheid," *International Affairs* 30, no. 3 (1984): 65–72; Reshetov, "The Israeli Atrocities," *International Affairs* 28, no. 12 (1982):107–14.

54. G. I. Tunkin, *Theory of International Law* (Cambridge, MA: Harvard University Press, 1974).

55. J. N. Hazard, review of *Theory of International Law*, by G. I. Tunkin, trans. William E. Butler, *The American Journal of International Law* 69, no. 2 (1975): 467–68.

56. Tunkin, *Theory of International Law* (see n. 54), 386–425.

57. Ibid., 421.

sometimes referred to as "the Talmud,"[58] Tunkin became the primary exponent of a new approach to international law that was never uncontroversial at home, but remained on the curriculum for decades and would serve as inspiration for the perestroika rethinking of international law. In this context, Tunkin's theory competed and co-existed with other approaches to international legal relations and law, such as those advanced by Roman L. Bobrov, professor at Leningrad, or Fedor I. Kozhevnikov at Moscow State Institute for International Relations (MGIMO). In contrast to his colleagues, Tunkin's work was internationalist in essence and featured more references to foreign scholarship, something that occasionally led authorities to question his sympathies.[59] In opposition to the perspectives championed by researchers from MGIMO in particular, Tunkin offered a perspective that was diplomatically supportive of the Soviet Union, but tacitly valued international law over national systems—in effect ironing out the normative differences between capitalist and socialist systems reproduced in scholarship that was more orthodox.

While the window for critical legal thinking was narrowed with the ending of the thaw and the emergence of the *détente*, the USSR remained active in the area of internationalized criminal justice and signed a number of treaties. It was also in this period that the 1975 Helsinki Accords was signed. Although the Helsinki Final Act was non-binding, the carefully worded text outlined ten "general principles guiding relations between participating states," with Articles VII and VIII highlighting the respect for human rights, equal rights, and self-determination.[60] Against the intention of USSR leadership, the principles on human rights would become important for dissidents within the union who used this document as a stepping-stone for their critique of the system, as an official document safeguarding their right to speak out against it.[61] As scholars have pointed out, these principles would be used by civil society movements to apply

58. Pavel Palazchenko, *My Years with Gorbachev and Shevardnadze, the Memoir of a Soviet Interpreter* (University Park: The Pennsylvania State University Press, 1997), 23.

59. Rein Müllerson, "The Tunkin Diary and Lectures: The Diary and Collected Lectures of G. I. Tunkin at the Hague Academy of International Law," *American Journal of International Law* 107 (2013): 712.

60. Conference on Security and Co-Operation in Europe, *Final Act* (Helsinki, 1975), 3–8.

61. John Lewis Gaddis, *The Cold War: A New History* (London: Penguin Press, 2005), 189–91.

increasing pressure on the union during the 1980s.[62] Although not always directly linked to Helsinki, it was on similar principles that the perestroika elite would try to base its new legal thinking aimed at ensuring support for and the survival of this very group and its reforms.

III. LEGALISM AS POLITICAL SURVIVALISM DURING THE PERESTROIKA

Besides the brief opening of the thaw era, the socialist orthodoxy of international law was not challenged substantially until the coming to power of Mikhail Gorbachev, himself a lawyer, and the entourage of new elites mobilized around him. In the book that introduced the ambitious reform program of the perestroika to a wider international public, Mikhail Gorbachev called for a "new thinking" for the USSR and the world.[63] The new political leadership of the USSR deployed the meta-capital of the party and the state to give value and voice to scholars and experts,[64] including professionals who were brought into the upper echelons of power, or served as advisors to this level, and from that position helped create a new legal thinking. Other elites within both party and state remained critical to, and would eventually rebel against, the reform agenda.

Much like the wider groups of perestroika professionals, the new thinkers of international law were not institutionally dominant outside of the top echelons around Gorbachev, but were a minority within the wider elites of the state system itself. The new elite of international law thinking consisted of professionals who had established themselves during the thaw, as well as younger agents who were promoted to help craft new thinking and practice. These professionals were recruited from the system itself based on their political views and their perceived convergence with perestroika norms, and became part of the intellectual machinery of the perestroika. The Minister of Foreign Affairs, Edouard Shevardnadze, appointed in 1985 and like Gorbachev a former protégé of Yuri Andropov (Secretary

62. Sarah B. Snyder, *Human Rights Activism and the End of the Cold War, a Transnational History of the Helsinki Network* (Cambridge: Cambridge University Press, 2013); Thomas, *The Helsinki Effect* (see n. 12).

63. M. S. Michail Sergeevič Gorbačev, *Perestroika, New Thinking for Our Country and the World*. Updated ed. (New York: Harper and Row, 1988).

64. English, *Russia and the Idea of the West* (see n. 13).

General, 1982–1984), was the most central figure in the new diplomacy. He was selected personally by Gorbachev with whom he had served as Komsomol officials,[65] a youth organization under the CPSU used to groom future talent as well as instill party discipline in young Soviet citizens. In the diplomacy built around Shevardnadze, new professionals sympathetic to the perestroika were brought in from academia or recruited from the ranks of the diplomatic system.[66] In constant conflict with hardliners within the CPSU and the wider state system, in particular the KGB and the army, this group began a strategy of international cooperation and rapprochement that included the negotiation of nuclear arms treaties with the United States and the withdrawal of troops from Afghanistan. Both of these processes were negotiated partly by career diplomat Yuli Vorontsov, whose name had been briefly discussed to head the ministry, but who was instead brought back to the USSR from his post as Ambassador to France to function as First Deputy Minister of Foreign Affairs. These key agents were supplemented by new perestroika recruits who became central in crafting and implementing new thinking in the diplomatic position-taking of the USSR. This thinking was built on a valuation of legalism (*pravovoe gosudarstvo*)[67] at both the national and international level.

The younger generation activated by the perestroika had typically studied during the *détente* and reproduced the idea of international legal norms as highlighted by Tunkin and inscribed in the Helsinki Final Act, norms that became important for legitimizing the perestroika at the international as well as the community level. Perhaps the most emblematic trajectory of the younger elite was Rein Müllerson, who served as Gorbachev's and Shevardnadze's advisor on international law and was recommended for this position by his former professor, Gregory Tunkin. After the fall of the USSR, Müllerson served as First Deputy Foreign Minister in his native Estonia and became a prominent academic who served, among other things, as president of the Institute of International Law. As evidenced in the trajectories of the perestroika elite, the new thinking of international

65. Ė. A. Shevardnadze, *The Future Belongs to Freedom* (New York: Free Press, 1991).

66. Mikhail Sergeevich Gorbachev, *Memoirs*. 1st ed. (New York: Doubleday, 1996), 180–81.

67. Eugene Huskey, "From Legal Nihilism to Pravovoe Gosudarstvo: Soviet Legal Development, 1917–1990," in *In Search of the Law-Governed State: Political and Societal Reform under Gorbachev*, ed. Donald D. Barry (1991), https://www.ucis.pitt.edu/nceeer/1991-805-01-Huskey.pdf.

law did not appear *ex nihilo*. On the contrary, it built on intellectual openings created during the thaw and to a lesser extent, the *détente*. As the analysis will show, these openings were tied to concrete career profiles and transformations in the mobilization of meta-capital at the political level. With the perestroika these legal professionals gained access to the state and its symbolic apparatus, and used it to champion the law as the principal tool of international governance.

In this context, the scholarship of Tunkin again became relevant. The idea that international law was a product of the meeting between East and West, the USSR and the US in particular, mirrored the ambition of the perestroika to support and create strong international institutions without challenging the status of the Soviet system. Early innovations of perestroika and new thinking could be difficult to detect for the uninitiated, and the scope of these ideas only slowly dawned on domestic and international audiences. In legal scholarship, a guarded and watchful testing of ideas occurred during, and in some cases before, the perestroika proper, scholars cautiously opening up to foreign colleagues about the repression of the USSR system.[68] One venue for meetings between legal thinkers from both sides of the Iron Curtain was the collaboration between University College London (UCL) and the Institute of State and Law in the USSR Academy for Sciences, or IGPAN.[69] Initiated by William E. Butler on the behalf of UCL and Vladimir Nikolaevich Kudriavtsev on behalf of the IGPAN, the exchanges begun in 1984 formed one of the professional venues where new legal thinking was developed.[70] In a collection of articles that sprung from this collaboration, a contribution from Tunkin succinctly summarized the ambition that also became that of the perestroika: crafting the "primacy of international law in politics."[71] Mobilizing around this idea, scholars of

68. Interview with international law scholar B, Jan. 19, 2015; interview with international law scholar C, Mar. 20, 2015.

69. Jane Henderson, "Talking across the Fence: Cold-War Academic Cooperation in the Legal Sphere," in *Legal Dimension in Cold-War Interactions: Some Notes from the Field*, Law in Eastern Europe, No. 62, ed. William B. Simons and Tatiana Borisova (Leiden: Brill Academic Publishers, 2012), 1–40.

70. Lori F. Damrosch et al., *Beyond Confrontation: International Law for the Post-Cold War Era* (Boulder, CO: Westview Press, 1995).

71. G. I. Tunkin, "On the Primacy of International Law in Politics," in *Perestroika and International Law*, ed. William E. Butler (Dordrecht: Martinus Nijhoff Publishers, 1990), 5–12; Vladen. S. Vereschetin and Rein Müllerson, "The Primacy of International Law in World Politics," *Sovetskoe Gosudarstvo i Pravo* 7, no. 6 (1989).

international law regarding the perestroika were involved in collectively naturalizing and universalizing the role of international law as a prominent academic discipline. As a result of their activities, the broad heading of a "new legal thinking" was adopted by scholars on both sides of the ideological divide between East and West.[72]

The scholars and international lawyers organized around the ambition of legal primacy did not necessarily agree on the direction of the perestroika, but invested part of their careers toward a new legal thinking on international law and the role of the USSR in creating and supporting it. Due to the inherited atrophy of linkages among the international, state, and community, the perestroika elites were relatively isolated. Their use of international networks and contacts to produce scholarship on the USSR and its approach to international law aimed at circumventing this isolation by tying the perestroika to wider international legal norms. At the same time, the focus on legalism and universality fused the mission of the perestroika to norms that had seeped into opposition communities in the Soviet Union. As such, promoting legalism latched onto a repertoire of legitimacy that was already established and valued internationally and nationally, although in some contexts mainly as a symbolic tool. By speculating on the exchange rate between domestic and international legitimacy built around the insistence on legalism, the focus on law and international law aimed to strengthen the position of the perestroika elite by constantly trading and re-trading international prestige for domestic support and vice versa. This double legalist bartering was crucial for the perestroika elite that remained a minority within the USSR system and used legalism as a tool for political survival that could bridge the international/national divide as well as the national/society divide. Perestroika investments in international law were part of a defensive strategy aimed at securing the influence of this particular elite.

Building a new, but short-lived, legal idiolect for the Soviet state by insisting on a form of legalism that restrained politics (at least in selected venues) by promoting a rule of law based on codified norms, this elite

72. John Quigley, "Perestroika and International Law," *American Journal of International Law* 82, no. 4 (1988): 788–97; Rein Müllerson, "Sources of International Law: New Tendencies in Soviet Thinking," *American Journal of International Law* 82, no. 3 (1989): 494–52; John N. Hazard, "'New Thinking' in Soviet Approaches to International Politics and Law," *Pace Yearbook of Internatonal Law* 2, no. 1 (1990): 1–19; William E. Butler, *Perestroika and International Law* (Dordrecht and Boston: Nijhoff, 1990).

played an important role in giving the goals of the perestroika direction. The endgame of these investments into international law was the formation of a more autonomous legal thinking that was not subordinate to politics and thus symbolically underlined the novelty and value of the perestroika, although its particular value in this context was linked to precisely the building of international and domestic political support. At the same time, due to the inherent uncertainty that surrounded the perestroika, the strategies of promoting primacy involved high professional risks in a context where the perestroika elite was effectively outnumbered and where access to meta-capital might disappear with a change of the guard at the top of the system. As such, building close links to the international also served as an insurance policy for professionals engaged in the perestroika. They tentatively created new perspectives on international law that allowed them to remain politically acceptable at home while crafting a possible international exit strategy that gave them access to international networks that could be used in case political access in the USSR dissipated.

A. The Impact of New Thinking on International Criminal Justice

In the legal diplomacy of the USSR, the new thinking of international law had significant impact.[73] The new focus was visible in the publications and speeches of Gorbachev, penned by Müllerson among others. These speeches focused on the adherence to legal norms as a driving factor in securing national stability as well as worldwide peace and coexistence,[74] the latter built around a more active role of the United Nations.[75] This targeted sea change was also visible in the acceptance of international institutions and legal norms. In 1989, the Soviet Union accepted the compulsory jurisdiction of the International Court of Justice (ICJ), withdrawing earlier reservations on six human rights conventions.[76] Internally, the USSR opened up to new forms of political thinking that were actively linked to international norms. In 1990, Article 6 of the

73. A. L. Adamishin and Richard Schifter, *Human Rights, Perestroika, and the End of the Cold War* (Washington, DC: United States Institute of Peace, 2009), 79–94.

74. Gorbačev, *Perestroika, New Thinking* (see n. 63), 138–46.

75. Gorbachev, *Gorbachev, on My Country and the World* (see n. 22).

76. Theodor Schweisfurth, "The Acceptance by the Soviet Union of the Compulsory Jurisdiction of the ICJ for Six Human Rights Conventions," *European Journal of International Law* 2, no. 1 (1990): 110–17.

constitution that had previously secured the pivotal role of the CPSU in the union was repealed,[77] and the inclusion of human rights norms was debated during negotiations of a new USSR constitution and championed by perestroika scholars such as Vladen Vereshchetin, Gennady Danilenko, and Müllerson.[78] The new constitution, however, never materialized.[79] Another striking example of the fragile political situation of the perestroika was the USSR Declaration on the Rights of and Freedoms Man. It was passed on September 5, 1991,[80] at the urging of Kudriavtsev,[81] during what turned out to be the dying hours of the union itself. It was to be the last legislative act passed by the USSR Congress of People's Deputies before it dissolved itself.

Although the language of the perestroika agenda that ended in 1991 was at times vague, Gorbachev's small pamphlet on the *Realities and Guarantees for a Secure World* presented a range of initiatives to strengthen the legal transparency and juridical accountability in international governance. Included in these proposals were UN reforms and the creation of an international criminal court to deal with international terrorism,[82] a proposal that was repeated in his address to the UN General Assembly on December 7, 1988.[83] From the perspective of domestic USSR politics, the idea of an international criminal court addressed the rise of terrorism and the increasing number of hostage-taking situations spurred by religious and ethnic conflicts, most noticeable in the Soviet military

77. Zlata E. Benevolenskaya, "The New Political Polarization of the World and the Reform of State Property Management in Russia," in *The Legal Dimension in Cold-War Interactions: Some Notes from the Field*, Law in Eastern Europe, No. 62, ed. William B. Simons and Tatiana Borisova (Leiden: Brill Nijhoff, 2012), 55–71.

78. Vereschetin and Müllerson, "The Primacy of International Law" (see n. 71); G. M. Danilenko, *Law-Making in the International Community*, Developments in International Law (Dordrecht and Boston: M. Nijhoff, 1993).

79. Alexander M. Yakovlev, *The Bear That Wouldn't Dance: Failed Attempts to Reform the Constitution of the Former Soviet Union* (Manitoba: Legal Research Institute of the University of Manitoba, 1992); Gennady M Danilenko, "The New Russian Constitution and International Law," *American Journal of International Law* 88, no. 3 (1994): 451–70.

80. Ferdinand Joseph Maria Feldbrügge, *Russian Law, the End of the Soviet System and the Role of Law*, Law in Eastern Europe, No. 45 (Leiden: Brill Nijhoff, 1993), 226–27.

81. Jane Henderson, *The Constitution of the Russian Federation, a Contextual Analysis*, Constitutional Systems of the World (Oxford: Hart, 2011), 229.

82. M. S. Michail Sergeevič Gorbačev, *Realities and Guaranties for a Secure World*, (Moscow: Novesti Press Agency Publishing House, 1987), 10.

83. UN Doc. A/43/PV.72 (1988).

campaigns in Afghanistan and the hijacking of Aeroflot 6833 in 1983. Although the concrete proposal to create an international criminal court did not play a major role in Gorbachev's small book or later speeches, the idea of establishing the court underlined the support of the perestroika legal diplomacy to international institution-building. Importantly for opening a new window in international politics for this form of law, the Soviet proposal predated Trinidad and Tobago's more celebrated proposal of 1989,[84] an initiative that was actively promoted after the establishment of the international criminal courts by the elites from Western universities who supported it.[85] When the Trinidad and Tobago proposal was presented, however, the idea of legal primacy as a form of global governance that included enforcement mechanisms was already written into the perestroika and translated into support for international criminal law. In other words, the window for international legal reform and institution-building had been opened prior to the 1989 proposal by one of the global super powers.

One of the main venues for discussing international criminal law was the International Law Commission (ILC). In 1981, the work on the "offences against the peace and security of mankind" was resumed by the ILC at the initiative of the UN General Assembly,[86] and discussions about international criminal jurisdiction that had been halted in 1954 recommenced.[87] With the emergence of the perestroika and the convergence of legal and political investments in international law, Soviet legal diplomacy in the ILC discreetly changed course. This transformation was visible in the professionals engaged in this legal diplomacy. The Soviet Union appointed Yuri G. Barsegov to the ILC in 1987. Formally, he continued the work of the former member, Nikolai A. Ushakov, who was honorably retired after serving almost two decades in the commission. The professional trajectory of the new member, however, was emblematic for the subtle but significant transformation of the perestroika perspective on

84. Marlies Glasius, *The International Criminal Court: A Global Civil Society Achievement* (New York: Routledge, 2006).

85. David Krieger and Robert Woetzel, *A Magna Carta for the Nuclear Age: Universal Declaration of Individual Accountability*, Waging Peace Series, Vol. 30 (Santa Barbara, CA: Nuclear Age Peace Foundation, 1992).

86. A/RES/36/106, "Draft Code of Offences against the Peace and Security of Mankind," ed. UN General Assembly (1981).

87. ILC, *Yearbook of the International Law Commission (1983)*, 149–51.

international law: in the ILC, Barsegov represented the perspective of the perestroika by supporting the universal jurisdiction of an international criminal court when it came to international crimes such as genocide and aggression. Although diplomatic engagement with the new criminal court was not completed in 1994, now negotiated by Barsegov's successor, Vladlen Vereshchetin, Barsegov himself would later study the Armenian genocide,[88] a crime that received new scholarly attention after the surge of interest in international criminal law. Barsegov's publications followed a larger development in which international criminal law was reimagined[89] after having been kept on theoretical life support since the Nuremberg trials among Soviet scholars[90] as well as in the West.[91]

The USSR disintegrated just before the field of international criminal law gained momentum. But the political opening created in part by the perestroika elite, and closely linked to its survival strategy, affected the geopolitical situation in which this new field was created. While the idea of legal primacy and insistence on legalism formulated by Tunkin and reproduced by his students was mirrored in the new field of international criminal law, the new legal thinking was slowly marginalized within the USSR as the union fell apart and the Russian Federation was created. In

88. Yuri Barsegov, *The Armenian Genocide: Turkish Responsibility and Obligations of the International Community. Documents and Comments* (2005).

89. Igor I. Lukashuk, "The Nuremberg and Tokyo Trials: 50 Years Later," *Review of Central and East European Law* 20, no. 2 (1994): 207–16; Igor P. Blishchenko, "Responsibility in Breaches of International Humanitarian Law," chap. 17 in *International Dimensions of Humanitarian Law*, Henry Dunant Institute (Paris: UNESCO, 1988).

90. L. N. Galenskaya, "O Ponyatii Mezhdunarodnogo Ugolovnogo Prava" [About the Essence of International Criminal Law], *Sovetskii ezhegodnik mezhdunarodnogo prava* [Soviet Annual Collection of International Law] (1969 [1970]); L. N. Galenskaya and Y. V. Petrovskii, "Otvetsvennost Yuridicheskih Lic Za Sovershenie Mezhdunarodnih Prestuplenii" [Responsibility of Legal Entities for International Crimes], ibid. (1971); P. S. Romashkin, "Mezhdunarodnoe Ugolovnoe Pravo Na Sluzhbe Mira I Demokratii" [International Criminal Law at the Service of Peace and Democracy], *Sovertskoe Gosudarstvo i Pravo* [The Soviet State and Law] 5 (1975); Y. A. Reshetov, "Bor'ba S Mezhdunarodnimi Prespuplenijami Protiv Mira I Bezopasnosti" [The Fight against International Crimes against Peace and Security], *Mezhdunarodnie otnoshenija* [International Relations] (1983); N. M. Korkunov, "Opit Konstrukcii Mezhdunarodnogo Ugolovnogo Prava" [The Experience in Constructing International Criminal Law], *Zhurnal ugolovnogo i grazhdanskogo prava* [The Journal of Criminal and Civil Law] 1 (1989).

91. M. Cherif Bassiouni, *International Criminal Law*, 3 vols. (Dobbs Ferry, NY: Transnational Publishers, 1986).

this new political context, the elite of perestroika remained supportive of international law and criminal law from the margins of power. It was also in this period that the originator of much new legal thinking gave his last support to legal primacy in international relations. Tunkin's last academic contribution was a short text written in March 1993 (published in an updated Russian version of his *Theory of International Law*). In this article, Tunkin offered an argument in support of the ICTY.[92] Published as the influence of new thinking was declining, it was emblematic for the grand ambition of the perestroika as well as for its defeat. Tunkin died in October 1993.

IV. BETWEEN PERESTROIKA AND NEW RUSSIAN PERSPECTIVES ON INTERNATIONAL LAW

Despite the failing of the perestroika both domestically and internationally, its elite of international law remained influential in the diplomacy of the new Russian Federation for a limited period after the dissolution of the USSR. When the new Russian Federation voted for the establishment of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) (UN Resolutions 827 and 955), this support was represented by members of the perestroika elite that had maintained their positions in the foreign policy bureaucracy. The last USSR ambassador to the UN, who became the first of the new Russian Federation, former Deputy Foreign Minister during the perestroika, Yuli Vorontsov, presided over the negotiations regarding the ICTY in the UN Security Council. From this position, Vorontsov voiced the strong support of Russia for a tribunal and helped draft its resolution,[93] while former Head of Section in the International Law Department of the Ministry of Foreign Affairs and member of the ILC, Kirill Gevorgian, contributed to the writing of the statute of the ICTY. Gevorgian later headed the Russian delegation that negotiated the Rome Statute before becoming judge at the ICJ. These contributions

92. Grigory Tunkin, "Neskolko Soobrazhenii V Svyazi S Proektom 'Ustav Mezhdunarodnogo Tribunala Dlya Rassmotrenija Del O Prestuplenijah, Sovershennih Na Territorii Bivshei Yugoslavii,'" in *Teorija Mezhdunarodnogo Prava* (Moscow: M. Zercalo, 2000), 383–84.

93. United Nations Security Council, "Provisional Verbatim Record of the Three Thousand Twohundred and Seventeenth Meeting, 25 May 1993," (1993), 43–45.

were only an element in the impetus behind the creation of a field of international criminal justice, but had roots in a larger opening toward international law that was shared, however briefly, between East and West, although for very different reasons. In the West, international law and criminal law came to be seen as a technology that could complement, if not substitute, military intervention and boots-on-the-ground, and support especially the symbolic role of the United States in world affairs.[94] For China, the massacres at Tiananmen Square in 1989 led to massive international pressure to improve the human rights situation. This led to the use of international law and human rights mechanisms to at least signal change in the country.[95] China would vote for the establishment of the ICTY, but abstained from voting on the ICTY[96] and did not sign the Rome Statute.

The tacit reproduction of perestroika perspectives on international law and criminal law, however, was slowly pushed to the side. New elites redirected the meta-capital of the state, and the patterns of investment in the link between the state and the international changed. Transforming support for foreign policy and international law was driven, or at least legitimized, by reference to realignments of global affairs, and support for universalism and multilateralism began to wane as is visible, for instance, in Russian scholarship that has often been skeptical toward international criminal law.[97] A symbolic turning point was the increased scholarly criticism of US unilateralism in international affairs, especially in Kosovo, as noted by Mälksoo.[98] In a 1999 commission of international law, scholars characterized the NATO bombings of Kosovo as an act of aggression and, in the case of specific acts, as a war crime.[99] Taking the bombings as an example that multilateralism and respect for international law was no longer a viable strategy, this report testified to a broader Russian shift away

94. Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2000), 206–75; Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace* (Oxford: Oxford University Press, 2016).

95. Ming Wan, "Human Rights Lawmaking in China: Domestic Politics, International Law, and International Politics," *Human Rights Quarterly* (2007): 727–53.

96. Michael P Scharf, "The Politics of Establishing an International Criminal Court," *Duke Journal of Comparative and International Law* 6 (1995): 169.

97. Mälksoo, *Russian Approaches* (see n. 27), 136–39.

98. Ibid., 173–83.

99. Ibid., 137.

from internationalism and toward a more nationally oriented understanding of international law and criminal law.

Outside of and reflected in legal scholarship, foreign policies of the federation were increasingly formulated in opposition to the US, NATO, and the European Union (EU),[100] recently discussed especially in relation to the annexation of the Crimea.[101] This also affected position-taking on international criminal law. In dominant post-Soviet scholarship, support for international criminal law has been cautious and has especially been critical of its potential role in a domestic Russian context, something that seems to have accelerated in recent years. While linked to internal political restructurings and Russian academic perception of the US and NATO in particular, this shift also coincided with a larger global transformation of political support for and investment in international criminal law. The support that characterized the 1990s was supplanted by donor fatigue in the 2000s[102] and by criticism of international courts[103] and criminal courts in the 2010s.[104] Russia originally signed the Rome Statute, but in 2016 notified other state parties and the UN Depository of Treaties that it would not implement the treaty.[105]

The reorientation of the role of international law in Russia was also linked to changes in legal education and the legal profession. From the early

100. Rajan Menon and Eugene B. Rumer, *Conflict in Ukraine, the Unwinding of the Post-Cold War Order*, Boston Review Book (Cambridge, MA: The MIT Press, 2015); Andrey S. Makarychev, *Russia and the EU in a Multipolar World, Discourses, Identities, Norms*, Soviet and Post-Soviet Politics and Society (Stuttgart: Ibidem-Verlag, 2014), 127.

101. Rein Müllerson, "Ukraine: Victim of Geopolitics," *Chinese Journal of International Law* 13, no. 1 (2014): 133–45.

102. Steven D. Roper and Lilian A. Barria, "Donor Motivations and Contributions to War Crimes Tribunals," *Journal of Conflict Resolution* 51, no. 2 (2007): 285–304.

103. Mikael Rask Madsen, "The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash," *Law and Contemporary Problems* 79, no. 1 (2016): 141–78; Karen J. Alter, James Thuo Gathii, and Laurence R. Helfer, "Backlash against International Courts in West, East, and Southern Africa: Causes and Consequences," *Duke Law School Public Law & Legal Theory Series* 2015, no. 19 (2015).

104. Clarke, *Africa and the ICC* (see n. 7); Laurence Helfer and Anne Showalter, "Opposing International Justice: Kenya's Integrated Backlash Strategy against the ICC," *International Criminal Law Review* 17, no. 1 (2017): 1–46.

105. "Statement by the Russian Foreign Ministry," Ministry of Foreign Affairs, Russian Federation, November 16, 2016, accessed February 27, 2020, http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2523566.

2000s, international law scholarship and education incrementally began to resurface in Russia, having been stalled by a period in which salaries fell dramatically and talented lawyers went into private practice rather than international law.[106] As international law resurfaced, its impetus was built partly as part of the official higher education system and partly on *pro bono* work originating outside of the official system. This dual development reflects a divided valuation of international law in the system. On the one hand, international law is highly valued in the elite institutions of Russian higher education; institutions such as MGIMO cultivate cooperation with universities worldwide, including other elite establishments. The official diplomatic system also values international expertise, as is evident in the careers of prominent international lawyers such as Roman A. Kolodkin, who has built up substantial international expertise as part of the Russian system and is currently serving as judge in the International Tribunal for the Law of the Sea. On the other hand, a gulf still exists between the internationalist part of the new generation of international law professionals and the older cohort of professors and practitioners who carried the discipline through the 1990s and early 2000s. Some of these professors still reproduce a highly theoretical perspective on international law[107] reminiscent of the period before the perestroika. New-generation professionals even mention how older generations make explicit their support for the old communist system[108] and have reportedly been known to deny the crimes of Stalin.[109] Forming perspectives on international law in opposition to this old guard, part of the new generation has pursued knowledge and built professional capital attuned to more international demands cultivated through more alternative venues often formed outside the university system. These venues supplemented traditional legal education with NGO experience and networks formed around moot courts.

In rebuilding a less theory-driven, and more critical and practice-oriented discipline of international law, the new generation has mobilized at the crossroads between national education/positions and international expertise/prestige. International moot court competitions have been crucial

106. Interview with new generation professional A, September 5, 2017. For a more general account of the period, see Masha Gessen, *The Future Is History, How Totalitarianism Reclaimed Russia* (London: Granta Publications, 2017).

107. Interview with Yeltsin generation professional A, September 4, 2017.

108. Interview with Yeltsin generation professional B, September 5, 2017.

109. Interview with new generation professional D, September 8, 2017.

for the collective strategy of the new generation of international lawyers in Russia, especially the Phillip C. Jessup International Law Moot Court Competition. This competition spread throughout domestic universities from 2002, when the international law firm White & Case developed and circulated packages of information on the moot written in Russian.[110] Most prominent supporters of international law among the new generation have been associated with the moots either as participants or as coaches. Many have also studied abroad, including at Ivy League schools in the US or Oxbridge in the UK. Circumventing the dominant perspectives at the institutions of higher education, these networks have built a supplementary system for training international lawyers, some of whom have been extremely successful, the Russian team winning the Jessup in 2012. Besides the moots, the new generation has been involved in creating original outlets for scholarly and critical perspectives on international law. One example is the journal *International Justice* (*Meždunarodnoe pravosudie*), founded in 2011 by the Institute for Law and Public Policy and aimed at contributing critical analyses of the practice of international courts rather than more theoretical investigations. The journal is funded by the Council of Europe and EDAS Law Bureau. Publishing in this journal (as well as others), more internationalist Russian scholars writing in English, for whom Tunkin remains a core figure, have highlighted the retrospective character and isolationist character of most Russian language scholarship on international criminal law.[111] This take on the perspective of other scholarly groups underlines the social, political, and professional lines of demarcation that characterize the national field of international law.

Due to the bisected worth attributed to international law—valued nationally if close to the state, but having to build international links to secure valorization if diverging too much from the official line—becoming engaged in some forms of scholarship and activism seen as oppositional to the system can be a high-risk strategy in a context where authorities are also cracking down on free speech.[112] In March 2017, for instance, a special

110. Interview with Yeltsin generation professional B, September 5, 2017.

111. Gleb Bogush, "Russia and International Criminal Law," *Baltic Yearbook of International Law Online* 15, no. 1 (2016): 169–80; Gennady Esakov, "International Criminal Law and Russia: From 'Nuremberg' Passion to 'the Hague' Prejudice," *Europe-Asia Studies* 69, no. 8 (2017): 1184–1200.

112. Gleb Bogush, "Criminalisation of Free Speech in Russia," *Europe-Asia Studies* 69, no. 8 (2017): 1242–56.

broadcast aired on the government-friendly Russian television station NTV accused specific NGOs, including the Institute for Law and Public Policy, of being influenced by foreign forces.[113] The pushback against NGOs funded by international partners and engaging in political activity, such as human rights, was inscribed into a bill passed in 2012 and supported by Vladimir Putin, who has dominated Russian politics since 2000. This law makes the operation of international NGOs difficult and costly by stipulating, for instance, rules of double-accounting.[114] The law and officially sanctioned pushback against NGOs working with international law, especially human rights law, demonstrates the declining status of these legal frameworks in Russia and the dangers and difficulties that are now related to working with them.[115] Unlike the perestroika elite for whom international investments were attuned to state meta-capital, the official valuation of international law expertise is now tied to more national perspectives, and the autonomy and value of alternative, more universalistic perspectives is diminishing.

CONCLUSION

The perestroika and its opening to international law and criminal justice was developed by a small elite mobilized around Gorbachev. Lifted out of normal rotation and into the engine-room of the perestroika, this group included professionals with expertise accumulated during the thaw and perestroika itself. Working at the intersection of law and politics, their support of international law—here in particular, international criminal law—was an integral part of the double directional strategy that aimed to overcome the atrophy related to the centralized state (in which there was tangible opposition to the perestroika project) by linking the small elite to international and community norms and currents of thinking, attempting to exchange international legitimacy for national support and vice versa. At the international level, this defensive strategy led the perestroika elite to promote a legalist vernacular that was gaining traction in the same period.

113. NTV, "ЧП. Расследование": "Евроколлекторы" [ChP, "Emergency situation"; Investigation: "Eurocollectors"], March 24, 2017, https://www.youtube.com/watch?v=-KO5qL2WIEI&app=desktop, last accessed July 17, 2019.

114. Interview with new generation professional C, September 6, 2017.

115. Van der Vet, "'When They Come for You'" (see n. 44).

At the community level, the strategy catered to groups within USSR society that had mobilized against the system that the perestroika sought to reform. This survival strategy, which invested in norms and practices that tied the perestroika to international patterns of thinking that had also impacted domestic communities of opposition, did not work. The influence of the elite of new legal thinking was short-lived.

In an attempt to solidify the position of the perestroika and its elites, the advocacy for legal primacy helped open a window for international law support that had effects beyond the USSR system. Importantly, this effort was supplemented and enforced by other streams of investment into this form of law especially in the 1990s. For various policy reasons, the US administration,[116] China (with strong reservations),[117] and the EU all supported the first *ad hoc* international criminal tribunals, with the EU also becoming the main supporter and funder of the International Criminal Court. However, this surge of symbolism and institution building was cursory as major powers turned their attention to other problems, with Russian support for international law becoming tied to the interests of the new federation, increasingly defined in opposition to the US and the EU. The push for international legal norms subsided. Like the reforms of the USSR, the perestroika of international criminal law was brief and incomplete, linked as it was to specific political preferences, including the attempt of the new thinking elite to craft ideas that could bridge the disconnects of the atrophied system they had inherited and worked to reform.

Despite its brevity, the perestroika reinvigorated the promise of legal primacy in international affairs, a promise that was promoted by an elite of international law whose interests, briefly, influenced the direction of the state. Able to redirect the meta-capital centralized in the state and party, this elite had significant impact on the USSR policy regarding international law at a crucial juncture in history, a juncture they helped define. Although the moment did not last, it did help instill strong normative expectations about the role of law in global governance, norms that themselves were inscribed into the wider endeavor of international law. These expectations still format discourses in the field of international law and criminal law, perhaps most clearly exemplified by the mission to end impunity. As the

116. Bass, *Stay the Hand of Vengeance* (see n. 94), 206–75.

117. U.N. Security Council, "Provisional Verbatim Record" (see n. 93), 33–34.

investigation of the perestroika of international criminal law shows, these expectations were the product of a very particular constellation of law and politics that changed form soon after it came into view.

As an endeavor aimed at ending impunity for genocide, crimes against humanity, war crimes and aggression, international criminal law was created in a current of international law thinking that was closely associated with the new legal thinking of the perestroika that contributed to its impetus. When assessing the ups and downs of international criminal law, the particular social and political dynamics that characterized its renaissance must be taken into consideration. Rather than take the strong normative push of the field for granted, a closer investigation reveals the fragile social and political foundation of support for international law and criminal law that promoted its worth and necessity. Without a strong constellation of support for this form of law and justice, akin to the one that characterized the perestroika era and its immediate aftermath, a fundamental gulf becomes evident between the promise of ending impunity through legal primacy and the social and political realities that lend such claims value and power.