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ПРАВОВЫЕ АКТЫ РОССИЙСКОЙ ФЕДЕРАЦИИ В СФЕРЕ ВОЕННО-ГРАЖДАНСКИХ ОТНОШЕНИЙ

КОММЕНТАРИИ

RUSSIAN FEDERATION LEGAL ACTS ON CIVIL-MILITARY RELATIONS

COMMENTARIES

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В книге, авторами которой являются крупнейшие российские и зарубежные эксперты, даются комментарии к правовым актам Российской Федерации в сфере военно-гражданских отношений.

Комментарии интересны прежде всего тем, что в них представлена сравнительная характеристика правотворческой и правоприменительной практики за рубежом и в России, дающая возможность дальнейшего совершенствования российского законодательства. Для работников органов государственной власти, депутатов законодательных собраний, юристов, преподавателей вузов и школ. Книга предназначена всем, кто интересуется вопросами военного права в России.

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Russian and Western experts provide commentaries to Russian Federation legislation (current and draft) relating to civil-military relations.

The book is of interest due to its comparative analysis of legal and juridical practice in Russia and the West. It gives a good basis for further improvement of Russian legislation, is useful for the staff of state organization, parliamentarians, jurists, academic teachers and researchers.

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FOREIGN POLICY CONCEPT OF THE RUSSIAN FEDERATION

David Law

According to the Foreign Policy Concept of the Russian Federation, the priority of Russian foreign policy is the 'protection of the interests of individuals, the society and the State'. As such, it complements the National Security Conception of the Russian Federation (approved by decree No.24 of the President of the Russian Federation) and has a number of implications for the way the country approaches its security sector and, in particular, the question of its reform

First, it is to be noted that the foreign policy concept has been made public and rendered widely accessible through the press and over the internet. That Russian and non-Russian citizens alike can easily consult the text, as can foreign governments, is significant. This contributes to transparency about the way Russia perceives its foreign policy interests and priorities, and constitutes a confidence-building measure in itself.

A second and related point is that the document recognizes the importance of nurturing favourable attitudes towards Russia abroad. To this end, it commits the Russian Federation to ensuring that an active information policy about developments in Russia is an integral part of its foreign policy. As long as the information policy is approached in a spirit of openness and integrity, this will also contribute to greater transparency.

Third, the concept makes clear that Russia is a *status quo* power largely content to maintain UN structures and procedures as they are, and wary of concepts such as 'humanitarian intervention' and 'restricted sovereignty'. At the same time, the document states that Russia is prepared to engage in a dialogue on 'perfecting the legal aspects of force application in international relations under the conditions of globalization'. This is highly encouraging: how countries work together internationally is an important dimension of security sector reform, and an especially challenging one in the post-9/11 world.

Fourth, while the document marks substantial progress in several respects over the 1993 concept, in certain areas it would seem that Russia's thinking about its role in the world is still in a transitional phase. Of particular relevance to security sector reform is

the way the concept refers to, as mentioned above, the 'interests of the individual, society and the State'. This suggests that society and the state may have different interests, which is rather different from the notion that the State is there to serve the interests of its citizens. There is a danger that this kind of approach could compromise the prospects for security sector reform.

A final consideration concerns discrepancies between some of the principles laid down in this document and the way they are implemented in practice. For example, the document commits Russia to respecting human rights and freedoms at home and abroad. There is much evidence to suggest that Russian military and paramilitary forces have not always honoured this commitment in Chechnya. Similarly, while the document refers to the Federation Council and the State Duma as having a role in the area of foreign policy, the ability of the legislature to exercise its oversight function leaves much to be desired. As long as such deficits have not been effectively addressed, progress in the area of security sector reform is likely to continue to be difficult.

ON MARTIAL LAW

David Law

Legislation addressing the extraordinary circumstances associated with martial law will raise a myriad of sensitive questions in any country that values its democratic principles and is concerned lest the measures adopted to deal with a martial law situation end up compromising the very security that they were supposed to protect. This is particularly true of the Russian Federation as a successor state to a regime that systematically misused state power to protect the monopolistic position of the Communist Party.

The authors of this law were clearly mindful of these antecedents when drafting the legislation in question. Thus, the law insists on the extraordinary nature of the circumstances that would be deemed to justify a decision to declare martial law, via the need '…to create conditions for repelling or preventing aggression against the Russian Federation.' In addition, several measures are included in the legislation that are designed to prevent the misuse of an emergency situation for political purposes as well as provide reassurance both at home and abroad. The Federal President, whose role it is to initiate legislation on martial law, is required to obtain the approval of the Federation Council. Other safeguards include the stipulation that the office of the Commissioner of Human Rights cannot be set aside in a situation of martial law and under the proviso that the United Nations and the Council of Europe are to be duly informed of the initiation of martial law.

In other respects, however, the document raises some questions of concern. Article 7 provides a list of "measures to be used in the territory where martial law has been introduced". As is to be expected of legislation of this nature, the measures are extremely far-reaching. While most measures would seem to be justifiable under the special conditions that accompany martial law, this is not necessarily uniformly the case. Take, for example, measures that foresee that the state can:

> 'introduce control over work of establishments that provide for functioning of the transport, communications …publishing houses, calculation centers…[and] mass media, to use their work for the needs of defence…'

'…introduce military censorship over mail and messages [and]…create bodies of censorship…'

'..forbid or limit the departure of citizens outside the territory of the Russian Federation…(and)'

'…introduce additional measures that are aimed at strengthening the regime of secrecy in the bodies of state power'.

One cannot exclude, of course, that steps of this kind might prove necessary in one or the other set of extraordinary circumstances. What is disconcerting is that the default position in this text appears to assume that an increase of state power in an emergency is necessarily a desirable option. For example, it is questionable whether the interests of the state and its citizens would be well served by a shutting out of the press or restrictions of all kinds being placed on the circulation of information, or by the assumption by state bodies of control over jurisdictions that they are not normally accustomed to supervising, let alone directing. Societies, not least those under serious duress, need to know what is going on; their governments need to know that those they govern have confidence in the information that is generated by official instances. Similarly, when coping with martial law, the broader interest may best be served if jurisdictions are left to operate autonomously, under the overall authority of the government. The state and its bureaucracy latter will have enough to do in an emergency without becoming involved in matters of which they have little notion. This is a policy course that becomes that much more realistic if those jurisdictions that are likely to play key roles in a situation of martial law have had the opportunity to practice cooperation in simulated emergencies in peacetime.

Chapter Three of the legislation addresses the question of the special powers of state authorities at a time of martial law, listing *inter alia*, the powers of the President. The problem is not that these are wide-ranging in nature. Rather, it is that the powers given to the President in Article 12 under this chapter do not appear to be subject to the stipulation given in Article 4, and mentioned above, to the effect that the President's actions must be approved by the Federation Council. For instance, one reads that the 'President can suspend the activity of political parties, other public associations, religious formations that conduct propaganda and/or agitation and any other activity that undermine defense ands security of the Russian Federation at the time of martial law.'

The President's discretion would also appear to be very wide when there is a question of terminating martial law. Article 21 foresees that it is the President who decides when martial law is to be brought to an end. This raises another issue that is not considered in the legislation, namely, that special powers given to the government should be subject to periodic review. For example, it might be appropriate for the legislation initiating martial law to stipulate how long this could be in effect without the President having to seek its renewal.

A particularly interesting aspect of the law concerns the kind of aggression that can give rise to a declaration of martial law. Approved by the Duma in December 2001, and by the Federation Council in January 2002, the legislation restricts the possible grounds for aggression undertaken by a foreign state or a group of foreign states. It would, therefore, not be possible to declare martial law in Chechnya owing to the military activities of the irregular Chechen military formations alone. If, however, a foreign country were to send 'armed gangs, groups, irregular forces or hirelings' to use force against the Russian Federation, this would constitute aggression of the type that could justify the declaration of martial law.

ON PROCEDURES FOR DEPLOYING CIVIL AND MILITARY PERSONNEL OF THE RUSSIAN FEDERATION FOR ACTIVITIES RELATED TO THE MAINTENANCE OR RESTORATION OF INTERNATIONAL PEACE AND SECURITY

David Law

A crucial dimension of security sector reform relates to the legal basis for the use of force in the international community and for the deployment of third party forces into a national theatre. This issue came under the spotlight in the 1990s when traditional forms of consensual peacekeeping transmogrified into peace enforcement operations typically involving the use of force against one or both combatants. The issue has become further complicated since the events of 11 September 2001. In its wake, there has been much discussion of such questions as whether a state has first had to suffer an attack to be able to mount a military response that is in keeping with international law, and whether international law *as per* the UN Charter and related instruments is sufficiently flexible and comprehensive to allow states to address effectively the security challenges they face at the beginning of the 21st century.

The Law on Procedures for Deploying Civil and Military Personnel of the Russian Federation for Activities Related to the Maintenance or Restoration of International Peace and Security was promulgated in 1995. As such, it does not take into account the more recent developments mentioned above. It does, however, create a framework that can help regularize decision-making about the deployment of Russian civilian and military forces in peace support activities and render the process more transparent and accountable. This is an important step forward when one considers the sometimes questionable rationales that were used to justify the deployment of Russian forces to a number of CIS countries in the first half of the 1990s.

The law in question is also significant from another perspective. For states that have been associated with imperialistic military behaviour in the past, it can be extremely difficult to establish a new basis for the deployment of forces abroad – however much changed circumstances might demand. For example, it took Germany half a century after World War II to establish a constitutional framework for sending troops abroad. Russia, while facing a quite situation, has managed to do this in half a decade.

The text stipulates that it does not apply to actions coming under Article 51 of the Union Charter. But to return to a point raised above, the distinction between an action of self-defense mounted in response to a direct attack on one territory's and an action designed to prevent a failed or failing state from becoming an even more dangerous haven for those whose purpose it is to launch a direct attack has become increasingly difficult to make.

Another aspect of the law is that it defines a number of different procedures to be followed depending on whether those to be deployed are civilians or military, or if the latter, constituted in a 'military formation' or an 'army unit'. These categories are not defined in the legislation, and only have a loose meaning in current Russian military usage. This could give rise to misunderstandings.

A related question concerns the lack of clarity over the roles of key executive and legislative bodies. The wording used to indicate whether a Presidential decision to dispatch Russian forces abroad on a peace support mission needs the approval of the Council of Federation seems to differ depending on whether the deployment is of a 'military formation' or an 'army unit'. Similarly, it is not clear why the President of the Russian Federation should be obliged to work with the legislature in decisions involving the deployment of civilian and military personnel, but not when it is a question of their recall.

ON THE FIGHT AGAINST TERRORISM

David Law

The anti-terrorism legislation of the Russian Federation, promulgated in 1998, takes a comprehensive approach to the problem of terrorism. It lays out the principles on which anti-terrorist actions are to be based, acknowledges the relevant legal obligations, both domestic and international, that the Federation has to observe, and provides a framework as well as procedures for ensuring the necessary vertical and horizontal cooperation among the agencies and jurisdictions that are entrusted with the anti-terrorist struggle. As such, it marks a major milestone in the efforts of the Federation state to arm itself conceptually, materially and organizationally for one of the most important security challenges confronting the young Russian state.

Unfortunately, the terrorist threat facing Russia has become even more serious and problematical since the law was passed. If and when the legislation comes up for review, there are a few aspects that lawmakers might wish to reconsider.

First, the definition of terrorism provided in Article 3, while wide-ranging, lacks specificity. This is not surprising – indeed it is typical of the definitions of terrorism used throughout the Euro-Atlantic area. In view of this, Russia will no doubt want to play a leading role in discussions at the UN and elsewhere aiming to develop an international consensus on a more rigorous definition of terrorism.

A second point concerns the organizational framework for the struggle against terrorism. Article 6 refers to six bodies as being on the front line in Russia's anti-terrorist efforts. What is striking about this list is the absence of what one would have assumed to be key actors in this regard. The President and his Administration are not mentioned, notwithstanding the pivotal role they play in virtually every major policy decision of the Russian state and the coordinating function that would logically fall to them. The Ministry of Foreign Affairs is also not mentioned despite the fact that it would certainly seem to have a leading role in securing the cooperation of foreign governments in bilateral or multilateral anti–terrorist operations as well as in international political efforts to address terrorism. Then there are ministries, such as those responsible for the safety of the food

supplies or for the security of air- and seaports, that may seem less immediately involved in anti-terrorist measures but which could end up playing a decisive role.

A third point relates to the relationship between principles and practice. Article 2 lays down the principles that are to guide government practice in the struggle against terrorism. Two in particular warrant mention: first, the use of prophylactic legal, political socio-economic and propagandistic measures, and second, the priority assigned to protecting the rights of persons running the risk of injury or death as a result of being caught up in a terrorist act. Both aspects point to dilemmas that virtually all states on the front line against terrorism have to face. It is one thing for a state to acknowledge the principle that root causes help breed the environment that fosters terrorism; it is quite another for a state to be able to address such root causes at the same time as it is knee deep in the operational aspects of the anti-terrorist struggle. Similarly, how are the state, civil society and the international community to evaluate whether the principle to protect innocent lives has been effectively upheld, for example, as in the terrible attack on a Moscow theatre in October 2002, where one in five hostages lost their lives?