CONTENTS

PRAXIS

RES JUDICATA

INTER-AMERICAN COURT OF HUMAN RIGHTS: PRACTICE REVIEW 2017
Oscar Parra Vera, Patricia Tarre Moser

This article focuses on the case law of the Inter-American Court of Human Rights for 2017. Through an analysis of the Court's principal rulings and advisory opinions, the authors' main purpose is to identify the innovations and progress of the Court's jurisprudence in specific subjects, thus establishing its potential contributions not only for the State's national law and the Inter-American system, but also for other regional human rights protection systems. The cases reviewed cover a wide range of subjects that include, among others, environmental protection and human rights, guarantees in military training, the observation and application of logical research guidelines, the application of International Humanitarian Law in international armed conflicts, LGBTI rights and the duties of the States concerning not only individuals but the community as a whole, the direct justiciability of social rights under Article 26 of the American Convention of Human Rights, transitional justice, judicial guarantees, and effective judicial protection. In order to achieve this purpose and for the sake of clarity, the article is organized by subject, concerning the main topic developed by each decision, and grouping them accordingly.

Keywords: Inter-American Court of Human Rights; environmental protection; International Humanitarian Law; logical research guidelines; military training; LGBTI rights; justiciability of social rights; judicial protection.

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EX OFFICIO

EUROPEAN COURT OF HUMAN RIGHTS: REVIEW OF THE GRAND CHAMBER JUDGMENT OF 28 NOVEMBER 2017 IN THE CASE OF *MERABISHVILI V. GEORGIA* (APPLICATION NO. 72508/13)

The Grand Chamber judgment of the European Court of Human Rights in the case of *Merabishvili v. Georgia* concerns the arrest and pre-trial detention of a former Prime Minister of Georgia, which, as claimed by the applicant, pursued ulterior purposes. The Grand Chamber concluded that, notwithstanding that the arrest and pre-trial detention initially conformed to the Convention, a continuation of the detention based on insufficient grounds and its use by the Georgian authorities to obtain information from the applicant violated respectively Article 5 § 3 and Article 18 taken in conjunction with Article 5 § 1 of the Convention. In this case the Grand Chamber provided an overview of the prior case law on Article 18 of the Convention, confirming previously established points that although Article 18 cannot apply alone, it can be breached even if there is no violation of the Article in conjunction with which it is applied, and it can only be contravened if the Convention right which has been interfered with is subject to restrictions – that is, is qualified rather than absolute. Furthermore, the Grand Chamber specified in relation to the situations when a restrictive measure pursues a plurality of purposes – whether or not prescribed by the Convention – that this in itself does not constitute a breach and in such situations a predominant purpose needs to be established. Finally, as far as the standard of proof is concerned, complaints under Article 18 do not necessarily require the applicant to furnish "direct and incontrovertible proof" and can be substantiated by circumstantial evidence.

Keywords: right to liberty and security; deprivation of liberty; arrest; pre-trial detention; limitation on use of restrictions on rights; plurality of purposes; predominant purpose; ulterior purpose.

SCRIPTORIUM

JUS GENTIUM

THE INTERNATIONAL LEGAL PRINCIPLE OF NON-INTERFERENCE AND CYBER-OPERATIONS: UNJUSTIFIED EXPECTATIONS?
Vera Rusinova

This article accesses whether and to what extent the principle of non-intervention into matters within domestic jurisdictions, which is one of the basic principles of International Law, is applicable and able to effectively deter so called "*low-intensity cyber-operations*", i. e. computer network attacks which do not fall under the notion of "use of force". For this purpose, the author tries to clarify the content and scope of application of this principle in International Law and comes to the conclusion that relevant acts of "soft law", by leaving the concrete shape of this principle foggy, reflect a comfortable compromise reached between states. As such, the impact of pronouncements made by the International Court of Justice in *Nicaragua v. USA*, which is still regarded as a key judgment in this sphere, is rather overestimated. As a result, it is concluded that the principle of non-intervention in its international legal dimension, though being able to restrain the flagrant and direct interference of other states, because of its limited scope, combined with a high level of "legal uncertainty" surrounding its basic elements, is not able to play a role of an effective instrument combatting cyber-operations. Moreover, a mixture of legal and political approaches, accompanying the application of this principle, becomes an obstacle for the crystallization of new international customs that might regulate the specifics of cyber-attacks.

Keywords: principle of non-intervention; cyber-operations; domaine réservé; International Court of Justice; sovereignty; Tallinn Manual.

OPINIO JURIS

HEARING LIFE: THE EFFECT OF ACTS OF AN INTERNATIONAL COURT IN NATIONAL LEGAL SYSTEMS
Tatyana Neshataeva

The article discusses the mutual influence of the legal positions of international courts (as illustrated by the case-law of the International Court of Justice, the European Court of Human Rights, and the Court of Justice of the European Union) and the influence of the legal positions of international courts formed in the course of judicial normative control on the development of international and national law (as illustrated by the Court of the Eurasian Economic Union). Today the main function of international courts is not to resolve disputes, but to interpret a provision of international law in order to create its uniform enforcement and uniform standards for all actors of international legal relationship. A court that has avoided politicization and functionally interprets the norms of international law can create a position that influences the legal regulation in a specific integration association. The court does not create a specific legal norm, but rather formulates a rule (position) that in the future, through case-law, becomes a customary rule, even an imperative rule, or through regulatory practice, progressively developing, is formalized in a statutory norm. A significant role in this process can be played by the

judgments of other international and national courts that have picked up the legal position of the court that has formulated a rule for the first time. The legal positions of the Court of the EAEU are gradually penetrating into framework of national legal systems in a very peculiar way that differs from those adopted in other regional integration associations: the EAEU gradually develops connections and interactions that correspond to the legal conscience, traditions, and notions common to member states of the Union. The problem of a negative precedent is touched upon, when the court impedes the development of law. Its possible causes and consequences are indicated. The author comes to the conclusion that the court, by creating a negative precedent, may have in mind other aspects of resolving an economic conflict. Overcoming these phenomena largely depends on the personal qualities of judges. The separate opinions are the only way to identify a negative precedent. The author concludes that the power of a judicial act is not important for the development of law, whether an obligatory decision, a recommendatory advisory opinion or a separate opinion of a judge.

Keywords: legal position; precedent; the Court of the EAEU; international judicial normative control; interpretation of international norms; development of international law.

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JUS HOMINUM

TERRORISM AND HUMAN RIGHTS: ON THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Angelika Nussberger

Fight against terrorism is exemplary for the conflict between the rights and interests of society as a whole on the one hand and the rights of individuals on the other hand. The European Court of Human Rights is faced with a panoply of different complaints: by victims (such as in the case *Tagayeva v. Russia*), by those accused of being terrorists (*El Masri v. Macedonia*; *Ibrahim v. the United Kingdom*), by potential future terrorists (*K2 v. the United Kingdom*), by family members of deceased terrorists (*Sabanchiyeva v. Russia*), as well as supporters whose statements are sanctioned as hate speech (*Leroy v. France*). In its jurisprudence the Court has to take into account the limits of "ultra posse nemo tenetur" when assessing the State's obligations to take effective preventive and repressive measures. At the same time it has to confirm the absolute nature of rights such as Article 3, especially in cases of extradition and expulsion. The standards for operative measures based on the right of life have been defined in *McCann v. the United Kingdom* from the perspective of the terrorists and refined in *Tagayeva v. Russia* from the perspective of the victims. Cases concerning fair trial demand careful consideration of the different rights involved, especially the right to an effective defence, and the right to an adversarial procedure; restrictions are allowed, but must not compromise the fair trial as a whole. While the Court's jurisprudence must not obviate an effective fight against terrorism, it must nevertheless uphold the basic understanding of human rights as "inalienable".

Keywords: European Convention on Human Rights; terrorism; right to life; positive obligations; state of emergency; fair trial.

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"PRINCIPLED RESISTANCE" AGAINST EUROPEAN COURT OF HUMAN RIGHTS JUDGMENTS IN THE LIGHT OF CRITICAL THEORY

Vladislav Tolstykh

In the past few years, the supreme courts of member states of the Council of Europe have repeatedly refused to comply with the European Court of Human Rights judgments with reference to the priority of domestic law or other obstacles existing at the level of internal order. This phenomenon was named "principled resistance." This article analyzes "principled resistance" in light of the critical approach to international law, voiced by D. Kennedy, J. Boyle, and M. Koskenniemi. This approach suggests several key ideas: the dependence of law on politics, the balance of autonomy and order, and the extension of argumentative possibilities. It considers human rights contextually, i. e. in connection with the environment in which they are discussed and act. It follows that human rights are not a single institution, but two (or more) institutions fixed in different orders. In this regard the phenomenon of "principled resistance" reflects not only the conflict of positions, but also the incompatibility of coordinate systems in which these positions were formed. This incompatibility does not suggest an impossibility of harmony of judicial decisions, which is achieved when the trends of autonomy and order are in balance. The trend of autonomy is realized if there are areas where states operate freely and independently; the trend of order is realized if there are areas where they observe common norms and carry out effective coercion in the common interest. Today these trends look almost exhausted and the opportunity for harmony of judicial decisions disappears: courts do not feel safe and stop making concessions. "Principled resistance" involves two groups of arguments: The first contains a criticism of activist practices of the European Court of Human Rights, while the second represents public policy tools, i. e. concepts that justify the right to refuse to implement disqualified judgments of the European Court of Human Rights. "Principled resistance" performs several useful functions, but undermines the existing balance between orders, devalues the rhetorical arsenal, and challenges human rights. The problem of "principled resistance" does not represent something completely new: any solution of it, however, will not be final, because it is caused by a general crisis of legal doctrine. This crisis can be resolved only through a transition to a fundamentally different legal paradigm.

Keywords: interaction of orders; human rights; European Court of Human Rights; constitutional justice; "principled resistance".

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SPORT DISPUTE SETTLEMENT IN THE EUROPEAN COURT OF HUMAN RIGHTS: THE CURRENT STATE OF AFFAIRS AND SOME PROSPECTS FOR THE FUTURE

Larissa Zakharova

Accusations according to which Russian athletes are guilty of breaching anti-doping rules make national legal scholars and practitioners search more actively for efficient ways to defend athletes' rights. The European Court of Human Rights holds much interest as a potential forum for resolving sport disputes. It is a controlling mechanism set up by the 1950 European Convention on Human Rights and Fundamental Freedoms. The present article gives an overview of the ECtHR jurisprudence on sports disputes that is being formed. It is divided into three categories depending on the violations of the convention rights indicated by the applicants: Art. 8 (right to respect for private and family life); and Art. 2 of Protocol No. 4 (freedom of movement); Art. 6 (right to a fair trial); Art. 3 (prohibition of torture and inhuman or degrading treatment or punishment) and Art. 5 (right to liberty and security). In the case of *Fédération Nationale des Syndicats Sportifs (FNASS) and Others* v. *France resolved by the Chamber* in January 2018, the Court pointed out to the absence of violations of athletes' rights established by Art. 8 and Art. 2 of Protocol No. 4. Earlier the Court recognized no breaches of the sport fans' rights laid down in Art. 3 and Art. 5. In the case of *FC Mretebi* v. *Georgia* the sport club succeeded in convincing the Court that Georgia had breached Art. 6. Will the Court satisfy the demands of the athletes to recognize the violations on the part of Switzerland (in the cases of *Adrian Mutu contre la Suisse*, *Claudia Pechstein contre la Suisse*)? The chances of the disputes being resolved in favor of the applicants seem to be fairly high. In the concluding section the author makes a few suppositions as to what can become a matter of dispute in the future, such as infringements of the prohibition of discrimination established by Art. 14 and Art. 11 of the Protocol No. 12.

Keywords: sport disputes; European Court of Human Rights; Court of Arbitration for Sport; athletes; sport clubs; sport fans; doping.

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LEX MERCATORIA

THE PROBLEM OF THE JURISDICTIONAL EFFECT OF MOST-FAVOURED NATION CLAUSES: A VIEW FROM THE CONTEXT OF SYSTEMIC VALUES OF INTERNATIONAL INVESTMENT LAW

Dmitry Krasikov

The Decision of the Tribunal from January 25, 2000, in *Maffezini v. Spain* has become a starting point for developing inconsistent case-law in the area of investment disputes settlement concerning the jurisdictional effects of most-favoured nation clauses contained in bilateral investment treaties. This inconsistency has developed into one of the most debatable issues in the area of settling international investment disputes. The present article is based on a resort to the systemic values of International Investment Law as a guide that can help participants of the debate to leave the circle of a retrospective exchange of arguments. It is argued that taking these values into consideration should correspond to the modern context of the discussion, which is different from that which existed at the birth and crystallization of the controversy. A change in the context is characterised by coexistence of several school of thoughts on the issue under consideration, by evolution of the MFN-based jurisdictional approach into a significant part of the case-law in investment arbitration, as well as by development of states' feedback towards inconsistencies in the area. The article contains a short overview of different approaches taken in the practice of investment arbitration and explains significance and relevance of taking the systemic values of International Investment Law into consideration. As a result of addressing the problem of jurisdictional effects of most-favored nation clauses in the context of such systemic values of International Investment Law as legal certainty, the attractiveness of participation in international investment relationships, the potential to solve and to develop general issues, and the neutrality in investor-state disputes settlement, it is argued that none of these values speaks against recognizing the jurisdictional significance of these clauses.

Keywords: most-favored nation clause; International Investment Law; jurisdiction of mixed arbitration tribunals; legal certainty.

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THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION: PERSPECTIVES OF DEVELOPMENT

Marina Trunk-Fedorova

The article discusses developments in respect of the Appellate Body of the World Trade Organization (WTO) during the last two years. Contrary to the position of the majority of WTO Members, one Member is blocking the appointment of new Appellate Body members; this is possible because of the WTO rules on appointment and reappointment of Appellate Body members – i. e. on the basis of consensus. Meanwhile, the terms of a considerable part of Appellate Body members have already expired or will expire soon. This causes the threat that the number of vacancies could increase and the number of active members decrease, reaching a critical level, at which point the Appellate Body would no longer be able to perform its functions according to WTO rules. If this problem is not resolved, a situation where appeals may not be possible could arise as soon as next year. The article illustrates that in such a case the whole WTO dispute settlement system would be destabilized. The author discusses possible solutions that would allow the preservation of the WTO appellate review stage, in particular, thanks to which the WTO Dispute Settlement system has got wide recognition. The proposed solutions are both within the WTO Dispute Settlement Understanding and outside the WTO system. For example, the article addresses the possibility of the application of Art. 25 of the Dispute Settlement Understanding, containing provisions on arbitration, in such a manner that it could perform the functions of the Appellate Body. Another proposed solution is to conclude a multilateral treaty that would cover only the issue of appellate review and preferably contain the rules on appellate review that are in force in the WTO system.

Keywords: international trade dispute settlement; World Trade Organization; WTO Appellate Body; appointment of Appellate Body members.

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THE UNBIASED NATURE OF ARBITRATORS IN INTERNATIONAL COMMERCIAL ARBITRATION: APPROACHES TO EVALUATION

Saglar Ochirova

One of the most difficult problems of international commercial arbitration nowadays is bias. The links that can arise between the arbitrator and the parties are much broader and more diverse than we sometimes can imagine. How are we to evaluate whether arbitrators are unbiased, in order to ensure compliance with the principle of independence and impartiality of the arbitrators and maintain the right of the parties to elect arbitrators? In this article, the author compares standards and approaches to the evaluation of the unbiasedness of judges and arbitrators that have developed in international practice. Given the fundamental difference between a judge as a public official and an arbitrator as private practitioner, the author comes to the conclusion that they should be subjected to different standards of independence and impartiality. At the same time, bearing in mind the difficulty to prove an actual bias on the part of any decision-maker, both of them should be subjected to an objective approach, which requires the exclusion of any reasonable doubts in independence and impartiality. However, due to the marked difference in standards the unbiasedness of judges and arbitrators should be evaluated through diametrically opposed unbiasedness tests. The "reasonable apprehension" of a bias test with the lowest standard of proof and evaluation of bias on the part of a reasonable observer provides the greatest possible confidence in the independence and impartiality of the judge in the public eye, which is a key requirement to the public justice system. The "real danger" of a bias test with the highest standard of proof and evaluation of bias on the part of professionals on the contrary meets the specifics of international commercial arbitration, ensuring compliance with the principle of independence and impartiality of arbitrators, and protecting the integrity of arbitration from various kinds of procedural abuses.

Keywords: International commercial arbitration; bias; independence; impartiality; reasonable apprehension of bias; real danger of bias.

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