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PRAXIS

RES JUDICATA

THE ISSUE OF UNREASONABLE CLOSED TRIALS IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS: CASE COMMENTS TO JUDGMENTS IN *CHAUSHEV AND OTHERS V. RUSSIA* (25 OCTOBER 2016) AND *LAMBIN V. RUSSIA* (21 NOVEMBER 2017)
Ilya Shablinsky

This article provides commentary on two judgements of the European Court of Human Rights on the decision of Russian courts to hold court proceedings in closed regimes. The article considers the factual allegations and shows that the ECtHR has dealt with these issues before. The ECtHR has stated that public and open hearings guarantee public confidence in the courts, and that a public hearing is a condition of a fair trial. Restrictions on publicity and closed trials are allowed only when provided for by law. The closed trial in the case of *Chaushev and others v. Russia* was not based on any accompanying law, and could have been explained by political motives. The closed trial in the case of *Lambina v. Russia* also was not based on law, but was explained to be a mistake. The ECtHR recognized that in both situations sec. 6, pt. 1 of the European Convention on Human Rights was violated. The main conclusion of this article is that the legal proceedings for serious and dangerous crimes require publicity and openness no less than any other legal proceedings. A court's openness in these situations is one of the factors of trust in justice. In this specific situation, at issue was trust in the court from residences of the Caucasus region (which the ECtHR mentioned in its judgement). A court's decision to hold the legal proceedings in a closed regime without any argument and appeal to the law could be perceived by residences of the region as a testimony of the political dependency of the court. Thusly, it is unlikely that the closed nature of a court that tried individuals who were accused of terrorism added any authority to the court's verdicts.

Keywords: European Court of Human Rights; closed trial; public and transparent hearing; restrictions of the transparency.

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THE CASE OF *RUSSIA AND MEASURES AFFECTING THE IMPORTATION OF RAILWAY EQUIPMENT AND PARTS*: CHALLENGING THE EAEU MEASURES IN THE WTO DISPUTE SETTLEMENT BODY
Daria Boklan, Polina Tonkikh, Maria Kozlova

The norms of Eurasian Economic Union law and the norms of WTO law mostly govern international trade relations. Therefore, the spheres of international relations governed by WTO law and the law of the Eurasian Economic Union often overlap. Moreover, the Treaty on the Eurasian Economic Union contains references to WTO agreements. This paper is aimed at determining specific characteristics of challenging measures adopted by the Eurasian Economic Union (EAEU) in the WTO Dispute Settlement Body (DSB). The analysis is based on four existing disputes where complainants put forward an issue connected with the inconsistency of EAEU law or its interpretation and its application to WTO obligations. Russia is the respondent in three out of four disputes mentioned above, and Kazakhstan is the respondent in one of the four disputes. The authors conclude that WTO law and EAEU law should be interpreted and applied on the basis of the principle of harmonization. However, the norms of EAEU law are not considered by the DSB as rules of law. Rather, they are considered as measures applied by EAEU member-states, while taking into account the fact that the EAEU is not a member of the WTO. Moreover, all the actions of the EAEU and its bodies are attributable to every EAEU member-state. The authors also conclude that not only the content of EAEU law norms as such, but also the method of their interpretation and application is of great importance in the context of challenging measures adopted by the EAEU in the DSB. The paper contains more detailed analysis of the Panel Report on *Russia – Railway equipment*. The other four disputes are briefly covered with a special focus on challenging measures adopted by the EAEU in the DSB. The paper makes several concluding remarks in respect to the specific characteristics of challenging such measures in the DSB.

Keywords: measures of the Eurasian Economic Union (EAEU); WTO Dispute Settlement Body; EAEU Law; interpretation and application of the EAEU law.

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EX OFFICIO

EUROPEAN COURT OF HUMAN RIGHTS: REVIEW OF THE JUDGMENT OF 18 JANUARY 2018 (FIFTH SECTION) IN THE CASE OF *FNASS AND OTHERS V. FRANCE* (APPLICATIONS NOS. 48151/11, 77769/13)

In the judgment in the case of *FNASS v. France*, the Chamber of European Court of Human Rights considered an issue concerning the requirement for a targeted group of professional sportsmen to inform the authorities of their whereabouts for the purposes of anti-doping tests. The applicants claimed that the authorities' actions constituted a violation of their right to respect for private and family life and home. They complained of a particularly intrusive anti-doping control system that allowed tests to be carried out every day at their homes or training venues. They noted that this system resulted in long-term interference with their right to a normal family life and a breach of their privacy. The claimant also alleged that her continued renewed registration in a targeted group constituted a repeated violation of her right to the respect for private and family life. The Chamber concluded that the unannounced tests did not violate the Article 8 of the Convention. The requirement for the members of a targeted group to be available and transparent was sufficient for the Court to find that whereabouts requirement interfered with the applicants' privacy. The Court observed, however, that the objective of anti-doping control was the protection of health which falls within the public interest. It was considered that the importance of the protection of health was provided by international and national acts and that doping prevention was clearly a health concern. The Court agreed that negative consequences of the use of doping constitute another reason for a better protection of the health of professional sportsmen who fall within the risk group of use of doping. Moreover, the Court stressed that the use of doping also violates the rights and freedoms of others by depriving the spectators of the fair competitions

which they expected. Regarding the necessity in democratic society, the Court reiterated that there was a consensus on every level of authorities about the importance of anti-doping control due to perils and negative consequences that use of doping causes. Thus, the Court held that the respondent State had struck a fair balance between the various interests at stake and that there had been no violation of Article 8 of the Convention

Keywords: the right to respect for private and family life; invasion of privacy; respect for home; professional sport; anti-doping rules; control after sportsmen' whereabouts; unannounced anti-doping tests; long-term control after sportsmen.

SCRIPTORIUM

JUS HOMINUM

GENDER DISCRIMINATION JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS: SOME AREAS OF CONCERN

Olga Podoplelova

The European Court of Human Rights regards gender equality as one of the key principles underlying the European Convention for the Protection of Human Rights and Fundamental Freedoms. At the same time, the jurisprudence of the European Court currently reveals certain approaches that may lead to a denial of protection against discrimination on the basis of sex. Starting from the concept of transformative equality, the author explores such approaches of the Court based on several categories of cases related to the protection from domestic violence, as well as the implementation of social and reproductive rights. On the one hand, the approaches of the European Court in these cases confirm the Court's attention to the issues of discrimination and protection of women's rights. On the other hand, a detailed analysis demonstrates that gender discrimination cases imply several risks for applicants. These risks are connected, first, with the Court's restrictive approach to dealing with cases under Article 14 of the Convention and its limiting the subject of the analysis to violations of the substantive provisions of the Convention. In some cases, this approach leads to a simplification of the legal problem by ignoring the gender dimension of the issues raised by the applicants in their complaints. This risk is demonstrated by the author through the cases on domestic violence. Second, when considering cases on gender discrimination, the Court relies on the doctrine of the margin of appreciation of the States in regulating issues affecting gender equality, and defines it as substantially wide. In this respect, the States can justify discriminatory measures by the existing perceptions of gender roles within society, which are not always condemned by the European Court. Based on the cases related to the distribution of social guarantees and the exercise of the right to an abortion by women, the author shows that this approach practically results in an inability to eradicate the roots of inequality.

Keywords: European Court of Human Rights; equality; gender discrimination; women's rights.

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THE COUNCIL OF EUROPE GUARDING THE RIGHTS OF VICTIMS OF HUMAN TRAFFICKING: LEGAL STANDARDS AND RISK FACTORS

Ekaterina Alisievich

On 16 May 2005, the Council of Europe adopted the Convention on Action against Human Trafficking, bringing together all member states of the Council of Europe, with the exception of the Russian Federation. The Convention is based on three human rights principles: (1) human trafficking constitutes an encroachment on the dignity and integrity of human beings; (2) the rights and interests of victims of human trafficking take precedence; (3) States are required to take additional protection measures for child victims of human trafficking. The aim of this study is to analyze, on the basis of the analysis of the reports of the Council of Europe's Expert Group on Combating Human Trafficking, GRETA and the case-law of the European Court of Human Rights in *Rantsev v. Cyprus and Russia*, *Chowduri and Others v. Greece*, *Seliaden v. France*, *L.E. against Greece*, and others to determine the content and scope of the positive obligations of the member states of the Council of Europe in the field of ensuring the rights and interests of victims of human trafficking. Particular attention is paid to factors that hinder the effective realization by victims of their rights: the criminalization of victims; protection on the condition of willingness to cooperate with the investigation; a mistake in establishing the age of the victim; and improper application of the principle of non-punishment. The methodological basis of the research is a set of general scientific (analysis and synthesis, induction and deduction, analogy) and private scientific (formal-legal, comparative-legal) methods of scientific cognition. This article analyzes the elements forming the concept of "trafficking in human beings" (Article 4(a) of the Convention): action, means, and purpose. Based on the analysis of the GRETA reports, violations of the rights of victims of human trafficking are identified in the process of identification, investigation, and court proceedings. The features of protection of child victims of human trafficking are considered. The author ends with the imperfection of the conceptual apparatus used in the Convention in defining the concept of "human trafficking" and concludes that, in general, states have the necessary legal tools to protect the rights and interests of victims of human trafficking, but they do not use them effectively enough.

Keywords: human trafficking; exploitation; forced labor; rights and interests of the victims of trafficking; European Court of Human Rights; GRETA.

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JUSTICIA

FROM APOLOGY TO APOLOGY: GENERAL PROBLEMS ARISING FROM THE ACTIVITY OF THE EURASIAN ECONOMIC UNION COURT

Vladislav Tolstykh

This article is an overview of political and technical problems arising from the activity of the EAEU Court. The main political problem is the predisposition of the Court in favor of the Commission and the states. It is not a question of bias or other malicious intent, but of the line of conduct chosen by the Court. This line of conduct is considered by the Court as appropriate and conforming to the law, but when placed under scrutiny it is characterized by a certain level of selectivity. Particular manifestations of this problem are the lack of a descriptive part in some decisions, dictated by the Court's desire to reduce the actual conflict to an abstract issue, and the practice of accepting the withdrawals of the requests for interpretation at the last stages of the process. Among the technical problems are the defects in reasoning (deviations from the rules of formal logic, arbitrary use of methods of interpretation, non-use of modern methods of grammatical interpretation, failure to balance the ascending and descending arguments, and giving excessive weight to the practice of other international courts) and linguistic defects (complex and illiterate formulations, tautologies, etc.). A particular technical problem is the irrelevance of dissenting opinions, which opinions could be used as a platform for articulating purely theoretical concepts, proposals *de lege ferenda*, a war of words with other judges, and sophistical exercises. These problems hinder the implementation of the Court's function and deprive it of the opportunity to seriously influence the development of the EAEU law. The main conclusion is that the general line of conduct of the Court, characterized by caution, predictability, and creative passivity, does not correspond to the requirements of the development of the legal system of the EAEU.

Keywords: international courts; international law; customs law; Eurasian integration.

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THE EVOLUTIONARY APPROACH OF THE EUROPEAN COURT OF HUMAN RIGHTS TO THE INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS: PERIODIZATION

Svyatoslav Kovalenko

This article examines the issue of periodization of the evolutionary (evolutive) interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 applied by the European Court of Human Rights in its practice. The analysis that follows helps to comprehend the process of the interpretation of the European Convention in the light of the present-day conditions in its entirety and gives possibility to focus on identifying similarities and differences between two periods in the history of the European Court's approach to the Convention as to a "living instrument" from 1959 to the present day. The creation of a single, full-time European Court of Human Rights in 1998, following the adoption of Protocol No. 11 to the European Convention is a line that separates these periods from each other. An important question of the application of periodization as a research method is the choice of its criteria. Particular attention is therefore paid to the analysis of the qualitative and quantitative features of each period. The main tendency of the first period is the gradual formation of the evolutionary approach of the European Court of Human Rights to the interpretation of the provisions of the European Convention. The first case in which the European Court recognized an evolutionary approach to the interpretation of the Convention is *Tyrer v. the United Kingdom* (1978). The article also discusses the importance of the *Golder v. the United Kingdom* judgment (1975) which laid the foundations for the evolutionary interpretation. The significant role of the reports of the European Commission on Human Rights in the emergence of the "living instrument" doctrine in the jurisprudence of the European Court of Human Rights is particularly emphasized. During the second period (1 November 1998 – present), evolutionary interpretation was finally established as a one of the main interpretative methods employed by this international court. The text of the European Convention has been modified without adopting its new edition.

Keywords: European Convention on Human Rights; European Court of Human Rights; treaty interpretation; evolutionary (evolutive) interpretation; the "living instrument" doctrine; periodization.

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LEX MERCATORIA

AWARDS OF INTERNATIONAL INVESTMENT ARBITRATION TRIBUNALS ON COMPETENCE (JURISDICTION) AND ADMISSIBILITY OF CLAIMS: AN OVERVIEW OF THE MOST REMARKABLE CASES FOR 2016

Iliya Rachkov

In international investment law, there are no uniform rules. This is true for both the substantive and the procedural law provisions. There is no single body for resolution of investment disputes either. All this makes the application and the interpretation of international investment law extremely difficult. These difficulties entail non-predictability as to which strategy and tactics the claimant or the respondent shall follow in order to get the dispute resolved in his favour. To protect themselves from foreign investors' claims, the respondent States hosting investments challenge the competence (jurisdiction) of arbitration tribunals and the admissibility of claims. This is due to the following: if the dispute passes from the first stage (jurisdiction and admissibility of claim) into the next one – the merits stage, statistically the respondent State is less likely to win the case. This article analyses specific examples of how States defend themselves from claims of foreign investors by challenging the competence (jurisdiction) of arbitration tribunals and the admissibility of claims. In the beginning, emphasis is put on the distinction between the notions of "jurisdiction" and "admissibility". This is followed by specific examples of how respondent States substantiate their arguments that the arbitration tribunal has no jurisdiction over the claim or that the claim is not admissible. The following falls within the first group: the subject matter of the dispute does not qualify as an "investment"; the claimant is not an "investor"; when operating its investment, the investor violated the laws of the host country; the period of limitation expired; the investor abused his rights; protection of the investor's rights shall be denied; the respondent State filed a counterclaim against the investor; the international treaty to which the investor refers does not constitute the basis for the protection of the investor/his investment; the investor waived his rights; the actions of the persons who violated the investor's rights are not attributable to the State; the arbitration tribunal is not entitled to solve the dispute at hand.

Keywords: international investment law; foreign investments; foreign investors; host states; competence (jurisdiction) of international investment arbitration tribunals; admissibility of claims.

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FAIR TREATMENT AND SECURITY OF FOREIGN INVESTMENTS IN INTERNATIONAL LAW

Alexander Borgoyakov

The problem of fair and equitable treatment and full protection and security of foreign investments is one of the most complicated issues of international investment law. It arises out of a continuous discussion regarding the nature and content of the rules of law constituting the legal framework of foreign investments in a host state and raises a number of fundamental issues of public international law, including the process of forming the rules of international customary law. This article analyses the essence of this problem, its genesis in the historical retrospective, and the approaches of solving problems that are raised by it. In particular, this article reviews and analyses the historical background preceding the formation of the international minimum standard of treatment of aliens as customary rule of public international law and the reasons for including the standards of fair and equitable treatment and full protection and security in international treaties on promotion and mutual protection of foreign investments. It also analyses the content of the standards of fair and equitable treatment and full protection and security, including the structure of their elements, and the practice of their interpretation and application in international investment arbitration proceedings. It is argued in the article that these standards, despite the fact that they are similar to the minimum standard of treatment of aliens, are treaty rules of public international law and hence shall be construed in accordance with the requirements of the Vienna Convention on the law of treaties from 1969. Finally, the article suggests practical approaches for interpreting these standards in international investment arbitration proceedings. Thus, the standards of fair and equitable treatment and full protection and security may be construed with a link to the rules of international customary law when certain disputes are resolved. For example, the express indication in a treaty that the standards are a part (or an equivalent) of the international minimum standard may be considered as an argument to construe such standards as elements of or equivalent to the international minimum standard for the purposes of interpreting such a treaty.

Keywords: foreign investments; international investment arbitration; international minimum standard; national standard; standard of fair and equitable treatment; standard of full protection and security; international customary law.

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JUS COMMUNE

COUNTERMEASURES OF NON-INJURED INTERNATIONAL ORGANIZATIONS: KNOW-HOW OR AN ESTABLISHED INTERNATIONAL CUSTOM?

Aiman Smagulova

The present article considers the use of countermeasures by the non-injured international organizations against states and international organizations

committed international wrongful act. In particular, the author attempts to find out whether countermeasure represents either a new legal phenomenon, which is still evolving or existing international custom. For that purpose, two constitutive elements to determine customary international law will be analyzed: general practice and whether that practice is accepted as law (*opinio juris)*. The paper investigates contemporary practice of international organizations such as the League of Arab States, Organization of African Union, Organization of Islamic Cooperation, Organization of American States, European Union, Council of Europe and etc. through provisions of 2001 Articles on Responsibility of States for Internationally Wrongful Acts and 2011 Articles on the Responsibility of International Organizations. Moreover, countermeasures taken by the non-injured international organization against responsible international organization, member-states and non-member states will be differentiated. In parallel, procedural and substantial requirements for countermeasures will be raised and distinction between countermeasures, sanctions, restrictive measures and retorsions having a similar meaning will be made. Particular attention in the article is paid to *opinio juris* of the non-injured international organizations taking countermeasures. Hence, the author concludes that the practice of international organizations other than the injured subjects is widespread, representative and consistent, but only in particular cases it accepted as *opinio juris*. However, there is a reason to believe that the process of formation of international custom has been launched.

Keywords: countermeasure; sanction; non-injured international organization; international responsibility; non-injured state.

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