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EX OFFICIO

INTERNATIONAL CRIMINAL COURT: REVIEW OF JUDGMENT OF APPEALS CHAMBER OF 15 JUNE 2017 IN THE CASE OF *PROSECUTOR V. BOSCO NTAGANDA* (CASE NO. ICC-01/04-02/06)

This review is on the judgment of the Appeals Chamber of the International Criminal Court in the case of Prosecutor v. Bosco Ntaganda concerning the war crimes of rape and sexual slavery of child-soldiers committed by the armed forces or groups of which the child soldiers are members. The Appeals Chamber concluded that according to the ordinary meaning, context, and drafting history of Articles 8(2)(b)(xxii) and (e)(vi) of the Rome Statute regarding the "established framework of international law", members of armed forces or groups are not excluded from protection against the war crimes of rape and sexual slavery committed by other members of the same armed force or group. Thus, having a status of "protected persons" is not a requirement to be a victim of the war crimes of rape and sexual slavery. According to the Court, international humanitarian law does not generally exclude persons belonging to the same armed force or group from protection. While Geneva Conventions III and IV protect persons who have become prisoners of war or appeared under an occupying power, Geneva Conventions I and II protect the wounded and sick "in all circumstances" without excluding violations committed by members of their own armed force. Common Article 3 provides for unqualified protection against inhumane treatment irrespective of a person's affiliation. Therefore, in the absence of any general rule excluding members of armed forces from protection against violations by members of the same armed force, there are no grounds for assuming the existence of Status Requirements specifically for the war crimes of rape and sexual slavery.

Keywords: child soldiers; rape; sexual slavery; status requirement; protected persons.

EUROPEAN COURT OF HUMAN RIGHTS: REVIEW OF JUDGMENT (GRAND CHAMBER) IN THE CASE OF *BURMYCH AND OTHERS V. UKRAINE*

The Grand Chamber judgment of the European Court of Human Rights (ECtHR) in the case of Burmych and Others v. Ukraine concerns continuous failure of Ukraine to adopt general remedial measures at the national level to deal with numerous repetitive applications to the ECtHR on the subject of non-enforcement or delayed enforcement of domestic judicial decisions, as required the ECtHR in its "pilot" judgment Yuriy Nikolayevich Ivanov v. Ukraine adopted in 2009. In the situation where the Court's previous approach of examining thousands of those repetitive cases in an accelerated, summary procedure had no impact on the overall number of such applications, which continued to grow, the Grand Chamber considered that it was no longer justified to continue examination of Ivanov-type applications as the legal issue had already been resolved in the pilot judgment and the Court had thereby discharged its main function. Instead, it has fallen on the Committee of Ministers to deal with such pending (five applications in the present case and 12 143 similar applications) and future cases in the process of execution of the pilot judgment.

EUROPEAN COURT OF HUMAN RIGHTS: REVIEW OF JUDGMENT (GRAND CHAMBER) IN THE CASE OF *MOREIRA FERREIRA V. PORTUGAL (NO. 2)*

The Grand Chamber judgment of the European Court of Human Rights in the case of Moreira Ferreira v. Portugal (no. 2) concerns the refusal by a domestic court to review a final judicial decision in a criminal case against the applicant on the basis of a previous Court judgment, adopted in 2011, in which it found a violation of Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms in those criminal proceedings. Under Portuguese law, a final judicial decision may be reviewed including on the ground that the conviction is irreconcilable with a binding judgment of an international body. The national court refused the applicant to review the conviction noting that it was not irreconcilable with the 2011 Court judgment. The Grand Chamber found that this approach did not violate Article 6 § 1 of the Convention, as the interpretation of the previous Court's judgment by the national court was not arbitrary, the Convention itself does not recognise a right to have a final judicial decision reviewed, and there is no uniform approach to this issue among the member States of the Council of Europe.

Keywords: fair trial; access to court; criminal proceedings; review of a final judicial decision; execution of judgments.

SCRIPTORIUM

JUSTICIA

EVOLUTION OF MECHANISMS FOR CONSIDERING DISPUTES BETWEEN INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS AND THEIR EMPLOYEES

Alexandra Popova

The immunity of international intergovernmental organizations from the jurisdiction of national courts, as well as the special status of the employees of such organizations, which are both broadly accepted concepts today, have demanded the establishment of special mechanisms ensuring the protection of the rights of international servants for settling internal labor disputes that arise. Nowadays there are various formal and informal mechanisms for considering relevant internal labor disputes between international organizations and their employees. These mechanisms function within most international intergovernmental organizations. Their establishment has provided a possibility for employees of international organizations to resolve labor disputes with an international organization employer in the absence of access to national courts. Nevertheless, there is a problem of efficiency with such mechanisms, which can be especially observed now through the lens of providing the appropriate standards for protection of the rights of international employees and the availability of justice. In the present article, the author focuses on the questions of the evolution of the mechanisms for considering disputes between international organizations and their employees in the light of realizing the right of access to the court. The author also carries out an analysis of the contemporary approaches of international and national courts regarding this issue. Having analyzed various decisions of these courts, the author comes to the conclusion that the existing mechanisms for considering internal labor disputes between international intergovernmental organizations and their employees should be improved in a certain way that takes into account the context of contemporary international law realities.

Keywords: International employees; formal and informal mechanisms for considering internal labor disputes; quasi-judicial authorities; equivalent protection; functional immunity.

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LEX MERCATORIA

AWARDS OF INTERNATIONAL INVESTMENT ARBITRATION TRIBUNALS ON THE MERITS: AN OVERVIEW OF THE MOST REMARKABLE CASES OF 2014–2015

Ilia Rachkov

As a rule, international investment arbitration tribunals consider the claims of foreign investors against states hosting such investments. The course and the outcome of such claims are quite difficult to predict since there is no single set of international law rules (either substantive or procedural), nor is there a single dispute resolution body. However, despite this lack of predictability, one may detect certain trends and patterns. This is necessary in order to enable foreign investors and host states to plan their activities, and is also useful in case a dispute arises. This overview gives examples of how international investment tribunals apply the provisions of international treaties that deal with such questions as a host state's violation of its duty to provide foreign investors with the national treatment, a minimum standard of treatment, a fair and equitable treatment, the state's duties arising out of an umbrella clause, and selected aspects of expropriation. Although in 36.4 % of known cases international arbitration tribunals rendered awards in favor of states

(against 26.7 % of disputes being decided in favor of foreign investors), as a rule those awards that were favorable to states were rendered by international investment tribunals at the jurisdictional stage. However, if it comes to the examination of a dispute on its merits, arbitration tribunals usually decide in favor of claimants, i. e. foreign investors. For Russia, these statistical data are of interest for two reasons. First, Russia combines two roles: that of a state that hosts foreign investments and that of a state of origin of foreign investments. Due to this dual role, Russia as a defendant and Russian investors as claimants are heavily involved in investor-state dispute resolutions at the international scale. Second, many Russian outbound investments are state-owned or state-controlled. This is why it is important for Russia to keep pace with the newest trends in investor-state dispute resolutions.

Keywords: national treatment; minimum standard of treatment of foreigners; fair and equitable treatment; legitimate expectations of investors; denial of justice; expropriation; proportionality.

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OPINIO JURIS

JURISDICTIONAL IMMUNITIES OF FOREIGN STATES AT THE STAGE OF RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS IN RUSSIA

Alexey Vyalkov

The article addresses the issue whether the conclusion of an arbitration agreement by a foreign State by itself implies under Russian law that the foreign State has waived its immunity from jurisdiction for the purposes of the subsequent recognition and enforcement of an arbitral award in the courts where the assets of the debtor-State are located. The issue is resolved from the perspective of both commercial and investment arbitration. The article comments on the judgment of the Commercial Court for the Moscow Circuit dated 29 August 2017 in Tatneft v Ukraine (A40-67511/2017). The article further offers interpretation of an arbitration exception under Article 6(2) of the Federal Law dated 3 November 2015 No. 297-FZ "On jurisdictional immunities of the foreign State and assets of the foreign State in the Russian Federation". The article derives the offered interpretation from travaux préparatoires to the Law, the UN Convention on Jurisdictional Immunities of the States and Their Property, other treaties and soft law instruments on the issues of State immunity, European Convention on Human Rights and Fundamental Freedoms, State practice and customary international law. Along the line, the article offers interpretation of the ambiguous Article 17 of the UN Convention on Jurisdictional Immunities of the States and Their Property based on a detailed analysis of travaux préparatoires to it, summarizes State practice on the issue whether the fact of the State's entering into arbitration agreement as such can be deemed a waiver of immunity from jurisdiction for the purposes of subsequent recognition and enforcement of the arbitral award, and opines on the state of customary law on the same issue.

Keywords: arbitration agreement; waiver of immunity from jurisdiction; Law on Jurisdictional Immunities; customary international law.

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HISTORIA

"DEALING WITH THE PAST": THE DIFFICULTIES OF FORENSIC TRUTH

Oleksandr Yevsieiev

This article examines the phenomenon of "dealing with the past" in the activities of international criminal tribunals, particularly the International Criminal Tribunal for the Former Yugoslavia. The "politics of memory" is analyzed as one of the elements of transitional justice, which makes it possible to make a transition to peace. There are two main strategies that the state can follow when attempting to deal with its own past: either a policy of silence, or a policy under the motto "never again!" The ambiguity of the truth that is extracted during the course of forensic investigation is emphasized. Particular attention is paid to the psychological and socio-cultural difficulties that arise in a person or an ethnic group when interacting with a different treatment of events than that adopted in their environment. In this regard, the specificity of "memory wars" is revealed as a defensive reaction to another version of historical events. Specific examples illustrate the attitude of the tribunal to the events of the Yugoslav war of 1991 to 1995. The ambiguous role of truth commissions has been identified, which in practice may prove less effective than full-fledged criminal tribunals. The possibilities of using the "memory policy" in post-conflict areas, in particular in the example of Bosnia and Herzegovina and Ukraine, are considered. The article concludes with a question: Given that it is known that the version of past events that is supported in a court's opinion is referred to as forensic truth, is it possible that a key purpose of the existence of international law is to achieve maximum conversion of forensic truth and actual truth?

Keywords: International Criminal Tribunal for the Former Yugoslavia; transitional justice; the Yugoslav war of 1991 to 1995; "memory wars"; memorial culture; war crimes.

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