address these issues in a pending case, *Nada v. Switzerland*, which challenges restrictions by the Qaeda and Taliban sanctions regime of certain rights guaranteed under the ECHR.[27]

To conclude: this is yet another judgment by the Court that clarifies some important questions, particularly how to interpret Security Council resolutions that do not conform with the ECHR, while leaving other issues unclear, such as the concept of attribution. The following guidance, however, should play an important interpretive role when states are to comply with Security Council resolutions affecting their human rights obligations: unless the Council clearly and explicitly requires them to derogate from their human rights obligations, states must comply with those obligations under international human rights law.

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European Convention on Human Rights—nondiscrimination—gender equality—parental leave—military service

MARKIN v. RUSSIA. Application No. 30078/06. *At* http://www.echr.coe.int. European Court of Human Rights (Grand Chamber), March 22, 2012.

On March 22, 2012, the Grand Chamber of the European Court of Human Rights (European Court or Court) held that Russia's refusal to grant parental leave to a military serviceman on the same basis as his female counterparts constituted impermissible discrimination under the European Convention on Human Rights and Fundamental Freedoms (Convention).[1] The decision marks an important evolution in the Court's jurisprudence concerning gender stereotyping and parental rights, as well as the application of human rights norms to the military. In addition, as the Court's first direct challenge to a ruling of the Constitutional Court of the Russian Federation, the case has become a litmus test for Russia's relationship with international law in general, and European human rights law in particular.

Konstantin Markin was serving in the Russian army when he and his wife (Ms. Z) divorced in September 2005, on the same day as she gave birth to their third child. After the divorce, the two reached an agreement under which their three children would continue to live with Markin while Ms. Z would pay child support. In October, Markin asked the head of his military unit for three years' parental leave, but the request was rejected because the relevant legislation entitled only female military personnel to such leave. Instead, as the sole caregiver for his children, Markin was allowed three months' leave as provided for by the same legislation.

Markin challenged the decision in Russia's military courts on the basis, inter alia, of the provision in the Russian Constitution guaranteeing equality between women and men. The military courts denied his claim. Despite that decision, the head of his unit granted Markin parental leave until the third birthday of his youngest son. Markin also received considerable financial assistance "in view of [his] difficult family situation, the necessity of taking care of three minor children and the absence of other sources of income" (para. 31).[2]

[27] Nada v. Switzerland, App. No. 10593/08 (Eur. Ct. H.R. relinquishment filed Oct. 20, 2010).

[1] Markin v. Russia, App. No. 30078/06 (Eur. Ct. H.R. Mar. 22, 2012). Judgments and decisions of the Court are available online at http://www.echr.coe.int.

[2] Quoting Letter from head of military unit No. 41480 to applicant (Nov. 9, 2006).

Markin then took his case to the Russian Constitutional Court, again claiming that the provisions of the Military Service Act limiting the three-year parental leave to women violated the equality clause of the Russian Constitution. In January 2009, the Constitutional Court rejected his application, reasoning that the statutory prohibition against granting extensive parental leave to servicemen (as opposed to servicewomen) is "based, firstly, on the special legal status of the military, and, secondly, on the constitutionally important aims justifying limitations on human rights and freedoms in connection with the necessity to create appropriate conditions for efficient professional activity of servicemen who are fulfilling their duty to defend the Fatherland" (para. 34). Because of the specific demands of military service, excusing servicemen from their duties en masse "might cause detriment to the public interests protected by law" (*id.*).[3]

Earlier, in May 2006, Markin had filed an application against Russia in the European Court of Human Rights. In October 2010, eighteen months after the Constitutional Court's decision, a chamber of the European Court decided in Markin's favor, finding a violation of Article 14 of the Convention (prohibiting discrimination) in conjunction with Article 8 (guaranteeing respect for private and family life). The chamber saw no objective or reasonable justification for the different treatment of men and women with respect to parental leave and recommended that the Russian government amend the relevant legislation "with a view to putting an end to the discrimination against male military personnel as far as their entitlement to parental leave is concerned."[4]

Anatoly Kovler, the judge elected from Russia to the European Court, filed a dissenting opinion to the chamber's judgment in which he agreed with the core argument of the Constitutional Court; namely, that "the taking of parental leave by servicemen on a large scale would have a negative effect on the fighting power and operational effectiveness of the armed forces."[5]

After the judgment came out, Russia sought referral of the case to the Grand Chamber—an interesting move because voting in the chamber had not indicated any major "political" split among the judges. The government argued that the case had been effectively resolved (because Markin had been granted some parental leave and financial assistance), that his divorce had been a sham (since he and his wife had actually continued their relationship, remarried in 2008, and had a fourth child), and that states enjoy a wide margin of appreciation in matters of national security.

In its judgment of March 22, 2012, the Grand Chamber affirmed (by a vote of 16-1) the chamber's determination of a violation of Article 14 in conjunction with Article 8. It awarded Markin just €3000 in nonpecuniary damages and €3150 in costs and expenses. Judge Dragoljub Popović filed a dissenting opinion in which he disagreed with the majority's interpretation regarding Markin's status as a victim, arguing that in light of certain facts, including that Markin and his wife had remarried and had a fourth child together, their "community of life" had never been substantially interrupted (diss. op., para. 1).

[3] Quoting Judgment of the Russian Federal Constitutional Court of Jan. 15, 2009, Case No. 187-0-0, para. 2.2, *at* http://www.ksrf.ru (in Russian).

[4] Markin v. Russia, App. No. 30078/06, para. 67 (Eur. Ct. H.R. Oct. 7, 2010).

[5] *Id.* (diss. op. Kovler, J.).

The Grand Chamber first noted that the Russian Constitution guarantees equal rights to men and women and provides that the care and upbringing of children is an equal right and obligation of men and women, although by statute only women are entitled to 140 days of maternity leave and three years of "child-care leave" (paras. 43–44). The Court then reviewed relevant international and comparative material, including the Convention on the Elimination of Discrimination Against Women, Conventions No. 111 and No. 156 of the International Labour Organization, and the European Social Charter (to all of which Russia is party), as well as other documents of the Council of Europe and the European Union, and the domestic legislation and practices of thirty-three Council of Europe member states (paras. 49–75). According to the Grand Chamber, this material demonstrates that "contemporary European societies have moved towards a more equal sharing between men and women of responsibility for the upbringing of their children" and that "in a majority of European countries, including in Russia itself, the legislation now provides that parental leave may be taken by civilian men and women" (para. 140).

Not every difference in treatment, the Court noted, violates Article 14: "A difference of treatment is discriminatory if it has no objective and reasonable justification" (para. 125). Moreover, Article 8 does not obligate states to provide parental leave, but if a state does create a parental leave scheme, it must do so in a manner compatible with Article 14 (para. 130). In this respect, the Court observed, "men are in an analogous situation to women" (para. 132). While states may restrict the rights of military personnel to a greater degree than would be permissible in the case of civilians (para. 135), "the Convention does not stop at the gates of army barracks" and any restriction on the rights of military personnel "must satisfy the test of necessity in a democratic society" (para. 136).

> [R]eference to the traditional distribution of gender roles in society cannot justify the exclusion of men, including servicemen, from the entitlement to parental leave. The Court agrees with the Chamber that gender stereotypes, such as the perception of women as primary child-carers and men as primary breadwinners, cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similiar stereotypes based on race, origin, colour or sexual orientation. (Para. 143)

The Court also noted that the Russian government had not conducted any expert study or statistical research to support its contention that granting parental leave to servicemen would have a negative effect on the fighting power and operational effectiveness of the armed forces (para. 144). For purposes of national security, certain restrictions on entitlement to parental leave might be justifiable, but a blanket exclusion of men on the basis of their gender "must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be" (para. 148).

* * * *

Several aspects of the decision are significant. First, the circumstances of the underlying dispute—together with the accompanying politics—offer a vivid snapshot of the evolving and sometimes tense relationship between international law and the Russian Federation's constitutional law. As mentioned above, this is the first time that the European Court and Russia's Constitutional Court have clashed directly on what fundamental rights actually mean and who has priority in expressing it. Second, the Grand Chamber's decision illustrates tensions that lie beneath the claims of universality and progress in European human rights law.

When the Russian Federation adopted its democratic constitution in 1993, it was celebrated as receptive to international law, including international treaties.[6] The Constitution proceeds from a natural law (noncontractual) approach to human rights (Art. 2) and gives international treaties priority over domestic legislation (Art. 15(4)). It thus departed from the strictly dualist Soviet approach, characterized by the idea that international law consists only of explicit commitments by the state, and that ultimately state sovereignty always takes precedence.

Since then, however, Russian legal scholars have engaged in a lively debate about the place of international law in Russia's legal system.[7] For its part, the government has found it hard to accept the predominance of international law, European integration, and international courts in concrete cases. It apparently was much easier to grant international law a superior place in abstract (constitutional) terms than in actual practice.

Implementation of the European Convention on Human Rights and Fundamental Freedoms, which Russia ratified in 1998, is a case in point. The decision by Russia to participate in the system of European human rights protection was initially seen as a further sign of its new openness toward international law and human rights law, but since then the reality of Russia's experience in the Strasbourg system has been more sobering. More than once, cases decided by the Court have met with hostility and accusations in Moscow.[8] Ironically, in practice the Constitutional Court has taken a relatively enlightened view of the judgments of the European Court, referring to them frequently and, in the Russian context at least, often acting de facto as an ally of that Court.[9] By comparison, Russia's lower courts have been somewhat reluctant to refer to the European Court's decisions as precedents.[10]

Against this background, the chamber's judgment of October 2010 in *Markin* triggered a strong domestic backlash within Russia. Within only a few weeks, the chairman of the Constitutional Court, Valery Zorkin, published an article in the daily *Rossiiskaia Gazeta* entitled *The Margin of Giving In*,[11] where he argued that priority in defining the public interest must reside in the state and its authorities, not international judges. He pronounced this principle to be the essence of the margin of appreciation (or subsidiarity) doctrine. He found it "unprecedented" that the chamber had ruled that an entire legislative act did not accord with the Convention. He further challenged the chamber's position that considering women the primary caretakers of small children was just a "gender stereotype." Instead, the special role of mothers in raising their children was supported by contemporary psychology. Zorkin also criticized the

[6] *See, e.g.*, Gennady M. Danilenko, *The New Russian Constitution and International Law*, 88 AJIL 451 (1994).

[7] *See, e.g.*, BOGDAN ZIMNENKO, MEZHDUNARODNOE PRAVO I PRAVOVAYA SISTEMA ROSSIISKOI FEDERATSII. OBSHAYA CHAST. KURS LEKTSII [International Law and the Legal System of the Russian Federation. General Part. Course of Lectures] (2010); SERGEI MAROCHKIN, DEISTVIE I REALIZATSIA NORM MEZHDUNARODNOGO PRAVA V PRAVOVOI SISTEME ROSSIISKOI FEDERATSII [Impact and Application of the Norms of International Law in the Legal System of the Russian Federation] (2011); NIKOLAI LYGIN & VALENTIN TKATCHEV, MEZHDUNARODNO-PRAVOVYE STANDARTY I KONSTITUTSIONNAIA ZAKONNOST' V ROSSIISKOI SUDEBNOI PRAKTIKE [International Legal Standards and Constitutional Legality in Russia's Court Practice] (2012).

[8] *See, e.g.*, Symposium, *Russia and European Human Rights Law: Progress, Tensions, and Perspectives*, 37 REV. CENT. & E. EUR. L. 155–375 (Nos. 2 & 3, 2012).

[9] *See generally* ALEXEI TROCHEV, JUDGING RUSSIA: THE ROLE OF THE CONSTITUTIONAL COURT IN RUSSIAN POLITICS, 1990–2006 (2008).

[10] *See* ANTON BURKOV, KONVENTSIA O ZASHCHITE PRAV CHELOVEKA V SUDAKH ROSSII [Convention on the Protection of Human Rights in Russian Courts] (2010).

[11] V. Zorkin, *Predel ustupchivosti* [The Margin of Giving In], ROSSIISKAIA GAZETA, Oct. 29, 2010, *at* http://www.rg.ru/2010/10/29/zorkin.html. Translations below of quotations from this article are by the present author.

chamber's reliance on the earlier decision in *Smith & Grady v. United Kingdom*,[12] which concerned the rights of homosexual men in the army, arguing that the preoccupation of contemporary European lawyers with homosexual rights was taking "grotesque forms" that sometimes turned into a "tragedy" (such as in Serbia where organizing a gay parade in a "traditionally Orthodox country" led to "mass riots").[13] While it was tempting to condemn such riots as ignorant, they could also be a protest of the reasonably upset majority against a minority that "violates cultural, moral and religious code[s]."[14]

In response to such judgments, Zorkin argued that Russia had three alternatives. The first two were practically unwise: self-isolation, on the one hand, and servile subjugation of sovereignty to international institutions, on the other. The right way, in his view, would be to follow the logic of the 2004 judgment of the German Constitutional Court in *Görgülü*, where the Court had maintained that the German Constitution is open to international law but does not ultimately waive German sovereignty: "There is therefore no contradiction with the aim of commitment to international law if the legislature, exceptionally, does not comply with the law of international agreements, provided this is the only way in which a violation of fundamental principles of the constitution can be averted."[15]

Zorkin recommended that Russia follow this German constitutional precedent in a "soft, delicate and enlightened manner,"[16] by which he appeared to mean that the country is entitled to work out a "defense mechanism" for cases in which the European Court's decisions conflict with Russia's core constitutional principles. Any foreign "directing" of the legal situation in Russia, if it ignores the country's historical, cultural, and social situation, must be resolutely opposed.[17]

The relationship with the Court was a topic of considerable debate in Russia before the State Duma elections of 2011. That summer, Aleksandr Torshin, then the acting chairman of the Federation Council (the second chamber of the parliament), initiated a new draft law according to which judgments of the European Court of Human Rights could be implemented in Russia only if first approved by the Constitutional Court. This approach was dismissed by Russian international law experts, but it nevertheless triggered concern in the Parliamentary Assembly of the Council of Europe.[18] In October 2011, Torshin, linking his suggestion to Vladimir Putin's presidential campaign thesis that Russia should create a Eurasian Union, proposed that a separate regional human rights court be created for members of the Commonwealth of Independent States.[19]

Zorkin's article in *Rossiiskaia Gazeta* could be interpreted at least in part as an element in the author's campaign for reappointment as chairman of Russia's Constitutional Court (Zorkin was indeed reappointed in January 2012). But it also constituted a substantive change in

[12] Smith v. United Kingdom, App. Nos. 33985/96, 33986/96, 1999-VI Eur. Ct. H.R. 45.

[13] Zorkin, *supra* note 11.

[14] *Id.*

[15] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Oct. 14, 2004, 111 BVerfGE 289, para. 35, *Eng. trans. at* http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104en.html.

[16] Zorkin, *supra* note 11.

[17] *Id.*

[18] Svetlana Sukhova, *V PASE protiv popravok Torshina* [In the PACE Against the Amendments of Torshin], NEZAVISIMAIA GAZETA, June 24, 2011, *available at* http://www.ng.ru/world/2011-06-24/2_pase.html.

[19] Nataliia Gorodetskaia & Anna Pushkarskaia, *Stat'ia prem'era nashla svoego chitatel'ia* [The Article of the Premier Found Its Reader], KOMMERSANT, Oct. 6, 2011, *available at* http://www.kommersant.ru/doc/1788610.

Russia's rhetoric regarding the European Court. According to Russian liberal political analyst Lilia Shevtsova, the post-Soviet Russian leaders have been very skillful at mimicry in their relationship with the West, even as the Russian elite continued "to think that Russia could join the Western club while continuing its traditional practices at home."[20] The *Markin* case and Judge Zorkin's reaction to it may demonstrate the end of this approach. That the European Court might insist that Russia change its domestic practices to conform to the Court's rulings has led Russia's top judges to realize that mimicking may no longer work.

In any case, Zorkin formulated a clear warning to Strasbourg and signaled that in the future Russia's acceptance of European human rights law may be conditional. It may not have been a coincidence, therefore, that the Grand Chamber publicly issued its judgment in *Markin* just after (not before) Russia's presidential elections in early 2012, or that it omitted the chamber's explicit reference to the need for Russia to revise its legislation.

Nevertheless, the *Markin* decision will probably have additional ramifications. Individuals (and lawyers) filing complaints with Russia's Constitutional Court are likely to feel encouraged to challenge its decisions before the European Court. For example, in a recent proceeding, a member of the military who had been prohibited from leaving the Russian Federation because he had previously had access to state secrets, threatened to overturn the arguments of the Constitutional Court in Strasbourg.[21] This tactic may result in making the top Russian judges even more defensive. Thus, in May 2012, the chairman of the High Arbitration Court, Anton Ivanov, suggested at a high-level lawyers' conference that Russia must defend its sovereignty in the face of attacks and usurpations by foreign legal systems.[22]

The second significant aspect of the *Markin* case is that it illustrates tensions lurking beneath the claims of universality and progress in European human rights law. These tensions cannot necessarily be perceived in how the various judges of the Grand Chamber actually vote in a particular case but in the emergence of what could be called a traditionalist critique of human rights in Russia. Since the collapse of the Soviet Union, Russia has searched for its own voice in the global discourse on human rights law. It seems to have discovered it in a traditionalist critique of the (Western) human rights construct. In the last decade of his life, Alexander Solzhenitsyn criticized the Western concept of human rights. Nowadays, one of the most vocal critics of secular Western human rights discourse is Kirill I, the Russian Orthodox patriarch of Moscow.[23]

In some ways, certain ultraprogressive opinions expressed in European human rights discourse—for example, in the *Markin* case experts from Ghent University maintained that it was

[20] LILIA SHEVTSOVA & ANDREW WOOD, CHANGE OR DECAY: RUSSIA'S DILEMMA AND THE WEST'S RESPONSE 69 (2011).

[21] Anna Pushkarskaia, *Gostainy ostalis' nevyezdnymi. Konstitutsionnyi sud otkazalsya otkryt' granitsu dlya polkovnik Genshtaba* [State Secrets May Not Travel Abroad: The Constitutional Court Refused to Open the Border to a Colonel in the General Headquarters], KOMMERSANT, June 8, 2012, *available at* http://www.kommersant.ru/doc/1953656.

[22] Anna Pushkarskaia & Anna Zanina, *Deklaratsia o sudebnom suverenitete. Anton Ivanov predlozhil Dmitriu Medvedevu sposob zashchititsya ot davlenia inostrannykh pravovykh sistem* [Declaration on Court Sovereignty: Anton Ivanov Suggested to Dmitry Medvedev Means to Defend the Country Against the Impact of Foreign Legal Systems], KOMMERSANT, May 18, 2012, *available at* http://www.kommersant.ru/doc/1935924.

[23] Kirill's articles, speeches, and interviews, originally published in Russian daily newspapers, were recently translated and published in the Estonian language. *See* KIRILL, VABADUS JA VASTUTUS. HARMOONIA OTSIGUL. INIMÕIGUSED JA ISIKSUSE VÄÄRIKUS [Freedom and Responsibility. In Search of Harmony. Human Rights and Dignity of the Person] (Tallinn, Estonian Orthodox Church of Moscow Patriarchate 2012).

a mere "gender stereotype" to contend that fighting and military service were for men rather than for women—do not correspond to sociological realities in European countries where postmodernity has not yet arrived in the form of that kind of thinking. It is perhaps worth noting that the *Markin* case was decided at a time when most European NATO allies were reducing military spending, while the Russian Federation was considerably increasing it. In any case, although European countries (including Russia) have "Europeanized" human rights law, they have not "Europeanized" collective security.

All the same, Zorkin's case for subsidiarity in human rights law does have some merit. Consider a fascinating detail in the *Markin* case: it was the head of Markin's military unit who granted him parental leave and some financial assistance even though military courts had ruled the opposite. One can hardly imagine that such an "anarchical" step would be taken in Germany or the United States. How can a West European judge understand this act, or the circumstances and motives that led to it? Yet in a way, this sort of gap between what the law(yer) says and what the man (or hero) must do reminds one of the influential observation about Russian culture by the Tartu semiotician Yuri Mikhailovich Lotman (1922–93): that it has a "binary" structure and tends to replace law with moral or religious principles.[24] Lotman pointed out that in classical Russian literature, heroes oppose Grace (*milost'*) to the Law (*zakon*) and idealize the former. According to Lotman, for Russians law was often just a dry and inhuman principle opposed to such informal, yet superior notions as grace, sacrifice, and love.[25] In the Western tradition, an individual who successfully challenges the (always potentially oppressive) state may become a hero, whereas in a country historically steeped in a state-centric approach, such an individual can be seen as a selfish person who puts his or her own interests ahead of those of the nation.

To the extent that the traditionalist argument appears to be strengthening in Russia, at least among the political and judicial elites, European human rights discourse will be further challenged, not just from the viewpoint of institutional legitimacy (who gets to decide?) but also from the viewpoint of substance (what are human rights?). Because of this tension, Russia will continue to be a difficult partner in the Strasbourg system and how far to extend the margin of appreciation regarding Russia will remain problematic.

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[24] YURI M. LOTMAN, *Kul'tura i vzryv* [Culture and Explosion], *reprinted in* SEMIOSFERA 11, 142 (2000).
[25] *Id.* at 143.