



**Russian Federation
vs.
Svetlana Prokopyeva**

January 2021

TRIALWATCH FAIRNESS REPORT
A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE

legislation to be amended so that civilians are tried by civilian courts rather than by military tribunals.¹⁰² The Committee concluded that states have “an obligation to take all measures necessary to prohibit the trial of civilians in military courts,” noting that such trials raise “serious problems as far as the equitable, impartial and independent administration of justice is concerned.”¹⁰³

The ECtHR has previously found that the status of military judges sitting as members of National Security Courts in Turkey provided some guarantees of independence and impartiality, but certain aspects of their status made their independence and impartiality questionable.¹⁰⁴ In particular, in a case where a civilian was convicted of disseminating leaflets containing separatist propaganda capable of inciting people to resist the government and commit criminal offenses, the ECtHR noted that military judges were servicemen who still belonged to the army, which in turn took its orders from the executive; that they remained subject to military discipline; and that decisions pertaining to their appointment were to a great extent taken by the administrative authorities and the army.¹⁰⁵ The ECtHR ultimately found a violation of the right to an independent and impartial tribunal because of a legitimate fear that the executive could influence the court.¹⁰⁶

In *Gerger v. Turkey*, the ECtHR similarly found a violation of the right to be tried by an impartial tribunal where the defendant was convicted by a three-judge panel that included one member of the military. The ECtHR considered whether the civilian defendant – who was prosecuted for alleged dissemination of propaganda aimed at undermining the territorial integrity of the state and national unity – objectively “had a legitimate reason to fear that the court which tried him lacked independence and impartiality.”¹⁰⁷ The ECtHR concluded that the “applicant’s fears as to that court’s lack of independence and impartiality were objectively justified,” because one of the judges was “a regular army officer.” The defendant reasonably feared that the court “might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case.”¹⁰⁸

The Russian judicial system is often criticized for lack of impartiality and independence. In 2016, the Council of Europe's three former Commissioners for Human Rights jointly authored an article in which they concluded that Russia’s existing procedures and criteria for the appointment, removal, and responsibility of judges still do not provide sufficient

¹⁰² See, e.g., Concluding Observations of the Human Rights Committee on the Russian Federation, U.N. Doc. CCPR/C/79/Add.54 (July 26, 1995) ¶ 25; Concluding Observations of the Human Rights Committee on Uzbekistan, U.N. Doc. CCPR/CO/71/UZB (Apr. 26, 2001) ¶ 15; Concluding Observations of the Human Rights Committee on Egypt CCPR/C/79/Add.23, ¶ 9; U.N. Doc. CCPR/CO/76/EGY (Nov. 28, 2002) ¶ 16.

¹⁰³ Human Rights Committee, *Aleksandr Tyvanchuk et al. v Belarus*, U.N. Doc. CCPR/C/122/D/2201/2012, ¶ 7.2.

¹⁰⁴ See European Court of Human Rights, *Incal v. Turkey*, Judgment, App. No. 22678/93 (June 9, 1998) ¶¶ 65, 68.

¹⁰⁵ *Id.* ¶ 68.

¹⁰⁶ *Id.* ¶¶ 72-73.

¹⁰⁷ European Court of Human Rights, *Gerger v. Turkey*, App. No. 24919/94 (July 8, 1999) ¶ 61.

¹⁰⁸ *Id.*

fairness guarantees and that judges remain vulnerable to political and economic influence.¹⁰⁹

In Ms. Prokopyeva's case, there are ample reasons to doubt the independence and impartiality of the military judges that rendered the guilty verdict. Judges who are former members of the military and have a military rank have taken an oath both as judges and as members of the military. They were subject to military discipline and were trained to obey the orders of their commanders. Those orders ultimately come from the executive branch of the government, which is charged with appointing the judges. In particular, judges of Russian military courts are appointed by the president.¹¹⁰ All three judges who convicted Ms. Prokopyeva were members of the military when they were initially appointed. The requirement to be a military officer in order to become a judge of a military court has since been abolished. However, military officers on active duty or in the reserve currently have a priority right to be appointed as judges of military courts.¹¹¹

Despite Russian legislation providing for the independence of military judges,¹¹² there are insufficient guarantees that such judges remain independent and impartial in cases where civilians are charged with offenses such as justification of terrorism. This concern is exacerbated by the current political climate and the widely reported abuse of anti-extremism and anti-terrorism laws to silence critics of the government.¹¹³ Indeed, we have not identified any acquittals in cases involving justification-of-terrorism charges. It is also notable that even in criminal cases tried in *non-military* courts, less than 0.25 percent end in acquittal.¹¹⁴

¹⁰⁹ *Until the Judicial System of the Russian Federation Becomes More Independent, There Will Be Doubts About Its Effectiveness*, Kommersant (Feb. 25, 2016), <https://www.kommersant.ru/doc/2924065> (in Russian).

¹¹⁰ Russian Federation Law No. 3132-1, *On the Status of Judges in the Russian Federation*, Art. 6(4) (June 26, 1992), http://www.supcourt.ru/en/judicial_system/law_status_judges/.

¹¹¹ Federal Constitutional Law No. 1-FKZ, *On Military Courts of the Russian Federation*, Art. 27 (June 23, 1999), http://www.supcourt.ru/en/judicial_system/law_Military_courts/.

¹¹² *Id.* Art. 5.

¹¹³ See, e.g., *Russian Federation: Misuse of Anti-Terrorism Legislation Limits Media Freedom and Freedom of Expression*, Council of Europe (Feb. 19, 2019), <https://www.coe.int/en/web/commissioner/-/russian-federation-misuse-of-anti-terrorism-legislation-limits-media-freedom-and-freedom-of-expression>; *Russia's Overuse and Misuse Of Anti-Extremism Laws*, European Human Rights Advocacy Centre (Dec. 19, 2019), <https://ehrac.org.uk/news/russias-overuse-and-misuse-of-anti-extremism-laws/>; *Russia: Harsh Verdicts in Controversial Terrorism Cases*, Human Rights Watch (Feb. 12, 2020), <https://www.hrw.org/news/2020/02/12/russia-harsh-verdicts-controversial-terrorism-cases>; *Inappropriate Enforcement of Anti-Extremist Legislation in Russia in 2019*, SOVA (Apr. 21, 2020), <https://www.sova-center.ru/en/misuse/reports-analyses/2020/04/d42333/>; *Russian Human Rights Organizations Filed a Report With the UN Human Rights Committee*, SOVA (Jun. 30, 2020) <https://www.sova-center.ru/en/misuse/reports-analyses/2020/06/d42595/>.

¹¹⁴ Oliver Carroll, *Russian Justice System Criticised After Acquittal Rate Drops to 0.25%*, The Independent (May 30, 2019), <https://www.independent.co.uk/news/world/europe/russia-justice-system-low-acquittal-rate-uk-crown-court-a8935016.html>; see also *Russian Conviction Rate Is Higher Than Under Stalin*, The Times (Aug. 14, 2017), <https://www.thetimes.co.uk/article/russian-conviction-rate-is-higher-than-under-stalin-hj2v7f0bg>.

Given these circumstances, Ms. Prokopyeva had reason to be concerned that the judges in her case were vulnerable to influence or pressure from the government to render a guilty verdict.

Facts suggesting lack of impartiality at trial

The UN Human Rights Committee has found violations of the guarantee of impartiality under Article 14(1) of the ICCPR where trial courts have disregarded key defense contentions and motions.¹¹⁵ The conduct of the judges at Ms. Prokopyeva's trial suggests that they may have been predisposed against Ms. Prokopyeva.

Despite the fact that four expert witnesses testified in Ms. Prokopyeva's defense, the prosecution and the judges failed to ask these experts a single question regarding the substance of their reports. Instead, the court effectively disregarded the defense experts' reports entirely, and relied solely on the inconsistent expert evidence submitted by the prosecution. As noted above, one of the expert witnesses disregarded by the court was the author of the official Methodology for Conducting Forensic Psychological and Linguistic Examination of Materials in Cases Related to Countering Extremism and Terrorism, which all expert witnesses in this case were required to follow.

The court's conclusion that the defense experts *might* have had an interest in the outcome and were, therefore, biased is unsupported by any evidence in the record. The fact that Ms. Prokopyeva was trying to locate defense experts prior to the commencement of the investigation was not surprising – Russian media watchdog Roskomnadzor had already targeted her broadcast and article and was conducting an investigation against the media outlets that distributed them. Moreover, the court did not explain why Ms. Prokopyeva's effort to secure experts to help with her defense was any more disqualifying than the prosecution's repeated efforts to do the same for her prosecution. It is also notable that the court did not find the prosecution's expert, Ms. Yakotsuts, to be biased, despite the fact that Ms. Yakotsuts filed a defamation suit against Ms. Prokopyeva on the same day that she submitted her expert report. In fact, no evidence was elicited at trial that undermined the integrity or impartiality of the defense experts. The court's unjustified and unsupported decision to reject the defense experts' testimony therefore appears to have been arbitrary, demonstrating a bias in favor of the prosecution and against Ms. Prokopyeva.

¹¹⁵ For example, in *Toshev v. Tajikistan*, U.N. Doc. CCPR/C/101/D/1499/2006 (Mar. 30, 2011), the UN Human Rights Committee found a violation of Articles 14(1) and 14(3)(e) and (g) of the ICCPR where the court disregarded the defense's motions to summon and examine important witnesses as well as defense's objections to the content of the trial transcript. *International Standards on Criminal Defence Rights: UN Human Rights Committee Decisions*, Open Society Justice Initiative 44 (Apr. 2013), <https://www.justiceinitiative.org/uploads/d4a5fd83-2158-4f5a-9bf4-7d9dd2fed055/digests-arrest%20rights-human-rights-committee-20130419.pdf>. In *Litvin v. Ukraine*, U.N. Doc. CCPR/C/102/D/1535/2006 (Sept. 15, 2011), the Committee found a violation of Art. 14(3)(e) where the request to call and examine several key witnesses as well as the motion to conduct additional forensic examinations were denied. *Id.*

Similarly, several of the defense's motions were not given due consideration by the court, and were rejected without reasonable justification. In particular, the court denied the defense's request to cross-examine the prosecution's experts at trial, despite the fact that the court relied heavily on the conclusions of those experts in its verdict. The court likewise denied the defense's motion to order additional independent expert examinations in order to reconcile the conflicting and inconsistent findings of the expert reports in the record. The court also entirely disregarded the defense's arguments regarding the qualifications of the prosecution's experts and their apparent violations of expert examination guidelines, which prohibit experts from examining legal issues that are reserved exclusively for the competency of the court.¹¹⁶ Such conduct strongly suggests that the court had already formed an unfavorable view of Ms. Prokopyeva's case before it heard all the evidence.

It is also doubtful that the judges of the Second Western District Military Court were well suited to try the case against Ms. Prokopyeva, which raises concerns regarding the right to be tried by a competent tribunal. As the UN Working Group on Arbitrary Detention has pointed out, two of the core values of a military officer are obedience and loyalty to her or his supervisors, which conflict with the requirement to be independent and impartial. Therefore, the Working Group concluded that under international law, military courts can be considered competent to try only military personnel for military offenses.¹¹⁷

Ms. Prokopyeva's case is an example of the consequences of allowing military courts to try cases that are unrelated to the military. Neither Ms. Prokopyeva nor the subject of her broadcast have any affiliation with the Russian military or a role in military activities.¹¹⁸ Likewise, resolving the charges against her required no specialized knowledge of military affairs or functions. Instead, it required an analysis of linguistics, psychology, and freedom of speech. In the verdict, the court failed to conduct any legal analysis of Ms. Prokopyeva's statements whatsoever, and similarly failed to identify any specific language or statement justifying terrorism. The court likewise failed to analyze the substance of the expert reports and reconcile their conclusions. Finally, the court entirely ignored the free-speech issues raised by the prosecution of a political journalist and failed to consider the extensive jurisprudence of the European Court of Human Rights on this subject.

Right to Appeal: Duly Reasoned Judgment

Article 14(5) of the ICCPR establishes the right to appeal. As the UN Human Rights Committee has explained, exercise of the right to appeal requires a "duly reasoned" written judgment: If a court does not provide sufficient rationale for a conviction, a

¹¹⁶ See *Resolution of the Plenum of the Supreme Court of Russia on Judicial Practice in Criminal Cases Involving Extremist Crimes* (June 28, 2011) ¶ 23 (as amended).

¹¹⁷ Human Rights Council, *Report of the Working Group on Arbitrary Detention*, A/HRC/27/48 (June 30, 2014) ¶ 85, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/068/65/PDF/G1406865.pdf>.

¹¹⁸ This report does not reach the issue of whether civilians working in military-adjacent occupations might be appropriately subject to military courts.

defendant cannot effectively challenge the judgment before a higher tribunal.¹¹⁹ As the Committee explained in *Van Hulst v. Netherlands*, courts must give “reasons” for dismissing a defense.¹²⁰ Likewise, Article 6 of the ECHR requires that judgments state “adequately” the reasons on which they are based,¹²¹ in order for parties to be able to effectively appeal.¹²²

The court in this case failed to provide a duly reasoned judgment that would allow Ms. Prokopyeva to effectively appeal. Rather than conducting its own legal analysis of the charges against her, the court simply excerpted the conclusory assertion of the prosecution’s experts that the broadcast and article contained “signs of justifying the ideology and practice of terrorism, the formation of a view, and a positive emotional-semantic attitude . . . to the Arkhangelsk terrorist and his actions.”¹²³ This statement merely reiterates the charge against Ms. Prokopyeva and does not include any analysis of why the court reached its determination. It is also problematic because it reflects a legal conclusion by the prosecution’s experts, when legal findings are exclusively within the competence of the court.

Similarly, the defense repeatedly noted at trial that the charges against Ms. Prokopyeva were insufficiently specific, in that they failed to identify precisely which of the statements in her broadcast and article justified terrorism. However, the court entirely ignored this argument in its judgment, and in turn also failed to identify the specific statements from the article that warranted a conviction. As a result, the judgment did not provide a specific basis from which Ms. Prokopyeva could effectively appeal.

By failing to conduct its own legal analysis and failing to identify the specific statements that broke the law, the court produced a judgment that was not duly reasoned. The court therefore violated Ms. Prokopyeva’s right to appeal under Article 14(5) of the ICCPR and Article 6 of the ECHR.

¹¹⁹ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) ¶ 49; Human Rights Committee, *Van Hulst v. Netherlands*, U.N. Doc. CCPR/C/82/D/903/1999 (Nov. 15, 2004) ¶¶ 6.4-6.5. The violation of the right to appeal due to the absence of a duly reasoned judgment can also be characterized as a violation of the right to a reasoned judgment protected by Article 14(1).

¹²⁰ Human Rights Committee, *Van Hulst v. Netherlands*, U.N. Doc. CCPR/C/82/D/903/1999 (Nov. 15, 2004) ¶¶ 6.4-6.5. See also Human Rights Committee, *Mennen v. Netherlands*, U.N. Doc. CCPR/C/99/D/1797/2008 (Aug. 24, 2010) ¶ 8.3; Human Rights Committee, *Hamilton v. Jamaica*, U.N. Doc. CCPR/C/50/D/333/1988 (Mar. 25, 1994) ¶ 9.1.

¹²¹ European Court of Human Rights, *Hadjianastassiou v. Greece*, App. No. 12945/87 (Dec. 16, 1992) ¶ 33.

¹²² European Court of Human Rights, *Hirvisaari v. Finland*, App. No. 49684/99 (Sept. 27, 2001) ¶ 30.

¹²³ Prokopyeva Judgment at 14.

C. OTHER FAIRNESS CONCERNS

Right to Freedom of Expression

In addition to the fairness concerns discussed above, the prosecution and conviction of Ms. Prokopyeva also violated her right to freedom of expression as guaranteed by Russian law and by Article 19 of the ICCPR and Article 10 of the ECHR.

Ms. Prokopyeva was prosecuted for exercising rights guaranteed to her by Russian law. Russia's "Mass Media Law" includes protections for mass communication and safeguards against censorship.¹²⁴ The same law provides special protections for journalists, guaranteeing a number of rights, including the right to receive and spread information and the right to "set forth his or her personal judgments and assessments in reports and materials intended for dissemination under his or her signature."¹²⁵

Russian law establishes several ostensible safeguards to prevent the mass media from abusing the rights granted to it. One of these safeguards is the prohibition against the use of mass media to commit criminal acts such as distributing information containing a public call to commit terrorist activities, a justification of terrorism, or other extremist materials. In Ms. Prokopyeva's case, the facts suggest that the laws prohibiting the justification of terrorism were applied to silence the criticism of the Russian government rather than to prevent the abuse of mass media rights.

Russia's vague and overly broad anti-terrorism and anti-extremism laws have given Russian security forces and the Russian judiciary the legal justification to suppress criticism of government policies in the name of national security, and have allowed authorities to circumvent protections of free expression. This state overreach is evident in Ms. Prokopyeva's case.

Ms. Prokopyeva's right to free expression is also guaranteed by international instruments to which Russia is party. The ECHR mandates: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorit[ies] and regardless of frontiers."¹²⁶ Article 19 of the ICCPR, in language that mirrors the ECHR, includes the "freedom to seek, receive, and impart information of all kinds . . . in the form of art, or through any other media."¹²⁷

¹²⁴ Law of the Russian Federation No. 2124-1 *On Mass Media*, Art. 1, 3 (Dec. 21, 1991), <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102013812> (*in Russian*) ("Law on Mass Media"). See also *Media Regulation in Russia: A Landscape Analysis of Law and Trends*, Thomson Reuters Foundation (2015), [https://www.trust.org/contentAsset/raw-data/4798c68a-eed1-4660-b7c9-fc16a0032cc9/file#:~:text=2124%2D1%20'On%20Mass%20Media,Mass%20Media%20Law%E2%80%9D%20\)1.&text=Under%20the%20Mass%20Media%20Law,periodical%20dissemination%20of%20mass%20info%20rmation](https://www.trust.org/contentAsset/raw-data/4798c68a-eed1-4660-b7c9-fc16a0032cc9/file#:~:text=2124%2D1%20'On%20Mass%20Media,Mass%20Media%20Law%E2%80%9D%20)1.&text=Under%20the%20Mass%20Media%20Law,periodical%20dissemination%20of%20mass%20info%20rmation).

¹²⁵ Law on Mass Media, Art. 47.

¹²⁶ European Convention on Human Rights, Art. 10 (1950).

¹²⁷ International Covenant on Civil and Political Rights, Art. 19 (1966).

As in Russian law, international protections on free expression are not absolute. The ECHR, for instance, allows for “such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society,” and lists several grounds for reasonable restrictions, including national security and public safety.¹²⁸ The ICCPR includes provisions permitting a limited set of similar grounds for restrictions.¹²⁹

Ms. Prokopyeva’s prosecution is not the sort of restriction on speech permitted by international protections on free expression contained in the ICCPR and the ECHR. Under both agreements, restrictions must be provided by law and must not be overly broad or vague. The UN Human Rights Committee, commenting on Article 19, writes that such restrictions “must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly,” and “may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.”¹³⁰ Similarly, the ECtHR requires that restrictions on speech be “prescribed by law,”¹³¹ that is “accessible to the person concerned and foreseeable as to its effects”¹³²

Even when a restriction on free expression is permitted, authorities must specify the prohibited conduct and how it violates the law with precision.¹³³ Ms. Prokopyeva’s prosecution and trial failed to do that. She was charged under Article 205.2 of the Russian Criminal Code for public justification and propaganda of terrorism, a crime that requires a “public statement on the recognition of the ideology or practices of terrorism as correct, and in need of support.”¹³⁴ Ms. Prokopyeva’s commentary discussed only the possible motivations of the Arkhangelsk bomber; it did not encourage or condone that ideology. In fact, she expressed a hope that others would *not* follow that example, saying, “Just hope that he is an exception.”¹³⁵

Even assuming that Ms. Prokopyeva’s prosecution was in furtherance of a legitimate aim, it was not a proportionate response. Indeed, her comments are not of the sort that the ECtHR has found to raise significant national security concerns, and speech by journalists and on matters of public concern merit special protections.

In a similar case, *Sürek and Özdemir v. Turkey*, the ECtHR found a violation of the right to freedom of expression where the owner of a Turkish newspaper was prosecuted and convicted for publishing the statements of the Kurdistan Workers’ Party, which the Turkish

¹²⁸ European Convention on Human Rights, Art. 10 (1950)

¹²⁹ The ICCPR allows restrictions on speech when provided by law and necessary for “the protection of national security or of public order, or of public health or morals.” International Covenant on Civil and Political Rights, Art. 19 (1966).

¹³⁰ Human Rights Committee, General Comment No. 34 (Sept. 12, 2011) ¶ 25 (Article 19 ICCPR), <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

¹³¹ *Guide on Article 10 of the European Convention on Human Rights*, European Court of Human Rights 19 (Mar. 31, 2020) https://www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf.

¹³² European Court of Human Rights, *Kiliçdaroğlu v. Turkey*, App. No. 16558/18 (Oct. 27, 2020).

¹³³ Human Rights Committee, *Tae Hoon Park v. Republic of Korea*, U.N. Doc. CCPR/C/64/D/628/1995, (Nov. 3, 1998) ¶ 38.

¹³⁴ Art. 205.2 of the Russian Criminal Code.

¹³⁵ Svetlana Prokopyeva, Repressions for the State, Pskov Newline (Nov. 8, 2018).

government recognizes as a terrorist organization.¹³⁶ The ECtHR held that mere publication of an interview was not itself grounds for interference with the freedom of expression, and that any security concerns were outweighed by the public's right to be informed.¹³⁷

In *Dmitrievsky v. Russia*, the ECtHR found a violation of the right to freedom of expression where a newspaper editor was convicted for publishing statements from two Chechen separatist leaders criticizing the government.¹³⁸ The ECtHR held that the limits of permissible criticism of the government are wider than in relation to a private individual, and that the government should display restraint in resorting to criminal proceedings in such cases, particularly where other means are available for responding to criticisms.¹³⁹

Ms. Prokopyeva's case presents even less of a state security concern than in *Sürek or Dmitrievskiy*. She did not publish or repeat the words of a member of any state-designated terrorist organization, instead providing her own commentary and seeking to understand the root cause of an attack and motivation of the bomber. She linked the bomber's actions to the political climate under President Putin, suggesting that political activism in the country was severely restricted, leading people to despair.

In fact, because Ms. Prokopyeva's commentary was on a matter of great public interest, it merited greater protection than ordinary speech. As the ECtHR noted in *Sürek*, and as it has held repeatedly,¹⁴⁰ free expression is especially important when it is aimed at public officials, who "must be subject to close scrutiny."¹⁴¹ Indeed, the ECtHR is especially attentive to any limitations on free expression that could be construed as discouraging criticism of the government.¹⁴² The ECtHR has found that government interference, such as suspending the publication or dissemination of news media for such criticism, even for

¹³⁶ European Court of Human Rights, *Sürek and Özdemir v Turkey*, App. No. 23927/94, 24277/94 (July 8, 1999), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-58278%22%7D>; see also *Sürek and Özdemir v. Turkey*, Global Freedom of Expression, Columbia University <https://globalfreedomofexpression.columbia.edu/cases/surek-ozdemir-v-turkey/>.

¹³⁷ European Court of Human Rights, *Sürek and Özdemir v Turkey*, App. Nos. 23927/94, 24277/94 (July 8, 1999) ¶ 61, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-58278%22%7D>.

¹³⁸ European Court of Human Rights, *Dmitriyevskiy v. Russia*, App. No. 42168/06 (Oct. 3, 2017).

¹³⁹ *Id.* ¶ 54. In another case — *Perinçek v. Switzerland* — the court expressed doubt that there was a "pressing social need" to prosecute a Turkish politician for publicly denying that the atrocities perpetrated against the Armenian people in 1915 and the following years constituted genocide. See European Court of Human Rights, *Perinçek v. Switzerland*, App. No. 27510/08 (Dec. 17, 2013).

¹⁴⁰ See, e.g., European Court of Human Rights, *Thorgeir Thorgeirson v. Iceland*, App. No. 13778/88 (June 25, 1992) ¶¶ 59-70 (right to freedom of expression violated where the applicant was ordered to pay a fine following the publication of two articles alleging police brutality); European Court of Human Rights, *Lingens v. Austria*, App. No. 9815/82 (July 8, 1986) ¶ 41 (finding that the fine imposed on the applicant for defaming a politician in a newspaper article was an unjustified interference with his freedom of expression and information as guaranteed by ECHR Art. 10).

¹⁴¹ European Court of Human Rights, *Sürek and Özdemir v. Turkey*, App. Nos. 23927/94, 24277/94 (July 8, 1999) ¶ 60.

¹⁴² See, e.g., European Court of Human Rights, *Bédat v. Switzerland*, App. No. 56925/08 (Mar. 29, 2016) ¶ 79.

a very short time, “went beyond any notion of necessary restraint in a democratic society.”¹⁴³

The UN Human Rights Committee also makes this clear. The Committee writes: “[T]he penalization of a media outlet, publishers, or journalist solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression.”¹⁴⁴ The Committee also emphasizes the importance of protecting speech on matters of public concern. It has noted that “the free communication of ideas about public and political issues between citizens, candidates, and elected representatives is essential.”¹⁴⁵ Emphasizing the obligations of state parties to the ICCPR to protect free expression, the Committee writes that it is not compatible with Article 19 to invoke laws based on national security to “suppress or withhold from the public information of legitimate public interest that does not harm national security, or to prosecute journalists...for having disseminated such information.” Ms. Prokopyeva’s trial represents just such a prosecution.¹⁴⁶

For these reasons, Ms. Prokopyeva’s prosecution, trial, and conviction violated her right to free expression.

Abuse of Process

The ICCPR also prohibits the abuse of judicial proceedings to intimidate, discriminate against, or punish individuals for the exercise of their rights.

Article 18 of the ECHR likewise directs that “the restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.” Article 18 can be applied only in conjunction with one or more substantive rights delineated in the ECHR,¹⁴⁷ and establishes that such rights cannot be restricted for improper or ulterior purposes, including intimidation and suppression of dissent.¹⁴⁸

In considering whether a prosecution is driven by improper motives, the ECtHR considers circumstantial evidence, including: the political context in which the

¹⁴³ See, e.g., European Court of Human Rights, *Ürper and Others v. Turkey*, App. Nos. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07 (Oct. 20, 2009) ¶ 44.

¹⁴⁴ See Human Rights Committee, General Comment No. 34 (Sept. 12, 2011) ¶ 42 (Article 19 ICCPR), <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

¹⁴⁵ *Id.* at 4.

¹⁴⁶ *Id.* at 7.

¹⁴⁷ European Court of Human Rights, *Gusinskiy v. Russia*, App. No. 70276/01 (May 19, 2004) ¶ 73.

¹⁴⁸ *Id.* ¶¶ 76-78; European Court of Human Rights, *Cebotari v. Moldova*, App. No. 35615/06 (Nov. 13, 2007) ¶ 53; European Court of Human Rights, *Merabishvili v. Georgia*, App. No. 72508/13 (Nov. 28, 2017) ¶ 353; European Court of Human Rights, *Lutsenko v. Ukraine*, App. No. 6492/11 (Aug. 1, 2012) ¶ 109; European Court of Human Rights, *Tymoshenko v. Ukraine*, App. No. 49872/11 (July 30, 2013) ¶ 299; European Court of Human Rights, *Mammadov v. Azerbaijan*, App. No. 15172/13 (May 22, 2014) ¶ 143; European Court of Human Rights, *Mammadli v. Azerbaijan*, App. No. 47145/14 (Apr. 19, 2018) ¶¶ 104-105; European Court of Human Rights (Grand Chamber), *Navalnyy v. Russia*, App. No. 29580/12 (Nov. 15, 2018) ¶¶ 175-176.

prosecution was brought¹⁴⁹; whether the court was independent from executive authorities¹⁵⁰; whether “there was a political impetus behind the charges”¹⁵¹; whether authorities took action against the defendant despite an “increasing awareness that the practices in question were incompatible with Convention standards”¹⁵²; whether the prosecution had reasonable suspicion to bring the charges¹⁵³; how the criminal proceedings were conducted¹⁵⁴; and whether the ultimate decision was well-reasoned and based on law.¹⁵⁵

Examining Ms. Prokopyeva’s case against these criteria, it appears highly likely that she was prosecuted in order to discourage her (and other journalists) from expressing critical views of the government.

The political context in which Ms. Prokopyeva was prosecuted is one of increasing restrictions on free expression and a free press in Russia. Specifically, vague “anti-extremism” laws, like the one at issue here, grant authorities broad discretion to target the expression of ideas and opinions that are critical of the government.¹⁵⁶ And Ms. Prokopyeva’s case is one of many recent examples of Russia’s crackdown on journalists who dare to express views critical of the government or to cover anti-government protests.¹⁵⁷ In recent years, Russia has also used laws prohibiting the justification of terrorism to fine individuals who posted comments about the Arkhangelsk

¹⁴⁹ European Court of Human Rights, *Guide on Article 18 of the European Convention of Human Rights, Limitations on Use of Restrictions and Rights*, (Aug. 31, 2018) ¶ 57, https://www.echr.coe.int/Documents/Guide_Art_18_ENG.pdf (citing European Court of Human Rights, *Merabishvili v. Georgia*, App. No. 72508/13 (Nov. 28, 2017) ¶ 322; European Court of Human Rights, *Khodorkovskiy v. Russia*, App. No. 5829/04 (May 31, 2011) ¶ 257; European Court of Human Rights, *Khodorkovskiy and Lebedev v. Russia*, App. Nos. 11082/06 and 13772/05 (July 25, 2013) ¶ 901; European Court of Human Rights, *Nastase v. Romania*, App. No. 80563/12 (Nov. 18, 2014) ¶ 107; European Court of Human Rights, *Rasul Jafarov v. Azerbaijan*, App. No. 69981/14 (Mar. 17, 2016) ¶¶ 159-61; European Court of Human Rights, *Mammadli v. Azerbaijan*, App. No. 47145/14 (Apr. 19, 2018) ¶ 103; European Court of Human Rights, *Rashad Hasanov and Others v. Azerbaijan*, App. No. 148653/13 (June 7, 2018) ¶ 124).

¹⁵⁰ European Court of Human Rights, *Merabishvili v. Georgia*, App. No. 72508/13 (Nov. 28, 2017) ¶ 324.

¹⁵¹ *See id.* ¶ 320.

¹⁵² European Court of Human Rights (Grand Chamber), *Navalnyy v. Russia*, App. No. 29580/12 (Nov. 15, 2018) ¶ 171.

¹⁵³ *See* European Court of Human Rights, *Khodorkovskiy v. Russia*, App. No. 5829/04 (May 31, 2011) ¶ 258; European Court of Human Rights, *Khodorkovskiy and Lebedev v. Russia*, App. Nos. 11082/06 and 13772/05 (July 25, 2013) ¶ 908.

¹⁵⁴ European Court of Human Rights (Grand Chamber), *Navalnyy v. Russia*, App. No. 29580/12 (Nov. 15, 2018) ¶ 171.

¹⁵⁵ European Court of Human Rights, *Nastase v. Romania*, App. No. 80563/12 (Nov. 18, 2014) ¶ 107.

¹⁵⁶ *See Country Reports on Human Rights Practices: Russia 2020*, U.S. Dep’t of State, (2020) <https://www.state.gov/wp-content/uploads/2020/03/RUSSIA-2019-HUMAN-RIGHTS-REPORT.pdf>.

¹⁵⁷ *See, e.g.*, Robyn Dixon, *Russia’s Activists and Independent Journalists Face New Wave of Crackdowns*, Washington Post (July 26, 2020), https://www.washingtonpost.com/world/europe/russia-journalists-opposition-arrests-putin/2020/07/25/6ec32804-c784-11ea-a825-8722004e4150_story.html; *Russia: Dozens of Journalists Detained for Peaceful Protests*, Human Rights Watch (July 10, 2020), <https://www.hrw.org/news/2020/07/10/russia-dozens-journalists-detained-peaceful-protests>.

terrorist attack on social media,¹⁵⁸ and to fine a media outlet for publishing an interview with a Russian man who had fought alongside insurgents in Syria.¹⁵⁹

Similarly, there are multiple indications that the court was not independent of executive authorities. As a general matter, human rights monitors have observed that Russian courts are subject to pressure from the Russian government, including the military and state security services.¹⁶⁰ Moreover, the court in this case was a military tribunal made up of judges who were all current or former members of the military, meaning that they were subordinate to the executive branch.

In addition, the judgment in Ms. Prokopyeva's case was deeply flawed, based on poor reasoning and an erroneous application of the law. As explained above, the court effectively disregarded all of the expert evidence offered by the defense, and failed to provide a justification for rejecting several of defense counsel's motions. Similarly, the court failed to conduct any of its own legal analysis of the statements at issue, instead relying improperly on, and adopting wholesale, the prosecution's own arguments and legal conclusions.

Finally, it is particularly notable that one of the potential sentences that Ms. Prokopyeva faced if convicted was a four-year ban on working as a journalist. Fortunately, the court ultimately did not impose this sentence. However, the fact that it was sought by the prosecution demonstrates that the government was motivated by a desire to suppress journalistic expression and dissent. It also continues to serve as a threat to Ms. Prokopyeva and other journalists critical of the government that they risk losing their livelihoods if they express views deemed unfavorable by the government in the future.

¹⁵⁸ See Pavel Merzlikin, *Crushing the Anarchists: Following a Suicide Attack on the FSB, Russia has Cracked Down on Leftist Activists Nationwide, Sweeping Up More Than a Few Random Bystanders*, Meduza (Apr. 18, 2019), <https://meduza.io/en/feature/2019/04/19/crushing-the-anarchists>; Novaya Gazeta, *Court Sentenced Farmer and Father of Four to a Fine of 350,000 Rubles for Social Media Comment*, The Barent's Observer (Nov. 6, 2020), <https://thebarentsobserver.com/en/2020/11/court-sentenced-farmer-and-father-four-fine-350000-rubles-social-media-comment>; Lev Ponomarev, *We Defended Svetlana Prokopyeva. Now We Must Defend Nadezhda Belova*, Rights In Russia (July 22, 2020), <https://www.rightsinrussia.org/ponomarev-17/>.

¹⁵⁹ See *Russian Federal Agents Raid a Journalist's Home Because of His Interview with a Syrian Jihadist*, Meduza (Jan. 31, 2018), <https://meduza.io/en/news/2018/01/31/russian-federal-agents-raid-a-journalist-s-home-because-of-his-interview-with-a-syrian-jihadist>.

¹⁶⁰ *Until the Judicial System of the Russian Federation Becomes More Independent, There Will Be Doubts About Its Effectiveness*, Kommersant (Feb. 25, 2016), <https://www.kommersant.ru/doc/2924065> (in Russian).

CONCLUSION AND GRADE



The prosecution and conviction of Svetlana Prokopyeva violated her right to freedom of expression and demonstrated a flagrant abuse of process by the Russian authorities designed to intimidate journalists from expressing views critical of the government. Her trial was also marred by multiple violations of fundamental fair-trial rights enshrined in international law, including the right to be presumed innocent, the right to obtain the attendance and examination of witnesses, the right to an impartial and competent tribunal, and the right to a duly reasoned judgment.

More broadly, Ms. Prokopyeva's case is emblematic of Russia's persistent failure to abide by international human rights norms and the rule of law. She is only the latest of multiple journalists and activists to be aggressively targeted under overly broad "anti-terrorism" laws that are essentially tools to suppress unfavorable views of the government. Her case also demonstrates the troubling tendency of Russian courts to rely on improper legal conclusions of expert witnesses, without conducting any legal analysis of their own that considers evidence favorable to the defense. Finally, the court's judgment and the insufficient reasoning provided to support Ms. Prokopyeva's conviction further illustrate the partiality concerns inherent in the use of military tribunals to try civilians like Ms. Prokopyeva.

GRADE:

D



GRADING METHODOLOGY

Experts should assign a grade of A, B, C, D, or F to the trial reflecting their view of whether and the extent to which the trial complied with relevant international human rights law, taking into account, *inter alia*:

- The severity of the violation(s) that occurred;
- Whether the violation(s) affected the outcome of the trial;
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,”¹⁶¹ and retaliation for human rights advocacy (even if the defendant was ultimately acquitted);
- The extent of the harm related to the charges (including but not limited to whether the defendant was unjustly convicted and, if so, the sentence imposed; whether the defendant was kept in unjustified pretrial detention, even if the defendant was ultimately acquitted at trial; whether the defendant was mistreated in connection with the charges or trial; and/or the extent to which the defendant’s reputation was harmed by virtue of the bringing of charges); and
- The compatibility of the law and procedure pursuant to which the defendant was prosecuted with international human rights law.

Grading Levels

- A: A trial that, based on the monitoring, appeared to comply with international standards.
- B: A trial that appeared to generally comply with relevant human rights standards excepting minor violations, and where the violation(s) had no effect on the outcome and did not result in significant harm.
- C: A trial that did not meet international standards, but where the violation(s) had no effect on the outcome and did not result in significant harm.
- D: A trial characterized by one or more violations of international standards that affected the outcome and/or resulted in significant harm.
- F: A trial that entailed a gross violation of international standards that affected the outcome and/or resulted in significant harm.

¹⁶¹ ICCPR, Article 26.