



Russia vs. Aleksey Navalny

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*Judge Françoise Tulkens
Former Vice-President
European Court of Human Rights*

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

ABOUT THE AUTHOR

Judge Françoise Tulkens has a Doctorate in Law, a Master's degree in Criminology and a Higher education teaching certificate (agrégation de l'enseignement supérieur) in Law. She was a Professor at the University of Louvain and has taught, in Belgium as well as abroad, as a visiting professor at the Universities of Geneva, Leuven, Ottawa, Paris I, Rennes, Strasbourg and Louisiana State University, in the fields of general criminal law, comparative and European criminal law, juvenile justice and human rights protection systems. From November 1998 to September 2012, she was a Judge in the European Court of Human Rights, serving as Section President and as Vice-President of the Court. She has been an Associate Member of the Belgian Royal Academy since 2011. From 2012 to 2016 she chaired the Board of Governors of the King Baudouin Foundation. In September 2012, she took up an appointment as a member of the United Nations Human Rights Advisory Panel for Kosovo, which completed its work in June 2016. From 2013 to 2018 she was a member of the Scientific Committee of the European Union Fundamental Rights' Agency (FRA), serving as Vice-Chair from 2015 to 2018. From 2016 to 2018, she was co-president of the expert's commission to evaluate the Belgian anti-discriminations legislations and, until 2019, co-president of the Board of the Institute for the promotion of Islam training in the Wallonia-Brussels Federation. Since 2016, she is vice-president and president of the Federal Ethics Commission and she was a member appointed by the Committee of Ministers of the Administrative Tribunal of the Council of Europe (2018-2021). She is member of the High-Level Panel of Legal Experts on Media Freedom appointed by Lord Neuberger, former president of the UK Supreme Court, at the request of the UK and Canadian Government (2019-). Françoise Tulkens is the author of many publications in the areas of human rights and criminal law and also co-author of reference books. She holds honorary doctorates from the Universities of Geneva, Limoges, Ottawa, Ghent, Liège and Brighton. Judge Tulkens thanks staff at the TrialWatch initiative for helping to draft the report, which facilitated her legal conclusions and grading of the trial.

ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE

The **Clooney Foundation for Justice** (CFJ) advocates for justice through accountability for human rights abuses around the world. **TrialWatch** is an initiative of the Clooney Foundation for Justice. Its mission is to expose injustice, help to free those unjustly detained and promote the rule of law around the world. TrialWatch monitors criminal trials globally against those who are most vulnerable – including journalists, protesters, women, LGBTQ+ persons and minorities – and advocates for the rights of the unfairly convicted. Over time, TrialWatch will use the data it gathers to publish a Global Justice Ranking exposing countries' performance and use it to support advocacy for systemic change.

The legal assessment and conclusions expressed in this report are those of the author and not necessarily those of the Clooney Foundation for Justice.



Françoise Tulkens, who is a member of the TrialWatch Experts Panel, assigned this trial a grade of F: Aleksey Navalny's conviction for slander is but the latest in a long lineage of politicized prosecutions he has faced. This particular charge—based on his criticism of those who appeared in a pro-Putin video—is inconsistent with the international standards protecting the right to freedom of expression. Moreover, at trial the domestic court's treatment of the evidence, including its disregard of defense arguments, was sufficiently arbitrary as to constitute a denial of justice under the jurisprudence of the European Court of Human Rights and the UN Human Rights Committee. The domestic court likewise failed to respect Mr. Navalny's right to question witnesses in order to develop his defense, adopting the cramped view that he was only entitled to ask questions of witnesses that were 'relevant to the charges.' But perhaps most importantly, the proceedings appear to have been designed to tar Mr. Navalny as 'anti-Russian' by suggesting he is hostile to veterans of World War II. In fact, it is this prosecution that bears all the hallmarks of political hostility: It meets the threshold to be deemed an abuse of power under Article 18 of the European Convention of Human Rights. Further, in light of Mr. Navalny's prior treatment by the Russian authorities, which has in several cases been found to have violated the European Convention, this most recent conviction amounts to a persistent violation of his rights, which is why this case has been given a grade of 'F' under the methodology set out in the Annex.

Just weeks after returning to Russia from Germany—where he had been recuperating from having been poisoned—Russian opposition leader Aleksey Navalny was tried and convicted of slander. The slander trial unfolded against the backdrop of efforts by the Russian authorities to imprison Mr. Navalny on the basis of a prior conviction deemed

arbitrary by the European Court of Human Rights,¹ and it too violated Mr. Navalny's rights. Further, there are substantial reasons to conclude that the slander prosecution was pursued in order to suppress Mr. Navalny's political activities.

Mr. Navalny is Russia's most famous opposition figure. He has worked to expose corruption at the highest levels of Russian society and has been described as "a thorn in the Kremlin's side."² He is currently in detention, where he has suffered from several serious medical conditions: Indeed, Amnesty International suggested last year that the authorities are trying to kill him slowly.³ Russian authorities have banned his organization as 'extremist'⁴—and earlier this year he was once again put on trial from prison and on March 22 convicted and sentenced to nine years in prison for alleged fraud as well as charges related to this libel case.⁵ even while the world watches Russia's invasion of Ukraine.

The slander charges were based on Mr. Navalny's criticism of all those who appeared in a pro-Putin video, among them a World War II veteran named Ignat Artemenko. In particular, in the lead-up to a plebiscite on a controversial package of amendments to the Russian Constitution—one of which had the effect of permitting Russian President Vladimir Putin to run for a third consecutive term despite an ostensible two-consecutive-term limit—the state-affiliated TV channel "RT" produced a video urging Russians to vote in favor of the amendments. The video featured celebrities and others, including Ignat Artemenko, each reciting a phrase from the preamble to the Russian constitution.

Shortly after the promotional video was made public, Mr. Navalny posted the following on Telegram and Twitter: "Oh, here they are, darlings. I must admit that so far the team of corrupt stooges looks rather weak. Look at them: this is a disgrace to the country. People with no conscience. Traitors." On this basis, Mr. Navalny was charged with having violated Article 128.1 of the Russian Criminal Code, which criminalizes "the dissemination of deliberately false information, contained in a public statement, denigrating the honor and dignity of another person and undermining his reputation."

During the pendency of the trial, the same prosecutor who was pursuing the slander case was urging a different court to find that Mr. Navalny had violated the terms of his probation under a 2014 conviction for allegedly overcharging a subsidiary of the French company Yves Rocher. Even though the European Court of Human Rights had found that the Yves Rocher case should have been reopened due to violations of Mr. Navalny's rights,⁶ and even though Mr. Navalny's alleged breaches of probation were only his apparent failure to check in with his probation officer on the stipulated day during certain periods in 2020 and his failure to immediately inform the officer of his whereabouts after having been

¹ European Court of Human Rights, *Navalnyy v. Russia*, App. No. 101/15, Oct. 17, 2017.

² Daria Litvinova, *Explainer: Why Navalny is a Thorn in the Kremlin's Side*, AP, Jan. 22, 2021, *available at* <https://apnews.com/article/alexei-navalny-russia-explained-88c97b51172dbc0cff13f4d9e17b1f2a>.

³ Reuters, *Amnesty International Says Russia May Be Slowly Killing Navalny*, Apr. 6, 2021, *available at* <https://www.reuters.com/article/us-rights-amnesty/amnesty-international-says-russia-may-be-slowly-killing-navalny-idUSKBN2BT31F?il=0>.

⁴ Steve Rosenberg, *Alexei Navalny: Moscow Court Outlaws 'Extremist' Organisations*, BBC, Jun. 10, 2021, *available at* <https://www.bbc.com/news/world-europe-57422346>.

⁵ Anton Troianovski and Valeriya Safronova, *Aleksei Navalny, Fiery Putin Critic, Is handed a New, 9 Year Prison Sentence*, N.Y. Times, Mar. 22, 2022, *available at* <https://www.nytimes.com/2022/03/22/world/europe/russia-navalny-prison.html>; Andrew Roth, *Alexei Navalny Faces 15 More Years in Prison As New Trial Starts*, The Guardian, Feb. 15, 2022, *available at* <https://www.theguardian.com/world/2022/feb/15/alexei-navalny-faces-10-more-years-prison-focus-ukraine-crisis-russia>.

⁶ European Court of Human Rights, *Navalnyy v. Russia*, App. No. 101/15, Oct. 17, 2017, para 95 ("[T]he most appropriate form of redress would, in principle, be the reopening of proceedings").

released from a German hospital, a Russian court re-imposed a custodial sentence on February 2. On February 20, 2021—the same day an appellate court affirmed the re-imposition of a custodial sentence in the Yves Rocher case—Mr. Navalny was convicted of slander and fined, with the fine added to his sentence in the Yves Rocher case.

The prosecution and conviction of Mr. Navalny for an expression of political opinion are inconsistent with international standards protecting the right to freedom of expression. First, Mr. Navalny's post on Telegram and Twitter was a value judgment, not a statement of fact, and the European Court has made clear that statements that are not susceptible of proof (like value judgments) cannot be penalized without violating the right to freedom of expression (as all individuals must be free to have opinions); moreover, Mr. Navalny's social media post was not specific to Mr. Artemenko and the prosecution did not show "an objective link between the impugned statement and the person" alleging that they were slandered, as required by European Court case law. Second, even if Mr. Navalny's social media post was considered a statement of fact, his criminal prosecution and conviction were a disproportionate response: On the one hand, Mr. Artemenko exposed himself to potential criticism by participating in a highly-publicized political video; and on the other hand, criminal sanctions are an especially severe reaction.

Additionally, the conduct of the trial was inconsistent with Mr. Navalny's procedural rights. The trial court repeatedly curtailed Mr. Navalny's efforts to cross-examine Mr. Artemenko's grandson, a key prosecution witness—eventually stopping his questions entirely without even allowing his lawyers to resume the cross-examination. This violated Mr. Navalny's right to call and examine witnesses. Further, the court's failure to address defense arguments—in particular, expert evidence presented by the defense to the effect that Mr. Navalny's statement was a value judgment—was sufficiently arbitrary as to render Mr. Navalny's conviction inconsistent with his right to be presumed innocent under international standards.

Finally, there are sufficient indicia of political motivation in this case to meet the threshold for finding a violation of Article 18 of the European Convention on Human Rights, which forbids the abuse of the criminal justice system for 'ulterior motives'—here, in order to suppress Mr. Navalny's political activities. Moreover, Article 46 of the European Convention provides that states must abide by final judgments of that court. The Committee of Ministers has made clear that states parties to the Convention likewise "have the general obligation to solve the problems underlying violations found" in court decisions.⁷ In light of Russia's repeated refusal to afford Mr. Navalny his fair trial and other rights, in proceeding after proceeding and in the face of admonitions from the court, the violations in this latest case must be considered as amounting to persistent violations of his rights.

In the context of Russia's expulsion from the Council of Europe, the Committee of Ministers should nevertheless remain seized with Russia's previous and ongoing defiance of the Court.

⁷ Guide on Article 46 of the European Convention on Human Rights p. 8 (Aug. 31, 2021), *available at* https://www.echr.coe.int/Documents/Guide_Art_46_ENG.pdf.

A. POLITICAL AND LEGAL CONTEXT

Over the past several years, the Russian authorities have escalated their crackdown on activists and others exercising their right to freedom of expression—with a dramatic further clamp down following Russia’s invasion of Ukraine.

The Russian Parliament has facilitated this escalation by adopting or expanding laws that limit rights. And Russia has used the COVID-19 outbreak as an excuse to bolster its clamp down. At the same time, President Vladimir Putin has opened the door to staying in power for an additional twelve years by amending the Russian Constitution. It was in this context that Mr. Navalny made the comments in question.

Political Climate

Russia has used criminal and administrative offenses such as “mass simultaneous presence in public causing a violation of public order” and “repeated violation of the procedures for holding public events”⁸ to repress protests. For instance, in December 2020, opposition figure Yuliya Galyamina was convicted of repeatedly violating public assembly rules and given a two-year suspended sentence, although all she did was “post[] information on social media and tak[e] part in a peaceful public assembly.”⁹ Moreover, while some pandemic-related restrictions have been loosened, Human Rights Watch has noted that “peaceful protests remained effectively outlawed” due to COVID-19 rules¹⁰ - which Russia is using as a justification for some of the arrests of thousands protesting their invasion of Ukraine.¹¹

Russia has also adopted a set of widely-criticized laws over the last several years that regulate—and chill—non-governmental organizations.¹² One law requires such organizations to register as foreign agents.¹³ Another allows the Russian Attorney General to designate foreign NGOs as “undesirable.”¹⁴ As a result, those who work with them can be prosecuted—first administratively, and then, for repeated ‘offenses,’ criminally. For instance, in February of last year, a court convicted Anastasia Shevchenko of repeated

⁸ Perseus Strategies with Support from Memorial Human Rights Center, *The Kremlin’s Political Prisoners: Advancing a Political Agenda by Crushing Dissent*, pp. 10-11 (May 2019), available at <https://www.perseus-strategies.com/wp-content/uploads/2019/04/The-Kremlins-Political-Prisoners-May2019.pdf>.

⁹ Human Rights Watch, *Russian Court Sentences Opposition Figure to 2-Year Suspended Sentence*, Dec. 23, 2020, available at <https://www.hrw.org/news/2020/12/23/russian-court-sentences-opposition-figure-2-year-suspended-sentence>.

¹⁰ Human Rights Watch, *Russia: Events of 2020*, available at <https://www.hrw.org/world-report/2021/country-chapters/russia#>.

¹¹ Yana Pashaeva, *How the Russians Arrested for Protesting the “Special Military Operation” in Ukraine Are Being Treated*, *Slate*, Mar. 11, 2022, available at <https://slate.com/technology/2022/03/russia-protesters-arrests.html> (“[A]ll rallies are unauthorized; the government is using the pandemic as an excuse to deny requests for any demonstrations.”).

¹² See generally Perseus Strategies, *supra* note 9, at pp. 11-12.

¹³ Human Rights Watch, *Russia: New Effort to Stifle Independent Groups*, Nov. 12, 2020, available at <https://www.hrw.org/news/2020/11/12/russia-new-effort-stifle-independent-groups>

¹⁴ Human Rights Watch, *Russia: Persecution of ‘Undesirable’ Activists*, Jan. 18, 2020, available at <https://www.hrw.org/news/2020/01/18/russia-persecution-undesirable-activists>.

participation in ‘Open Russia,’ an ‘undesirable organization,’ based on her role at a meeting and attendance at a picket.¹⁵

A recent flashpoint was the July 1, 2020 plebiscite to gauge support for a package of amendments to the Russian Constitution.¹⁶ Most famously, these amendments reset the clock for calculating the number of terms a President would be permitted to serve, effectively allowing President Putin to circumvent the two-term limit in the Russian Constitution.¹⁷ But the package also included other provisions, such as protections for “historical truth” regarding the Russian role in World War II,¹⁸ including forbidding “belittling the people’s heroic protection of the Fatherland.”¹⁹ Another amendment in the package defined marriage as between a man and a woman.²⁰ Further amendments broadened the authority of the Russian Constitutional Court to order the non-execution of judgments of the European Court of Human Rights if it deems them inconsistent with the Russian Constitution.²¹ And other provisions “enable the president, with support from Parliament’s upper chamber, to remove judges from the Constitutional and Supreme Courts.”²²

The provisions regarding Russia’s role in World War II and marriage were characterized at the time as “a way of getting people excited about the changes - and getting them to the ballot boxes That’s where the populist slogans come in - and subjects like God, family and marriage.”²³ Russia’s elections authority ultimately reported that almost 78% of voters²⁴ supported the amendments, and President Putin recently signed them into law.²⁵

In the lead-up to the vote, “a long parade of prominent Russians who depend on the state for their positions and income — from actors and musicians to the head of the Hermitage Museum in St. Petersburg and the patriarch of the Russian Orthodox Church — . . .

¹⁵ See Clooney Foundation for Justice, Conviction of Anastasia Shevchenko Shows Pernicious Role of ‘Undesirable Organizations’ Law, Feb. 18, 2021, *available at* <https://cfj.org/wp-content/uploads/2021/02/Conviction-of-Anastasia-Shevchenko-in-Russia-Shows-Pernicious-Role-of-Undesirable-Organizations-Law.pdf>.

¹⁶ These amendments had already been ratified by federal and regional authorities at the time of the plebiscite. Andrew Higgins, The Theatrical Method in Putin’s Vote Madness, N.Y. Times, Jul. 1, 2020.

¹⁷ Elizabeth Teague, Russia’s Constitutional Reforms of 2020, 5 Russian Politics 301, 310-311 (2020) (the “argument was that the changes that were to be made to the constitution were so substantial that, while it was not a new constitution, it would have changed so significantly that Putin’s four terms under the old version should be discounted”).

¹⁸ Danila Galperovich, Russia’s New Constitution to Further Silence Debate, VOA, Jul. 18, 2020, *available at* https://www.voanews.com/a/press-freedom_russias-new-constitution-further-silence-debate/6193040.html

¹⁹ Teague, *supra* note 17, at 306.

²⁰ *Id.*

²¹ Venice Commission, Opinion on the Draft Amendments to the Constitution (As Signed by the President of the Russian Federation on 14 March 2020) Related to the Execution in the Russian Federation of Decisions by the European Court of Human Rights, June 18, 2020, ¶ 65 (“[T]he proposed amendments enlarge the possibilities for the Russian Constitutional Court to declare that decisions of interstate bodies adopted on the basis of provisions of international treaties of the Russian Federation which collide with the Constitution may not be executed in the Russian Federation.”).

²² Freedom House, Freedom in the World 2021 (Russia), *available at* <https://freedomhouse.org/country/russia/freedom-world/2021>.

²³ Steve Rosenberg, Russia’s Putin Wants Traditional Marriage and God in Constitution, Mar. 3, 2020, BBC, *available at* <https://www.bbc.com/news/world-europe-51719764>.

²⁴ Amy Mackinnon, Putin’s Russia Gets Voters’ Rubber Stamp, Foreign Policy, Jul. 3, 2020.

²⁵ Vladimir Isachenkov. Putin signs law allowing him 2 more terms as Russia’s leader, April 5, 2021, AP, *available at* <https://apnews.com/article/russia-putin-signs-law-allows-2-more-terms-d9acdada71b75c3daeafb389782fed4b>

paraded across state television urging people to vote.”²⁶ There were also significant concerns about the fairness of the vote. According to Freedom House, “[s]tatisticians claimed [the actual vote] was potentially the most falsified vote in Russian history.”²⁷ Those campaigning for a ‘no’ vote had their website blocked.²⁸ And the Russian watchdog organization Golos reported “irregularities.”²⁹ Following “reports of irregularities at some polling stations, and intimidation of activists and journalists seeking to monitor the vote” the European Union called for an investigation.³⁰

After the vote, Human Rights Watch reported that “authorities launched a crackdown on dissenting voices, with new, politically motivated prosecutions and raids on the homes and offices of political and civic activists and organizations.”³¹ Likewise, the Moscow Times reported that “[t]he week [after] Russia adopted constitutional changes [w]as . . . marked by a series of high-profile arrests and sentences for activists, journalists and government officials.”³²

Freedom of Expression

Russia has in particular sought to deter criticism of the State and officials, both through new legislation and prosecutions—a trend that has snowballed following Russia’s invasion of Ukraine. For instance, in 2019, Russia outlawed “blatant disrespect” for the State.³³ By March 2020, 12 months after the law was adopted, Human Rights Watch reported that an independent group had found that the “overwhelming majority of such charges involved alleged insults against Putin.”³⁴

Further, in addition to the ‘foreign agent’ laws discussed above, which can be used to declare media entities ‘foreign agents,’³⁵ Russia has also invoked legislation on extremism to crack down on journalists. Journalist Svetlana Prokopyeva, for instance, was tried and convicted of ‘justifying terrorism’ for a radio broadcast in which she commented critically

²⁶ Higgins, *supra* note 16.

²⁷ Freedom House, Freedom in the World 2021 (Russia), *available at* <https://freedomhouse.org/country/russia/freedom-world/2021>.

²⁸ Vladimir Kara-Murza, Putin Finally Sheds All Democratic Appearances, Wash. Post, Jul. 6, 2020, *available at* <https://www.washingtonpost.com/opinions/2020/07/06/putin-finally-sheds-all-democratic-appearances/>. Vladimir Kara-Murza. Putin finally sheds all democratic appearances (Владимир Кара-Мурза. «Путин наконец отбросил игры в демократию»), The Washington Post, 6 июля 2020 г., доступно по адресу: <https://www.washingtonpost.com/opinions/2020/07/06/putin-finally-sheds-all-democratic-appearances/>

²⁹ See The Movement for Defence of Voters’ Rights Golos. Preliminary Statement on the Early Vote on the Amendment of the Russian Constitution, Jul. 1, 2020, *available at* <https://www.golosinfo.org/en/articles/144476>.

³⁰ RFE/RL, EU Calls For Investigation Into Irregularities In ‘Triumphant’ Vote For Putin, July 2, 2020, *available at* <https://www.rferl.org/a/eu-calls-for-investigation-into-irregularities-in-triumphant-vote-for-putin/30702503.html>.

³¹ Human Rights Watch, Russia: Events of 2020, *available at* <https://www.hrw.org/world-report/2021/country-chapters/russia#>.

³² The Moscow Times, A Timeline of Russia’s Crackdown Since the Constitutional Reform Vote, Jul. 10, 2020, *available at* <https://www.themoscowtimes.com/2020/07/10/a-timeline-of-russias-crackdown-since-the-constitutional-reform-vote-a70836>.

³³ Federal Law on Amendments to the Federal Law on Information, Information Technologies and on Protection of Information, No. 30-FZ, Mar. 18, 2019.

³⁴ Human Rights Watch, Russia: Events of 2020, *available at* <https://www.hrw.org/world-report/2021/country-chapters/russia#>.

³⁵ Jessica Jerreat, Russia Ups Legal Pressure on Foreign Media Outlets, VOA, Feb. 3, 2021, *available at* <https://www.voanews.com/press-freedom/russia-ups-legal-pressure-foreign-media-outlets>. As of August 2020, there were 11 media organizations listed. See U.S. Dep’t of State, 2020 Country Reports on Human Rights Practices: Russia, *available at* <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/russia>.

on the political environment and its potential effects on a teenager who had detonated a bomb at an FSB building.³⁶ Indeed, according to the most recent U.S. State Department human rights report on Russia, “authorities prosecuted 585 extremism cases in 2019, the majority of which included charges of ‘extremism’ levied against individuals for exercising free speech on social media and elsewhere.”³⁷

COVID-19

The pandemic has also exacerbated some of these concerning trends. For instance, in March 2020, a new ‘fake news’ provision was introduced into the Criminal Code, which criminalizes publicly disseminating knowingly false information “about circumstances that pose a threat to the life and safety of citizens.” Russian human rights organization Agora found that prosecutions under this provision were initiated every two days.³⁸ In November 2020, for instance, journalist Alexander Pichugin was convicted of spreading ‘fake news’ for sarcastic commentary on the fact that religious institutions had been permitted to remain open despite the prevalence of COVID-19.³⁹

Russia’s Invasion of Ukraine

On February 24, 2022 Russia invaded Ukraine. The invasion has been met with fierce opposition not only in Ukraine, but also at home, with many Russians taking part in nationwide protests. Russian authorities have resorted to extreme measures to stifle dissent. For example on the day of the invasion, the Investigative Committee of Russia published a warning that organizing unauthorized gatherings was a prosecutable offence.⁴⁰ Despite these threats, peaceful protesters have continued to denounce the war, with thousands of Russians arrested across the country.⁴¹ The authorities have also cracked down on foreign and independent media reporting on the invasion with the Russian communications regulator blocking digital media outlets, radio stations, as well as foreign social media outlets.⁴²

³⁶ TrialWatch Fairness Report: Russia v. Svetlana Prokopyeva, Jan. 2021, *available at* <https://cfj.org/wp-content/uploads/2021/02/Svetlana-Prokopyeva-February-2021.pdf>.

³⁷ U.S. Dep’t of State, 2020 Country Reports on Human Rights Practices: Russia, *available at* <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/russia/>.

³⁸ Agora International Human Rights Group, The Fake News ‘Infodemic’: The Fights Against Coronavirus as a Threat to Freedom of Speech, *available at* https://agora.legal/fs/a_delo2doc/196_file__ENG_final.pdf.

³⁹ Clooney Foundation for Justice, Statement on the Conviction of Journalist Alexander Pichugin on ‘Fake News’ Charges in Russia, Nov. 12, 2020, *available at* <https://cfj.org/wp-content/uploads/2020/11/Statement-on-the-Conviction-of-Alexander-Pichugin-in-Russia.pdf>.

⁴⁰ Human Rights Watch, Russia; Arbitrary Detention of Anti-War Protesters, Feb. 26, 2022, *available at* <https://www.hrw.org/news/2022/02/26/russia-arbitrary-detentions-anti-war-protesters>.

⁴¹ See Ivan Nechepurenko & Dan Bilefsky, Thousands of Russians Protest President Vladimir V. Putin’s Assault on Ukraine. Some Chant: ‘No to War!’” N.Y. Times, Feb. 24, 2022, *available at* <https://www.nytimes.com/2022/02/24/world/europe/russia-protests-putin.html>; Guy Faulconbridge et al., More Than 4,300 Detained at Anti-War Protests in Russia,” Reuters, Mar. 7, 2022, *available at* <https://www.reuters.com/world/europe/more-than-64-people-detained-anti-war-protests-russia-protest-monitor-2022-03-06/>.

⁴² See Al Jazeera, Amid War, A Critical Russian Radio Station Goes Silent, Mar. 2 2022, *available at* <https://www.aljazeera.com/news/2022/3/2/amid-war-an-independent-russian-radio-station-goes-silent>; Anton Troianovski, Russia Takes Censorship to New Extremes, Stifling War Coverage, N.Y. Times, Mar. 4, 2022, *available at* <https://www.nytimes.com/2022/03/04/world/europe/russia-censorship-media-crackdown.html>; Human Rights Watch, Russia Criminalizes Independent War Reporting, Anti-War Protests, Mar. 7, 2022, *available at* <https://www.hrw.org/news/2022/03/07/russia-criminalizes-independent-war-reporting-anti-war-protests>.

On March 4, lawmakers also enacted new laws under the Criminal Code and the Code of Administrative Offences that make it an offence to spread “fake news” about the Russian armed forces – essentially making it illegal to report on the invasion or even call it that – and protesting against the invasion or calling on other countries to impose sanctions on Russia.⁴³ The penalties under the new laws range from 50, 000 ruble fines under the Code of Administrative Offences to 15 years’ imprisonment under the Criminal Code.⁴⁴

Russia’s Suspension and Removal from the Council of Europe

On February 25, 2022, following Russia’s invasion of Ukraine the Committee of Ministers of the Council of Europe adopted a decision to suspend Russia from its “rights of representation in the Council of Europe” because “[the invasion] goes against everything [the Council of Europe] stand for and is a violation of [its] statute and of the European Convention on Human Rights.”⁴⁵ The suspension took immediate effect.⁴⁶

On March 15, Russia notified the Secretary-General of the Council of Europe of its decision to withdraw from the Council of Europe.⁴⁷ Shortly thereafter, on March 16, the Council decided that Russia had “cease[d] to be a member of the Council of Europe as from 16 March 2022,”⁴⁸ with the result that Russia ceased to be a party to the European Convention on Human Rights “under the same conditions.”⁴⁹ The European Court then announced that it had decided to “suspend the examination of all applications against the Russian Federation pending its consideration of the legal consequences of this Resolution

⁴³ Article 207.3 of the Criminal Code makes it an offence to publicly disseminate, under the guise of truth “knowingly false information including facts on the use of the Armed Forces of the Russian Federation for the purpose of protecting the interests of the Russian Federation and its citizens, maintaining international peace and security.” The penalty ranges from 3 years’ imprisonment to up to 15 years’ imprisonment if the dissemination of information causes “grave consequences.” Article 280.3 of the Criminal Code prohibits “public actions aimed at discrediting the use of the Armed Forces ... including public calls to prevent their use,” with a fine of up to 300, 000 rubles or 3 years’ imprisonment. If the “public actions” lead to “mass disruption of public order” the maximum penalty increases to 5 years’ imprisonment. Article 284.2 of the Criminal Code makes it a criminal offence to call on a foreign state to impose sanctions on Russia and again imposes a fine of 500, 000 rubles or up to 3 years’ imprisonment. Article 20.3.3 of the Code of Administrative Offences makes it an offence to commit “[p]ublic actions aimed at discrediting the use of the Armed Forces of the Russian Federation for the purpose of protecting the interests of the Russian Federation and its citizens, maintaining international peace and security, including public calls to prevent the use of the Armed Forces of the Russian Federation for these purposes.” Article 20.3.4 of the Code of Administrative Offences makes it an administrative offence for a citizen to call for the imposition of sanctions by a foreign state. The penalty for both administrative offences is a fine of up to 50, 000 rubles and under Art. 20.3.3 is doubled if “accompanied by calls for holding unauthorized public events.”

⁴⁴ Marko Milanovic, *The Legal Death of Free Speech in Russia*, EJIL Talk!, Mar. 8, 2022, *available at* <https://www.ejiltalk.org/the-legal-death-of-free-speech-in-russia/>.

⁴⁵ Steven Erlander, *The Council of Europe Suspends Russian for its Attack on Ukraine*, N.Y. Times, Mar. 3, 2022 (“its invasion of Ukraine ‘goes against everything we stand for and is a violation of our statute and of the European Convention on Human Rights,’” its secretary general, Marija Pejcinovic Buric, said ...) *available at* <https://www.nytimes.com/2022/03/03/world/europe/council-of-europe-russia-suspension.html>

⁴⁶ Council of Europe, *Situation in Ukraine – Measures to be taken, including under Article 8 of the Statute of the Council of Europe*, 1426ter meeting, CM/Del/Dec(2022)1426ter/2.3, 25 Feb. 2022, *available at* [https://search.coe.int/cm/Pages/result_details.aspx?Reference=CM/Del/Dec\(2022\)1426ter/2.3](https://search.coe.int/cm/Pages/result_details.aspx?Reference=CM/Del/Dec(2022)1426ter/2.3)

⁴⁷ Council of Europe, *Council of Europe Leaders Make Joint Statement on the Exclusion of the Russian Federation from the Council of Europe*, Mar. 15, 2022, *available at* <https://go.coe.int/Xr6Ck>.

⁴⁸ Council of Europe, *Resolution CM/Res (2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe*, Mar. 16, 2022, *available at* https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a5da51.

⁴⁹ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Art. 58(3) (“Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.”).

for the work of the Court.”⁵⁰ On March 22, the European Court clarified that it has jurisdiction over violations of the Convention until 16 September 2022, at which point Russia will cease to be party to the European Convention.⁵¹

Fair Trial and Due Process Rights

The most recent U.S. Department of State human rights report on Russia noted that “judges remained subject to influence from the executive branch,”⁵² with an acquittal rate of less than 1% in 2019. Likewise, Freedom House has found that the “judiciary lacks independence from the executive branch, and career advancement is effectively tied to compliance with Kremlin preferences.”⁵³ These findings have been echoed by the Council of Europe’s Commissioners for Human Rights⁵⁴ and the UN Special Rapporteur on the Independence of Judges and Lawyers.⁵⁵

Other violations of the right to a fair trial have also been documented.⁵⁶ For instance, a recent TrialWatch Fairness Report found that during the trial of journalist Svetlana Prokopyeva, the court violated her right to call and examine witnesses by precluding her from calling the authors of the key expert report on which the prosecution relied.⁵⁷ Likewise, another TrialWatch Fairness Report—on the trial of lawyer Mikhail Benyash—found that the defendant’s right to call and examine witnesses had been violated where the court declined to call one of the key investigators and “repeatedly interrupt[ed] and abridg[ed] the cross-examination of key prosecution witnesses on material aspects of their testimonies.”⁵⁸

It is also not uncommon for expert testimony to feature heavily at trial in Russia, sometimes supplanting independent legal reasoning by the court. For instance, in the Prokopyeva case, the court “simply excerpted the conclusory assertion of the prosecution’s experts”⁵⁹ in its judgment.

⁵⁰ European Court of Human Rights, Press Release, The European Court of Human Rights Decides to Suspend the Examination of All applications against the Russian Federation, Mar. 16, 2022.

⁵¹ European Court of Human Rights, Press Release, Resolution of the European Court of Human Rights on the Consequences of the Cessation of Membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights, Mar. 22, 2022, *available at* https://echr.coe.int/Documents/Resolution_ECHR_cessation_membership_Russia_CoE_ENG.pdf.

⁵² U.S. Dep’t of State, 2020 Country Reports on Human Rights Practices: Russia, *available at* <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/russia/>.

⁵³ Freedom House, Freedom in the World 2021 (Russia), *available at* <https://freedomhouse.org/country/russia/freedom-world/2021>.

⁵⁴ Kommersant, As long as the judicial system of the Russian Federation does not become more independent, doubts about its effectiveness remain, Feb. 25, 2016, *available at* <https://www.kommersant.ru/doc/2924065>. See also: As Long as the Judicial System of the Russian Federation Does Not Become More Independent, Doubts About Its Effectiveness Remain, Feb. 25, 2016, *available at* <https://www.coe.int/en/web/commissioner/-/as-long-as-the-judicial-system-of-the-russian-federation-does-not-become-more-independent-doubts-about-its-effectiveness-remain>.

⁵⁵ Report of the Special Rapporteur on the Independence of Judges and Lawyers, Apr. 30, 2014, UN Doc. A/HRC/26/32/Add.1.

⁵⁶ U.S. Dep’t of State, 2020 Country Reports on Human Rights Practices: Russia, *available at* <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/russia/>.

⁵⁷ TrialWatch Fairness Report: Russia v. Svetlana Prokopyeva, Jan. 2021, *available at* <https://cfj.org/wp-content/uploads/2021/02/Svetlana-Prokopyeva-February-2021.pdf>.

⁵⁸ TrialWatch Fairness Report: Russian Federation v. Mikhail Benyash, Jul. 2020, *available at* <https://cfj.org/wp-content/uploads/2020/11/FAIRNESS-REPORT-ON-THE-TRIAL-OF-MIKHAIL-BENYASH-IN-RUSSIA.pdf>.

⁵⁹ Cf. Article 19, Rights in Extremis: Russia’s Anti-Extremism Practices from an International Perspective, Sep. 23, 2019, *available at* <https://www.article19.org/resources/rights-in-extremis-russias-anti-extremism-practices-from-an-international-perspective/>

Defamation Law in Russia

In 2011, the crimes of libel and insult were repealed (and turned into administrative offenses).⁶⁰ But just a few months later, Article 128(1) was re-added to the Russian Criminal Code. “Article 128(1) defines defamation [slander] (‘kleveta’) as ‘the dissemination of information known to be false impugning the honor and dignity of another person or damaging his reputation.’”⁶¹ While ‘insult’ remained an administrative offence, it appears to have a wider scope than slander—in particular, lacking requirements of falsity or *mens rea*.⁶²

For many years, Russia did not recognize a difference between value judgments and assertions of fact in its case law.⁶³ Additionally, the European Court of Human Rights has also admonished Russia regarding the important distinction between public figures and matters of public interest, on the one hand, and private matters, on the other, when it comes to balancing an individual’s interest in their reputation against the right to freedom of expression. For instance, in *Novaya Gazeta V Voronezhe v. Russia*, the European Court stressed that those “exposed to public scrutiny as regards their professional activities ought to have . . . a greater degree of tolerance to criticism in a public debate on a matter of general interest than a private individual.”⁶⁴

The Russian authorities have responded to some degree. The Plenary Session of the Russian Supreme Court produced a Decree in 2005 that sought to distinguish between facts and opinions.⁶⁵ Then, a 2010 Decree of the Plenary Session of the Supreme Court, “On the Practical Application by the Courts of the Law on the Mass Media,” created a distinction between “information on facts . . . capable of exerting a positive influence on public discussion of matters concerning, for example, the fulfillment of their functions by public officials and public figures” and “detailed information about the private life of a person not engaged in any public activity.”⁶⁶ It also emphasized that courts should take into account “whether [speech] can be regarded as an expression of opinion in the field of political discussions or as drawing attention to the discussion of socially significant issues.”⁶⁷

⁶⁰ Elspeth Reid, *Defamation and Political Comment in Post-Soviet Russia*, 38 *Review of Central and East European Law* 1, 12 (2013).

⁶¹ *Id.* at 13.

⁶² *Cf.* European Court of Human Rights, *Chemodurov v. Russia*, App. No. 72683/01, July 31, 2007, ¶16 (“As regards the legal basis for the interference, the present case is different from previous freedom-of-expression cases against Russia that have been before the Court, in that the domestic courts held the applicant liable not for his failure to prove the truthfulness of his assertions . . . but for having proffered an insulting statement.”).

⁶³ European Court of Human Rights, *Fedchenko v. Russia*, App. No. 33333/04, Feb 11, 2010, ¶ 37.

⁶⁴ European Court of Human Rights, *Novaya gazeta v Voronezhe v. Russia*, App. No. 27570/03, Dec. 21, 2010, ¶ 47.

⁶⁵ Decree on Court Practice on Cases on Protection of Honor and Dignity of Citizens as well as on Business Reputation of Citizens and Legal Entities, No. 3, ¶ 7 (2005) (indicating that false factual information consists of statements about facts or events that did not take place in reality at the time to which the information at issue relates); *id.* ¶ 9 (distinguishing between statements of fact and value judgments, which cannot be verified). While this Decree applies by its terms to civil cases, it is frequently referenced in connection with criminal proceedings.

⁶⁶ Reid, *supra* note 48, at 27 ; see Decree of the Supreme Court on the Practical Application by the Courts of the Law on the Mass Media, No. 16, ¶ 25 (2010).

⁶⁷ Decree of the Supreme Court on the Practical Application by the Courts of the Law on the Mass Media, No. 16, ¶ 28 (2010); see also *id.* (noting that the “humorous and satirical genre” protected by Article 10 of the European Convention is “subject to a large degree of exaggeration and even provocation, provided that society is not misled about the factual side of the case”).

Prior to Mr. Navalny's trial, Article 128(1) of the Criminal Code was again amended so as to permit the imposition of imprisonment as a penalty and so that it now permits criminal charges to be brought for statements applicable to multiple individuals.⁶⁸

B. CASE HISTORY

Prior Targeting of Mr. Navalny

This is not Mr. Navalny's first experience with Russian law enforcement. He has been arrested multiple times for protesting. In 2011, for instance, he participated in a protest related to alleged rigging of Russia's elections. He famously referred to the pro-Putin United Russia party as "a party of crooks and thieves."⁶⁹ He was then arrested, transferred to several different police stations (despite no evidence showing that this was necessary),⁷⁰ and convicted of disobeying police orders and sentenced to fifteen days' administrative detention. He took the case to the European Court, which found that Russia had breached Mr. Navalny's right to peaceful assembly as its response had been disproportionate.⁷¹

Further, Mr. Navalny and his co-defendant alleged:

"that the [domestic] court had refused to accept the video recordings of their arrest as evidence and to call and examine the witnesses they had requested, and had disallowed a number of questions to the police officers during their cross-examination. Furthermore, the court had not respected the equality of arms in that it had rejected the testimonies of all the defence witnesses while giving weight to the testimonies of the two police officers."⁷²

The European Court agreed with the claim that Article 6 had been violated, finding in particular that:

the domestic court "had decided to base their judgment exclusively on the version put forward by the police and had refused to accept additional evidence, such as video recordings, or to call other witnesses, when the applicants sought to prove that the police had not given any orders before arresting them. The Court considers that in the dispute over the key facts underlying the charges where the only witnesses for the prosecution were the police officers who had played an active role in the contested events, it was indispensable . . . to exhaust every reasonable possibility of verifying their incriminating statements."⁷³

⁶⁸ This provision was not applied to Mr. Navalny. See Tass, Putin Signs Bill Criminalizing Online Slander Into Law, Dec. 30, 2020, *available at* <https://tass.com/politics/1241379>.

⁶⁹ European Court of Human Rights, *Navalnyy and Yashin v. Russia*, App. No. 76204/11, Dec. 4, 2014, ¶ 7.

⁷⁰ *Id.* ¶ 68 ("The Government have not argued that in this case it was impossible, and no obstacles to drawing up the report on the spot may be discerned from the domestic decisions.").

⁷¹ *Id.* ¶ 72 ("[T]he sanction imposed on the applicants was unwarranted by the circumstances of the case and disproportionate.").

⁷² *Id.* ¶ 81.

⁷³ *Id.* ¶ 83.

Mr. Navalny was then arrested seven times between 2012 and 2014. He challenged these arrests—and his transportation to police stations rather than having potential administrative citations drawn up on the spot—before the European Court.⁷⁴ In respect of several of the incidents, the Court found that there had been no legitimate reason for the arrest, and in the others that the arrests had breached Mr. Navalny’s right to freedom of peaceful assembly because the arrests had not been necessary.⁷⁵ It went on to find that “a certain pattern may be discerned from the series of seven episodes . . . the pretexts for the arrests were becoming progressively more implausible, whereas the degree of potential or actual disorder caused by the applicant diminished.”⁷⁶ It concluded that at least as to the two arrests that lacked a legitimate purpose, there had been a violation of Article 18 of the European Convention, which forbids abuse of process.⁷⁷

Mr. Navalny was also charged with financial crimes in connection with his work with a timber company.⁷⁸ He was convicted of embezzlement in 2013⁷⁹ and sentenced to five years’ imprisonment, which was converted to a suspended sentence on appeal. The European Court of Human Rights again found that “the criminal law was arbitrarily and unforeseeably construed to the detriment [of Mr Navalny], leading to a manifestly unreasonable outcome of the trial.”⁸⁰ He was eventually given a re-trial and again found guilty.⁸¹ He was again given a five-year suspended sentence. As a result of his conviction, he was prevented from running in the 2018 elections.

In 2014, Mr. Navalny was convicted of fraud and money laundering. The charges in that case—relating to allegations that Mr. Navalny and his brother had overcharged a Russian subsidiary of the French company Yves Rocher—coincided with Mr. Navalny’s investigation into corruption by the head of the Investigation Committee of the Russian Federation.⁸² In the Yves Rocher case, Mr. Navalny was given a suspended sentence of three and a half years.⁸³ The European Court again subsequently found that his trial had been unfair: citing its prior decision, it held that the domestic court had failed to “make a proper assessment of the defence’s arguments. Consequently, the decisions reached by the domestic courts in the applicants’ criminal case were arbitrary and manifestly unreasonable.”⁸⁴

In addition to the Article 18 violation found in the protest cases, the European Court likewise found that Mr. Navalny’s placement under house arrest during the pendency of the Yves Rocher investigation had been “pursued . . . to suppress political pluralism.”⁸⁵

Mr. Navalny has also previously faced slander charges. Indeed, he was convicted in 2014 of slandering a city lawmaker from the ruling party by calling him a drug addict.⁸⁶ He was

⁷⁴ European Court of Human Rights, *Navalnyy v. Russia*, App. No. 29580/12, Nov. 15, 2018, ¶ 71.

⁷⁵ *Id.* ¶ 147.

⁷⁶ *Id.* ¶ 168,

⁷⁷ *Id.* ¶ 175.

⁷⁸ See generally European Court of Human Rights, *Navanyy & Ofitserov v. Russia*, Apps. Nos. 46632/13 and 28671/14, Feb. 23, 2016.

⁷⁹ *Id.* ¶ 61.

⁸⁰ *Id.* ¶ 115.

⁸¹ Neil MacFarquhar and Alexandra Odynova, *Moscow Court Rules Navalny Libeled Politician*, N.Y. Times, Apr. 22, 2014, available at <https://www.nytimes.com/2014/04/23/world/europe/moscow-court-rules-against-navalny.html>

⁸² European Court of Human Rights, *Navalnyy v. Russia* (No. 2), App. No. 43734/14, Apr. 9, 2019, ¶ 7.

⁸³ *Id.* ¶28.

⁸⁴ European Court of Human Rights, *Navalnyy v. Russia*, App. No. 101/15, Oct. 17, 2017, ¶ 83.

⁸⁵ European Court of Human Rights, *Navalnyy v. Russia* (No. 2), App. No. 43734/14, Apr. 9, 2019, ¶ 98.

⁸⁶ Nataliya Vasilyeva, *Navalny’s Conviction in Russia a Chilling Message*, Apr. 22, 2014, AP, available at

also indicted for slander based on his criticism of Pavel Karpov, “a key figure in the case of Russian lawyer Sergei Magnitsky, who died in a Russian jail in 2009.”⁸⁷

The RT Video and Mr. Navalny’s Alleged Slander

This slander case arises from a Telegram and tweet posted by Mr. Navalny in response to an “RT” video urging Russians to vote in the then-upcoming plebiscite. The video featured a number of celebrities and others reading provisions of the preamble to Russian Constitution. At the end of the video they say, “We accept the Constitution of the Russian Federation.”⁸⁸ Among those who participated in the video was a World War II veteran named Ignat Artemenko. Mr. Navalny posted on social media in response to the video: “Oh, here they are, darlings. I must admit that so far the team of corrupt stooges looks rather weak. Look at them: this is a disgrace to the country. People with no conscience. Traitors.”⁸⁹

This was not Mr. Navalny’s only criticism of those supportive of the plebiscite: He also criticized other celebrities who supported the campaign to get out the vote, saying that they were “revolting, vile and disgusting people” who “are lying, cheating the public for money.”⁹⁰

In addition to the social media post on Telegram and Twitter, Mr. Navalny appeared in a YouTube video in which he said “All of these people, we need to absolutely come down hard on all the people who participate in such videos. Russia Today is trying to raise sort of a mini scandal. I really did call everyone involved in this video a bunch of stooges. . . they will lay out these cards for us: there will be several crooks, there will definitely be a veteran, they will put on a show, there will be a distinguished doctor, an athlete and so on. And when you call them stooges, and I certainly consider stooges all those who, stooges and traitors, all those who pull people into this deception . . . Everyone will say, ‘My God, what?’ You insulted a veteran, a famous doctor who saved 27 lives or 277,000 lives, you called him a stooge. Of course, I called him a stooge, he is a stooge and is . . . And of course, these people should be labeled with clear words.”⁹¹

According to the indictment, a number of individuals saw the Telegram post and tweet and filed complaints.⁹² On June 15, the authorities opened an investigation. On June 17, the investigation department published a press release identifying World War II veteran I.S. Artemenko as a victim.⁹³ There was considerable public attention to the social media post, with state-affiliated media suggesting that Mr. Navalny was not patriotic.⁹⁴

<https://apnews.com/article/c0bd307f6c41455e91ad2d18c73f0fc8>.

⁸⁷ France24, Russian Opposition Leader Says Facing ‘Slander’ Charge, Oct. 15, 2018, *available at* <https://www.france24.com/en/20181015-russian-opposition-leader-says-facing-slander-charge>.

⁸⁸ See *generally* Navalny Versus the Veteran: A Defamation Case Pits Russia’s Opposition Against ‘RT’ and the Pro-Kremlin New Media, Meduza, June 18, 2020, *available at* <https://meduza.io/en/feature/2020/06/19/navalny-versus-the-veteran>.

⁸⁹ See <https://twitter.com/navalny/status/1267735112667496455>.

⁹⁰ Higgins, *supra* note 16

⁹¹ Indictment at 23.

⁹² See, e.g., Indictment at 7-9 par. 3-4 (“[H]e noticed the news that Alexei Anatolievich Navalny published a video along with his negative comment about the people who appeared in it. . . and so within several days after reading A. A. Navalny’s aforementioned public commentary, he (A. I. Lukin) filed several appeals to the state authorities of the Russian Federation with the intention that the law enforcement bodies conduct an inquiry.”).

⁹³ See Veteran of the Great Patriotic War Recognized As a Victim in the Investigation of the Criminal Case Against A. Navalny, *available at* <https://moscow.sledcom.ru/news/item/1474208/>.

⁹⁴ Navalny Versus the Veteran: A Defamation Case Pits Russia’s Opposition Against ‘RT’ and the

Mr. Navalny's Poisoning, Return to Russia, and the Slander Trial

On August 20, 2020, as recounted by UN Experts, Mr. Navalny was poisoned using a substance called Novichok.⁹⁵ The experts noted that “there appears to have been no reported development of Novichok by any countries besides the Russian Federation” and pointed to a pattern of harassment of Mr. Navalny by the Russian authorities. On this basis, the experts unequivocally stated that “[i]t is our conclusion that Russia is responsible for the attempted arbitrary killing of Mr. Navalny.”⁹⁶ Numerous states have publicly agreed with this assessment⁹⁷: For instance, the United States on March 2, 2021 declassified an intelligence assessment indicating that Russia’s security services orchestrated the poisoning.⁹⁸

After recuperating from the poisoning in Germany, Mr. Navalny returned to Russia on January 17. He was immediately detained based on allegations that he had breached the conditions governing his suspended sentence in the Yves Rocher case.⁹⁹ (His parole had been extended until the end of 2020 based on allegations that he had participated in unlawful protests.¹⁰⁰) On February 2, 2021 a court in Moscow converted his suspended sentence to incarceration based on this alleged failure to meet his parole conditions. On February 17, 2021, the European Court ordered his release from detention as a provisional measure.¹⁰¹ Mr. Navalny also appealed the domestic court’s February 2 decision.

In parallel, Mr. Navalny was brought to trial on the slander charge. After three days of hearings, on February 20, the court convicted him—on the same day an appeal court upheld the finding that he had violated his parole.¹⁰²

Prosecution’s Theory of the Case

Pro-Kremlin New Media, Meduza, June 18, 2020 (“Talk show host Vladimir Solovyov dedicated an entire segment of his YouTube show ‘Solovyov LIVE’ to the story on June 2, calling Navalny ‘Nazi scum’ and a ‘Vlasov bastard’ (a reference to a former Red Army general who defected to Nazi Germany).”), *available at* <https://meduza.io/en/feature/2020/06/19/navalny-versus-the-veteran>.

⁹⁵ Letter from the Special Rapporteurs on Extrajudicial, Summary or Arbitrary Executions and the Promotion and Protection of the Right to Freedom of Opinion and Expression, Dec. 30, 2020, *available at* <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=25830>

⁹⁶ OHCHR, Russia Responsible for Navalny Poisoning, Rights Experts Say, Mar. 1, 2021, *available at* <https://news.un.org/en/story/2021/03/1086012>.

⁹⁷ See, e.g., Rym Momtaz, France and Germany Accuse Russia in Navalny Poisoning, Politico, Oct. 7, 2020, *available at* <https://www.politico.eu/article/alexei-navalny-poisoning-france-germany-accuse-russia/>.

⁹⁸ David E. Sanger and Steven Erlanger, Biden Administration Accuses Russian Intelligence of Poisoning Navalny, and Announces Its First Sanctions, N.Y. Times, Mar. 2, 2021, *available at* <https://www.nytimes.com/2021/03/02/us/politics/russia-navalny-biden.html>.

⁹⁹ Anton Troianovski and Ivan Nechepurenko, Navalny Arrested on Return to Moscow in Battle of Wills With Putin, N.Y. Times, Jan. 17, 2021, *available at* <https://www.nytimes.com/2021/01/17/world/europe/navalny-russia-return.html>

¹⁰⁰ Human Rights Watch, Russian Court Rules to Jail Navalny, Feb. 2, 2021, *available at* <https://www.hrw.org/news/2021/02/02/russian-court-rules-jail-navalny>

¹⁰¹ European Court of Human Rights, Press Release, ECHR 063 (2021), *available at* <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-6942317-9334363&filename=The%20Court%20has%20decided%20to%20grant%20an%20interim%20measure%20on%20behalf%20of%20Aleksy%20Navalnyy%20indicating%20to%20the%20Russian%20Government%20to%20releas>

[e%20him.pdf](https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-6942317-9334363&filename=The%20Court%20has%20decided%20to%20grant%20an%20interim%20measure%20on%20behalf%20of%20Aleksy%20Navalnyy%20indicating%20to%20the%20Russian%20Government%20to%20releas).

¹⁰² See Radio Free Europe/Radio Liberty, Navalny's Prison Sentence Upheld, While He's Also Fined For Defamation, Feb. 20, 2021, *available at* <https://www.rferl.org/a/navalny-russia-court-veteran-sentence-defamation/31112560.html>.

The indictment alleges that Mr. Navalny's "remarks verbally express[ed] the facts of reality and the state of affairs pertaining to I. S. Artemenko, as well as statements consisting of negative judgments about I. S. Artemenko."¹⁰³ But the *specifics* of how Mr. Navalny had slandered Mr. Artemenko are unclear. Indeed, the indictment simply repeats the various words used in Mr. Navalny's Telegram post and tweet and then says they are "statements which do not reflect reality."¹⁰⁴ Likewise, in summarizing an expert analysis of Mr. Navalny's social media post, the indictment just notes that the expert found that Navalny's remarks were "expressing the facts of reality and the state of affairs that pertain to the Great Patriotic War (1941-1945) veteran I. S. Artemenko."¹⁰⁵ As the defense was at pains to stress, however, none of the alleged 'facts' are specifically identified in the indictment.¹⁰⁶

To the extent a theory can be discerned, the indictment appears to argue that the words "shameless" and "corrupt" would suggest that "he (I. S. Artemenko) participates in such videos and other programs for selfish gains."¹⁰⁷ Indeed, at closing argument, the prosecution referred to this by emphasizing that Mr. Navalny's reference to participants in the video as "corrupt" suggested Mr. Artemenko had been paid. Moreover, at trial, Mr. Artemenko's grandson referred repeatedly to his grandfather being particularly upset at allegedly being called a 'corrupt stooge' and a traitor. Likewise, in the judgment, the court specifically referenced the prosecution's expert's findings regarding the words "corrupt stooges."¹⁰⁸ The domestic court went on specifically to find that Mr. Navalny's social media post "contain[ed] affirmations about the commission of dishonest acts, wrong unethical behavior."¹⁰⁹

There are also indications that the prosecution's theory was that Mr. Navalny should be understood to have suggested that Mr. Artemenko had actually committed treason during World War II.¹¹⁰ A number of pre-trial witnesses whose statements were cited in the indictment reaffirmed that Mr. Artemenko had indeed "defended the Motherland during the Great Patriotic War."¹¹¹ Likewise, the indictment reflects an examination of Mr. Artemenko's personnel file and concludes that "no facts were established that I. S. Artemenko committed high treason, espionage, desertion and/or other crimes, including those against the foundations of the constitutional order and the state security."¹¹² As noted above, Mr. Artemenko's grandson also referred repeatedly to his grandfather being upset at being called a traitor. And the judgment also specifically referenced use of the word 'traitor.'¹¹³ In this regard, the domestic court found that "the examined evidence

¹⁰³ Indictment at 5.

¹⁰⁴ *Id.* at 20.

¹⁰⁵ *Id.* at 31.

¹⁰⁶ Defense Motion on the Accusation Against Aleksey Navalny.

¹⁰⁷ Indictment at 6. Indeed, the indictment is at pains to note that he was not compensated. See *Id.* at 8 (He "always did everything for everyone without mercenary motives . . . did not cater to anyone, especially not for any material benefits"); *id.* at 31 ("TV-Novosti" didn't transfer any money to I. S. Artemenko and his family members, did not provide any material or non-material benefits for participation in the video shoot.)

¹⁰⁸ Judgment at 7.

¹⁰⁹ *Id.* at 19.

¹¹⁰ Indictment at 7-8.

¹¹¹ *Id.* at 18; *id.* at 19 (another witness statement to the effect that the witness "personally knowing I. S. Artemenko since childhood, believes that A. A. Navalny is wrong and slandered I. S. Artemenko, since in reality I. S. Artemenko risked his life defending his Motherland from the German fascist invaders.").

¹¹² *Id.* at 30.

¹¹³ Judgment at 7.

proves that the victim I. S. Artemenko is not and was not a traitor, a disgrace to the country.”¹¹⁴

Boiled down to its essence, it seems that the prosecution’s argument was that Mr. Navalny’s words were critical, and Mr. Artemenko was a good man who should not have been criticized.¹¹⁵ Indeed, both during the legal proceedings and in the public sphere there were consistent references to Mr. Artemenko’s status as a veteran. For instance, the indictment summarizes that Mr. Navalny’s actions “entailed the infliction of moral harm upon *the veteran of the Great Patriotic War*.”¹¹⁶ At closing argument, the prosecution also sought to rebut Mr. Navalny’s argument that he had addressed all participants in the video and not Mr. Artemenko personally, saying that not everyone had joined the army at age 15. Further, the prosecutor expressly said that Mr. Navalny’s “intent was to deliberately discredit the victory of the USSR in the WWII.” Likewise, the judgment finds that Mr. Navalny was “insulting and slanderous toward a specific person, *namely the veteran of the Great Patriotic War I. S. Artemenko*.”¹¹⁷

This did not go unnoticed by the defense. On the first day of the trial, Mr. Navalny said that the case was “cunning” because “[i]t is necessary that in the hall I confront not shameless prosecutors, but something more important. And the idea arose: ‘Let’s find a veteran, put medals on him, so that we get Navalny vs. Veteran.’” Likewise, as Mr. Navalny put it in his final comments, “You constantly use it [World War II] because you do not want to talk about present. You use it, because it is very awkward to discuss any contemporary problem. People want to speak to you about corruption, poverty, [in]equality, healthcare. But you have nothing to reply. And when people like me start asking too many questions ... you immediately change the topic [to] veterans.”

Summary of the Proceedings

Testimony was heard during two of the hearings: on February 5 and February 12. On February 16, the parties made closing arguments, and on February 20, before the court rendered its decision, Mr. Navalny gave final remarks. During the first hearing, Mr. Artemenko and his nurse testified via video-conference, while his grandson testified in person, among others.¹¹⁸ Mr. Artemenko’s testimony was cut short after he said he began to feel unwell. The court also pretermitted his grandson’s testimony at a key moment—as Mr. Navalny was questioning him about the apparent inconsistency between his testimony that no one had ‘filed a complaint’ and the fact that a complaint by Mr. Artemenko appeared in the case file.

Prior to the second day of trial, the defense moved for the judge’s recusal, citing among other things disparate treatment of government-affiliated journalists and those who were not affiliated with the government (with the former being given access to a recording of the first hearing).¹¹⁹ The judge rejected the motion. At the second hearing, the court

¹¹⁴ *Id.* at 16.

¹¹⁵ *Cf.* Indictment at 20 (“But in fact, I. S. Artemenko is an honest, altruistic and kind person who lives his life with dignity”)

¹¹⁶ *Id.* at 5.

¹¹⁷ Judgment at 18 (emphasis added).

¹¹⁸ One of those who had reported the tweet to the authorities also testified, as well as Mr. Artemenko’s neighbor.

¹¹⁹ Recusal Motion.

heard further testimony from Mr. Artemenko's grandson as well as two experts—one for the prosecution and one for the defense.¹²⁰ Mr. Navalny also testified.

During the first and second hearings, there were significant issues with the defense's ability to cross-examine prosecution witnesses, in particular in respect of three issues: a potential financial motive for supporting the prosecution; how Mr. Artemenko came to see Mr. Navalny's Telegram post and tweet; and the process of obtaining statements and testimony from Mr. Artemenko.

First, the defense sought to cross-examine Mr. Artemenko's grandson as to any potential financial motive for cooperating with the authorities, but the judge struck questions relating to his occupation as well as the involvement of Mr. Artemenko in his grandson's business affairs (e.g., Mr. Navalny sought to show that Mr. Artemenko's grandson had used his grandfather's name in setting up a cell-phone repair business). The court consistently rejected such questions, ostensibly on the ground that they were not relevant to the merits of the charges. Mr. Navalny explained that the questions were relevant because they might "explain the motive for the false accusation," but the court said that these were not questions 'on the merits.'

Second, the prosecution's theory was that Mr. Artemenko's nurse had told him about Mr. Navalny's social media post.¹²¹ Mr. Artemenko's grandson had said during the investigation that he had told the nurse about the post and subsequent video but had not wanted her to show them to his grandfather,¹²² but she showed them to him anyway.¹²³ He reiterated this point in his testimony at trial. Yet at trial, the nurse said that Mr. Artemenko's grandson had told her to share the comments with Mr. Artemenko.

Third and finally, the case file included a statement from Mr. Artemenko. At trial, Mr. Artemenko's grandson testified that no one in the family had filed a complaint, saying repeatedly on cross-examination that "we did not write a complaint." When the defense sought to confront Mr. Artemenko's grandson regarding this contradiction, after procedural wrangling over whether the defense could even show Mr. Artemenko's grandson the complaint in the case file, the court adjourned the hearing. This was an important question because the defense theory was that the prosecution had worked with Mr. Artemenko to generate the case. At the next hearing, Mr. Artemenko's grandson avoided answering when asked whether anyone had coached him prior to the resumption of his testimony. Further, when pressed on the inconsistency between his testimony and the presence of a complaint in the case file, the grandson simply said "I don't know."¹²⁴ The court also struck questions to the grandson relating to whether his grandfather could have known how to file such a complaint or with whom.¹²⁵ Eventually, the court went so

¹²⁰ One of those who had reported the tweet to the authorities also testified, as well as a doctor who examined Mr. Artemenko.

¹²¹ Indictment at 6 ("[H]is nurse Z. KH. Temurova told him that the patriotic video in which he participated was publicly commented on by Alexei Anatolievich Navalny."). See also Judgment at 5 ("I. S. Artemenko's grandson sent [Mr. Artemenko's nurse] a link to this video, but asked not to show the video to his grandfather because he feared for his health. She told I. S. Artemenko about the content of A. A. Navalny's comments regarding the video with his participation. She was not going to show the video to I. S. Artemenko, but after his persistent requests, she nevertheless agreed.").

¹²² *Id.* at 11.

¹²³ *Id.* ("She thought that sooner or later I. S. Artemenko would find out about what happened and decided to show him A. A. Navalny's comments on her phone.").

¹²⁴ Eventually, Mr. Artemenko's grandson suggested that perhaps his grandfather had written the complaint without his knowing about it.

¹²⁵ For instance, Mr. Navalny asked how Mr. Artemenko could have known the name of the head of the Second Department for Major Cases Investigation in Moscow.

far as to end the cross-examination of Mr. Artemenko's grandson on the ostensible basis that Mr. Navalny's questions were abusive and not 'relevant to the charges.' The court then declined to permit Mr. Navalny's lawyers to ask questions, either.

Further, when Mr. Artemenko testified briefly at the first hearing by video-conference, there were other individuals apparently present with him.¹²⁶ When the defense sought to ask about who else was present, the court provided only limited answers—ultimately indicating that another judge and the victim's daughter were present.¹²⁷ Then, during the second hearing, the prosecution sought to admit a written statement from Mr. Artemenko in lieu of further testimony (after he said he felt ill during the first hearing). During cross-examination, the defense asked Mr. Artemenko's grandson whether Mr. Artemenko could have written a complaint on his computer and printed it. The grandson responded, "I don't think he could write a statement." When pressed further, the grandson suggested that Mr. Navalny ask his grandfather about the statement—which of course he could not since Mr. Artemenko had submitted a statement in lieu of appearing at the second hearing.

At numerous points during the second hearing, Mr. Navalny sought to contest the provenance of Mr. Artemenko's ostensible statement, and how the prosecution came to obtain it. The judge refused to admit any such questions. The defense then sought a handwriting analysis, with a view again to seeking to show that the various documents purporting to be from Mr. Artemenko had been written by others, but this request too was rejected.

Expert Testimony

Two experts also testified at trial—one for the prosecution and one for the defense. The prosecution's expert said that "[t]he content of the comments, including 'corrupt stooges, traitors,' contain a negative judgment, in particular, of I. S. Artemenko. This opinion contains a judgment, but at the same time, by itself, contains a statement about the facts of reality, which can be verified for accuracy and proof."¹²⁸ And yet on cross-examination, the prosecution's expert several times admitted that Mr. Navalny's comments reflected a judgment. The prosecution's expert seemingly also included this conclusion in their report "[b]ut in the judgement they became evidence that [Mr. Navalny] did commit slander."¹²⁹ The defense also questioned the prosecution's expert as to whether Mr. Navalny had described an individual, or only the group of participants in the video. The expert replied simply that Mr. Navalny had described Mr. Artemenko because Mr. Artemenko was a participant in the video.

The defense expert, by contrast, testified that Mr. Navalny's words were evaluative. In particular, with respect to the word 'traitor,' the expert adverted to the phrase 'traitorous husband' to show its figurative sense—i.e., as a person "who has violated loyalty to social ideals and ignores the interests of society" as opposed to in the factual sense of treason to a country. The expert concluded that "[t]here is nothing here but a judgment."

¹²⁶ Recusal Motion ("A number of other people involved in the examination were present in the room with witnesses but stayed anonymous in the process.").

¹²⁷ Mr. Artemenko's nurse also testified by video-conference, over the objections of the defense.

¹²⁸ Judgment at 7-8.

¹²⁹ Elizaveta Foht, The court upheld the judgment of Navalny in the case of slander against the veteran, BBC News, Apr. 29, 2021, available at: <https://www.bbc.com/russian/news-56926168> ("In expert Glotova's report, it was found that Navalny's words about the 'traitors' were value judgments, and not facts. But in the judgment, they became evidence that the politician did commit slander.")

The prosecution's only response to the defense expert's testimony was to suggest that he had not been duly notified of the consequences of false testimony when his report had been commissioned prior to trial. The domestic court itself simply rejected the defense expert's analysis of the word "traitor," saying that because it was juxtaposed with "disgrace to the country," it must have been meant in a factual, rather than figurative, sense.¹³⁰

On February 20, 2021 the domestic court convicted Mr. Navalny and fined him 850,000 rubles.

Current Targeting of Mr. Navalny

On February 15, 2022 Mr. Navalny was once again hauled before court, this time in a trial where he faced fresh charges of fraud – allegedly stealing 2.7 million rubles' worth of donations given to his political organizations – as well as contempt of court charges related to the slander trial the subject of this report, for allegedly insulting the judge and prosecution witnesses.¹³¹ The trial was heard in the detention facility in the Vladimir region where Mr. Navalny is currently imprisoned based on his alleged failure to meet his parole conditions in the Yves Rocher case described above. On March 22, Mr. Navalny was convicted on both charges and sentenced to nine years' imprisonment.¹³²

¹³⁰ Judgment at 14 ("The Court notes that in the corresponding comment the word 'traitor' appears alongside the phrase 'disgrace to the country,' which corresponds to the direct meaning of the word 'traitor,' which was articulated by the expert, namely 'traitor to the Motherland,' which, along with other remarks, is a statement of a fact.").

¹³¹ See BBC News, Putin Critic Navalny Put on Trial Again in Russia, Feb. 16, 2022, *available at* <https://www.bbc.com/news/world-europe-60387695>; France 24, New Trial Against Kremlin Critic Navalny Starts, Feb. 15, 2022, *available at* <https://www.france24.com/en/live-news/20220215-new-trial-against-kremlin-critic-navalny-starts>; Meduza, In Prison and on Trial Here's Why Alexey Navalny Is Back in Court and Facing Up to 15 More Years Behind bars, Feb. 16, 2022, *available at* <https://meduza.io/en/feature/2022/02/16/in-prison-and-on-trial>.

¹³² Anton Troianovski and Valeriya Safronova, Aleksei Navalny, Fiery Putin Critic, Is handed a New, 9 Year Prison Sentence, The New York Times, March 22, 2022, *available at* <https://www.nytimes.com/2022/03/22/world/europe/russia-navalny-prison.html>;

M E T H O D O L O G Y



A. THE MONITORING PHASE

The Clooney Foundation for Justice’s TrialWatch initiative monitored this trial through a variety of means. Materials were then shared with Judge Tulkens, the TrialWatch Expert responsible for evaluating the fairness of the trial.

B. THE ASSESSMENT PHASE

Judge Tulkens concluded that these proceedings are inconsistent with international standards protecting the right to a fair trial and right to freedom of expression. Further, she found that Mr. Navalny’s prosecution and conviction meet the threshold for finding a violation of Article 18 of the European Convention, which forbids the misuse of the law for ulterior motives.

In analyzing the proceedings, she did not seek to supplant the role of the domestic courts, which have the “function to deal with errors of fact or law.” Rather, this report looks to whether the conduct of the proceedings in this case “infringed rights and freedoms” protected by international human rights law.¹³³ In particular, with respect to the right to a fair trial, the report assesses whether the domestic court “failed to observe specific procedural safeguards” and whether the conduct of the proceedings as a whole failed to guarantee “a fair hearing.”¹³⁴ Indeed, as both the European Court and the UN Human Rights Committee have made clear, it is not inconsistent with appropriate deference to domestic courts to find a lack of a fair trial “in the event of evident arbitrariness” in the disposition of a case, in particular where “a connection between the established facts, the applicable law and the outcome of the proceedings is wholly absent from the impugned judgment.”¹³⁵

Taking into account the appropriate level deference to the domestic court, it is clear that the proceedings were flawed along a number of dimensions: The domestic court appears to have presupposed Mr. Navalny’s guilt and made an arbitrary assessment of evidence; further, the domestic court limited Mr. Navalny’s examination of prosecution witnesses without giving sufficient reason for doing so and admitted a statement from an absent witness without counterbalancing measures. Taken together, the violations of Mr. Navalny’s procedural rights meet the standards for finding an unfair trial.

¹³³ European Court of Human Rights, *Centro Europa 7 S.R.L. & Di Stefano v. Italy*, App. No. 38433/09, June 7, 2012, ¶ 197; cf. UN Human Rights Committee, *Cuartero Casado v. Spain*, UN Doc. CCPR/C/84/D/1399/2005, July 25, 2005, ¶ 4.3 (“[T]he Committee recalls its constant jurisprudence that it is not competent to re-evaluate findings of fact or re-evaluate the application of domestic legislation, unless it can be ascertained that the decisions of domestic courts were arbitrary or amounted to a denial of justice.”).

¹³⁴ European Court of Human Rights, *Centro Europa 7 S.R.L. & Di Stefano v. Italy*, App. No. 38433/09, June 7, 2012, ¶ 197

¹³⁵ European Court of Human Rights, *Andelkovic v. Serbia*, App. No. 1401/08, Apr. 9, 2013, ¶ 24 (“[T]he Court will not question the interpretation of domestic law by the national courts, save in the event of evident arbitrariness.”); cf. UN Human Rights Committee, *Griffin v. Spain*, UN Doc. CCPR/C/53/D/493/1992, Apr. 4, 1995, ¶ 9.6 (“It is not, in principle, for the Committee to review the facts and evidence presented to, and evaluated by, the domestic courts, unless it can be ascertained that the proceedings were manifestly arbitrary, that there were procedural irregularities amounting to a denial of justice, or that the judge manifestly violated his obligation of impartiality.”).

Moreover, as explained on the eve of Mr. Navalny's appeal,¹³⁶ Mr. Navalny's prosecution and conviction were inconsistent with European Court of Human Rights jurisprudence regarding the right to freedom of expression both because they were a disproportionate response to his political speech and because the domestic court failed sufficiently to analyze the key questions of whether Mr. Navalny's social media post was a value judgment or falsifiable statement of fact and whether Mr. Navalny had even referred specifically to Mr. Artemenko.

Finally, and perhaps most significantly, the political context and conduct of the proceedings lead to the inescapable conclusion that the charges were a pretext for criminalizing Mr. Navalny's political speech.

For these reasons, Mr. Navalny's conviction should be overturned.

¹³⁶ See Clooney Foundation for Justice, TrialWatch Expert Says Aleksey Navalny's Slander Conviction Violated his Right to Freedom of Expression, Apr. 28, 2021, *available at* <https://cfj.org/wp-content/uploads/2021/04/TrialWatch-Expert-Says-Aleksey-Navalnys-Slander-Conviction-Violated-his-Right-to-Freedom-of-Expression.pdf>.

ANALYSIS



A. APPLICABLE LAW

This report draws upon the International Covenant on Civil and Political Rights (“ICCPR”); jurisprudence from the United Nations Human Rights Committee, tasked with monitoring implementation of the ICCPR; the European Convention on Human Rights (“ECHR” or “European Convention”); and jurisprudence from the European Court on Human Rights (“European Court”), which is tasked with monitoring the implementation of and enforcing the ECHR. The USSR acceded to the ICCPR in 1973, and the Russian Federation succeeded to The USSR’s obligations under the covenant in 1991.¹³⁷ Russia ratified the ECHR in 1998, subject to certain reservations.¹³⁸

B. INVESTIGATION AND PRETRIAL STAGE VIOLATIONS

Right to be Informed of Charges

Article 14(3)(a) of the ICCPR entitles every person charged with a criminal offence “to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.” The European Convention provides similar protections. As the European Court has explained, Article 6 of the Convention requires that the defendant be able “to understand fully the extent of the charges against him with a view to preparing an adequate defence.”¹³⁹ In particular, the Court has stressed the need for defendants to be informed of the “essential details concerning time and place”¹⁴⁰ of the alleged offense.

Here, the defense alleged that the indictment was not clear as to what precise elements of Mr. Navalny’s social media post constituted false statements of fact.¹⁴¹ Moreover, the defense argued that the indictment did not make clear when and where the first prosecution witness identified in the indictment had read Mr. Navalny’s comments,¹⁴² which was an important jurisdictional question under domestic law.¹⁴³ Taken together, the lack of these details in the indictment raises concerns regarding respect for Mr. Navalny’s right to be informed of the charges.

¹³⁷ International Covenant on Civil and Political Rights, United Nations Treaty Collection 2020 https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtmsg_no=IV-4&src=IND.

¹³⁸ Chart of Signatures and Ratifications of Treaty 005, Council of Europe (2020) <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures>

¹³⁹ European Court of Human Rights, *Mattocchia v. Italy*, App. No. 23969/94, July 25, 2000, ¶ 60.

¹⁴⁰ *Id.* ¶ 71.

¹⁴¹ Defense Motion on the Accusation Against Aleksey Navalny (“The investigator just quoted the comments made by Mr. Navalny” but did not clarify what exactly was in violation of Article 128.1(2) of the Criminal Code).

¹⁴² Indictment at 14 (“Later, during the same day, she learned that Alexey Anatolievich Navalny posted negative comments.”).

¹⁴³ Defense Motion on the Accusation Against Aleksey Navalny (“According to the investigation, the first person who has learnt about the statements of Navalny was Mrs. Bataman, however, the investigator mentioned neither place nor the exact time when the witness read the comments. . . . Firstly, it deprives Mr. Navalny of the right to defence since he is deprived of the right to know the circumstances of the incriminated offence. Secondly, it makes it impossible to determine the competent court based on the territorial principle.”).

C. VIOLATIONS AT TRIAL

Right to the Presumption of Innocence

Under both the ICCPR and the European Convention, defendants are entitled to be presumed innocent. As the UN Human Rights Committee has explained, the presumption “imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt.”¹⁴⁴ Likewise, the European Court has stated that the presumption of innocence requires that “when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused.”¹⁴⁵

In particular, it is well established that this right is violated if “there is some reasoning suggesting that the court regards the accused as guilty” prior to their having been proved guilty¹⁴⁶ and that “the presumption of innocence will be infringed where the burden of proof is shifted from the prosecution to the defence.”¹⁴⁷ Further, while it is “generally for the relevant domestic courts to evaluate facts and evidence in a particular case,” if the “evaluation was clearly arbitrary or amounted to a denial of justice”¹⁴⁸ the presumption of innocence is likewise violated.¹⁴⁹ For instance, in *Ashurov v. Tajikistan*, the UN Human Rights Committee found that because the domestic court had failed to consider major gaps in the case, the defendant had not been “afforded the benefit of th[e] doubt” in violation of Article 14(2).¹⁵⁰ The European Court has likewise held that “dismissing all evidence in the defendant’s favor without justification” violates the presumption of innocence,¹⁵¹ and it has made clear that where there is no “connection between the established facts, the applicable law and the outcome of the proceedings,” it will find a denial of justice.¹⁵² In this regard, the European Court has held that an insufficiently reasoned judgment of conviction can constitute a violation of Article 6(2) of the ECHR.¹⁵³

¹⁴⁴ UN Human Rights Committee, General Comment 32, U.N. Doc. CCPR/C/GC/32, Aug. 23, 2007, ¶ 30.

¹⁴⁵ European Court of Human Rights, *Barberà et al. v. Spain*, App. No. 10590/83, Dec. 6, 1988, ¶ 77.

¹⁴⁶ European Court of Human Rights, *Minelli v. Switzerland*, App. No. 8660/79, Mar. 25, 1983, ¶ 37; *cf.* UN Human Rights Committee, *Campbell v. Jamaica*, Mar. 30, 1992, UN Doc. CCPR/C/44/D/248/1987, ¶ 6.2

¹⁴⁷ European Court of Human Rights, *Telfner v. Austria*, App. No. 33501/96, Mar. 20, 2001, ¶ 15.

¹⁴⁸ See UN Human Rights Committee, *Pustovoit v. Ukraine*, U.N. Doc. CCPR/C/110/D/1405/2005, Mar. 20, 2014, ¶ 8.11.

¹⁴⁹ See UN Human Rights Committee, *Ashurov v. Tajikistan*, U.N. Doc. CCPR/C/89/D/1348/2005, Mar. 20, 2007, ¶ 6.7 (“There is no information before the Committee that, despite their having being raised by Ashurov and his defence, these matters were taken into account either during the second trial or by the Supreme Court. In the absence of any explanation from the State party, these concerns give rise to reasonable doubts about the propriety of the author’s son’s conviction.”); *see also* UN Human Rights Committee, *Larranaga v. Phillipines*, U.N. Doc. CCPR/C/87/D/1421/2005, July 24, 2006, ¶ 7.4; UN Human Rights Committee, *Iskandarov v. Tajikistan*, U.N. Doc. CCPR/C/101/D/1499/2006, Apr. 28, 2011, ¶ 6.6; UN Human Rights Committee, *Khostikoev v. Tajikistan*, U.N. Doc. CCPR/C/97/D/1519/2006, Dec. 3, 2009, ¶¶ 7.2-7.3.

¹⁵⁰ See UN Human Rights Committee, *Ashurov v. Tajikistan*, U.N. Doc. CCPR/C/89/D/1348/2005, Mar. 20, 2007, ¶ 6.7.

¹⁵¹ See European Court of Human Rights, *Navalnyy v. Russia*, App. No. 29580/12 & others, Nov. 15, 2018, ¶¶ 83-4.

¹⁵² European Court of Human Rights, *Andelkovic v. Serbia*, App. No. 1401/08, Apr. 9, 2013, ¶ 27; *see also* European Court of Human Rights, *Bochan v. Ukraine*, App. No. 22251/08, Feb. 5, 2015, ¶ 64 (discussing domestic decision characterized as “grossly arbitrary” or as entailing a ‘denial of justice’”).

¹⁵³ European Court of Human Rights, *Ajdarić v. Croatia*, App. No. 20883/09, Dec. 13, 2011, ¶¶ 46-52 (where domestic court “made no comments about the contradictory witness statements” “the decisions of the national courts did not observe the basic requirement of criminal justice that the prosecution has to

In this case, the standards for finding a violation of Mr. Navalny's right to be presumed innocent have been met in all three of these ways: by a premature indication of guilt on the part of the court; by failure to respect the burden of proof; and by a sufficiently arbitrary treatment of the evidence as to give rise to a denial of justice.

First, the domestic court suggested a predisposition to finding Mr. Navalny guilty. In particular, the court stated that it considered Mr. Navalny's arguments regarding the prosecution's failure to prove elements of the crime not credible because they were "aimed at avoiding criminal liability."¹⁵⁴ This is the kind of "premature expression" of a defendant's guilt by the tribunal charged with deciding that very issue that the European Court has said "will inevitably run foul" of the right to be presumed innocent.¹⁵⁵ The fact that the statement in question is to be found in the judgment convicting Mr. Navalny does not render it any less prejudicial; because it is part of the reasoning for the conviction, it antedates the conviction.¹⁵⁶

Second, in neither the indictment nor the judgment was the alleged slander fully specified; instead, the indictment and the court relied on the testimony of the prosecution expert. For instance, the court in its judgment simply recited that "[a]ccording to the expert report No. 246/6-118л/20 dated 07.20.2020, A. A. Navalny's aforementioned public statement contains remarks expressing the facts of reality and the state of affairs pertaining to I. S. Artemenko."¹⁵⁷ However, it appears that the prosecution's expert did in fact express the view that Mr. Navalny's statements could have amounted to value judgements and might not be strictly statements of fact.¹⁵⁸

Further, the defense argued that Mr. Navalny had not actually spoken specifically about Mr. Artemenko, instead criticizing all those who participated in the video. (To make this point, Mr. Navalny asked one prosecution witness whether his use of the term "Party of Crooks and Thieves" would allow anyone from United Russia—President Putin's party—to claim slander.) This was a key argument because—at least for civil defamation purposes—"plaintiffs must prove that the impugned information explicitly concerns them, rather than any abstract person or social group."¹⁵⁹ Instead of requiring the prosecution to make its case on this point, this went largely unaddressed in the judgment other than the court noting that "[t]he arguments of the defendant A. A. Navalny that the aforementioned comments do not contain slander because they are his negative judgment about all persons who participated in the campaign to support the amendments to the Constitution

prove its case beyond reasonable doubt and were not in accordance with one of the fundamental principles of criminal law, namely, *in dubio pro reo*.")

¹⁵⁴ Judgment at 18; see also *id.* at 19 ("The Court finds these explanations of the defendant as a way of defense against the charges brought against him.")

¹⁵⁵ European Court of Human Rights, *Nestak v. Slovakia*, App. No. 65559/01, Feb. 27, 2007, ¶ 88,

¹⁵⁶ Indeed, the UN Human Rights Committee has previously noted that violations of the right to the presumption of innocence can occur following a conviction but before it has become final. See UN Human Rights Committee, *Pinchuk v. Belarus*, U.N. Doc. CCPR/C/112/D/2165/2012, Oct. 24, 2014, ¶ 8.3.

¹⁵⁷ Judgment at 3.

¹⁵⁸ Elizaveta Foht, The court upheld the judgment of Navalny in the case of slander against the veteran, BBC News, Apr. 29, 2021, available at: <https://www.bbc.com/russian/news-56926168> ("In expert Glotova's report, it was found that Navalny's words about the "traitors" were value judgments, and not facts. But in the judgment, they became evidence that the politician did commit slander."); Margarita Alekhina & Vladislav Gordeev, The court postponed the hearing on Navalny's case of slander against the veteran until February 16, RBC Free News, Feb. 12, 2021, available at: <https://www.rbc.ru/rbcfreenews/6026bec19a794766a723986b>.

¹⁵⁹ Elena Sherstoboeva, Defamation Law in Russia in the Context of the Council of Europe (COE) Standards on Media Freedom, 9 J. Int'l Media and Entertainment Law 69, 85.

of the Russian Federation, cannot be recognized as reasonable.”¹⁶⁰ The court simply said that the video captioned Mr. Artemenko as a veteran,¹⁶¹ as if that were sufficient to rebut the defense theory that Mr. Navalny’s social media post had been general and not specific.

Taken together, the court effectively relieved the prosecution of the burden of proof as to two key questions: what, specifically, was the slander, and about whom was Mr. Navalny speaking.

Third and finally, the domestic court’s judgment was sufficiently arbitrary as to meet the standards for finding a violation of Mr. Navalny’s right to be presumed innocent. The court dismissed all of the inconsistencies revealed by Mr. Artemenko’s grandson’s testimony, saying simply that it “finds the testimonies of witnesses I. V. Kolesnikov, Z. KH. Temurova, S. V. Kichibekov, G. A. Margulis, A. I. Lukin, V. A. Akimov to be reliable and truthful, since they are self-consistent, non-contradictory, consistent with each other and with the statement of the victim.”¹⁶² Likewise, it specifically found that Mr. Artemenko’s grandson had not been motivated by anything other than concern for his grandfather because “he did not demonstrate any of his political views neither during the preliminary investigation, nor during the trial.”¹⁶³ This was insufficient. Indeed, the UN Human Rights Committee in *Arutyuniantz v. Uzbekistan* found a violation of the presumption of innocence based on the domestic court’s failure to consider contradictions in the key witness’s testimony.¹⁶⁴

The court also treated the prosecution’s witnesses differently from those called by the defense. Not only did the court credit the prosecution’s expert, but it also relied on the opinions of other witnesses, whose views were all accepted uncritically.¹⁶⁵ By contrast, with respect to the defense expert, who testified in detail regarding his view that Mr. Navalny had expressed a value judgment and had not made a statement of fact, the prosecution said little more than that the expert had not been warned of the consequences of false statements when preparing his report. In turn, the judgment simply said the court found the defense expert’s analysis “superficial.”¹⁶⁶ Likewise, the court dismissed the defense expert’s analysis of the word ‘traitor’ as “absolutely incompatible with the content of videos”¹⁶⁷ without more.

In fact, the court’s skepticism of the defense expert appeared at least partially based on the fact that his findings contradicted the prosecution expert.¹⁶⁸ Moreover, the domestic court showed little interest in understanding the defense expert’s views. Instead, the

¹⁶⁰ Judgment at 18.

¹⁶¹ *Id.* at 19 (“[F]rom the video, which became the basis for A. A. Navalny’s comments, it follows that accompanying I. S. Artemenko’s image is an explanatory caption saying that the latter is a Great Patriotic War veteran.”).

¹⁶² *Id.* at 15.

¹⁶³ *Id.*

¹⁶⁴ UN Human Rights Committee, *Arutyuniantz v. Uzbekistan*, U.N. Doc. CCPR/C/83/D/971/2001, Mar. 30, 2005, ¶¶ 6.4-6.5; see also UN Human Rights Committee, *Koreba v. Belarus*, U.N. Doc. CCPR/C/100/D/1390/2005, Oct. 25, 2010, ¶¶ 7.6 (failure to allow examination of witness relevant to finding of breach of presumption of innocence).

¹⁶⁵ Judgment at 19 (“The Court comes to these conclusions not only on the ground of the victim’s statement and the expert’s findings, but also [on the ground] of testimonies of witnesses V. A. Akimov and A. I. Lukin, who have no personal interest in the outcome of the case, [and who] considered this information insulting and slanderous.”).

¹⁶⁶ *Id.* at 16.

¹⁶⁷ *Id.* at 13-14.

¹⁶⁸ *Id.* at 16 (“[T]he Court finds the testimony and findings of the expert A. N. Baranov questionable due to their contradiction to the examined evidence, including the expert report, which was conducted by the person authorized for this task, in accordance with the procedure established by the criminal procedure law.”).

judge suggested that she had tripped up the expert because the expert said that his report was ‘objective.’ The court took this to mean that opinions can be verified,¹⁶⁹ and thus that the defense expert had contradicted himself in saying that Mr. Navalny’s opinion could not be verified. But this bit of sleight of hand mistakes an expert opinion for a value judgment and only shows that the court was little inclined to consider what the defense expert had to say.

The European Court has explained in *Adjaric v. Croatia* that failure adequately to reconcile divergent witness testimonies can render a decision “not adequately reasoned.”¹⁷⁰ That is precisely what occurred here: the domestic court’s treatment of the evidence was arbitrary and meets the standards for finding a violation of Mr. Navalny’s right to be presumed innocent. Further, the court appears to have resolved doubts *against* Mr. Navalny, rather than in his favor, as is required by the principle of *in dubio pro reo*.¹⁷¹

Right to Call and Examine Witnesses

Defendants have a right to examine, or have examined, witnesses against them under Article 14(3)(e) of the ICCPR and Articles 6(1) and (3)(d) of the European Convention,¹⁷² although they must generally adduce “sufficient reasons” for [their] request to call a witness.¹⁷³ As the UN Human Rights Committee has explained, this right entails “a proper opportunity to question and challenge witnesses.”¹⁷⁴ In *Larrañaga v. The Philippines*, for example, the Committee found a violation where the court “repeatedly cut short” the cross-examination of witnesses “to avoid the possibility of harm to the witness.”¹⁷⁵ The European Court has likewise held that Articles 6(1) and (3)(d) require that defendants be given adequate opportunity to question any witness who testifies against them.¹⁷⁶ The European Court has also stressed that in evaluating whether a domestic court’s decisions regarding the examination of witnesses violated a defendant’s fair trial rights, it will consider the “impact which a decision refusing to examine a defence witness at the trial has on the overall fairness of the proceedings.”¹⁷⁷

For instance, in *Pichugin v. Russia*, the defense had sought to argue that it was “possible that [a witness] had agreed to testify against the applicant in return for some concession from the prison authorities.” The domestic court curtailed efforts to inquire into such issues. The European Court explained that it was necessary to “be aware of all relevant circumstances affecting [a witness] statement’s accuracy and credibility, including any incentive [the witness] might have had to misrepresent the facts.” The Court therefore

¹⁶⁹ *Id.* at 17 (“A. N. Baranov stated that all A. A. Navalny’s statements are opinionative in nature, and opinion cannot be evaluated for truth and falsity, however, later he stated that his report presents an objective opinion.”)

¹⁷⁰ European Court of Human Rights, *Adjaric v. Croatia*, App. No. 20883/09, Dec. 13, 2011, ¶ 51.

¹⁷¹ European Court of Human Rights, *Melich & Beck v. Czech Republic*, App. No. 35450/04, July 24, 2008 (discussing “le manque de preuves, notamment la non-identification par les policiers de plus de témoins, qui avait négativement influencé l’enquête subséquente.”).

¹⁷² The term “witness” also includes expert witnesses. See, e.g., European Court of Human Rights, *Balsytė-Lideikienė v. Lithuania*, App. No. 72596/01, Nov. 4, 2008.

¹⁷³ European Court of Human Rights, *Murtazaliyeva v. Russia*, App. No. 36658/05, Dec. 18, 2018, ¶ 161; see also European Court of Human Rights, *Perna v. Italy*, App. No. 48898/99, May 6, 2003, ¶ 29 (suggesting defendants should show “why it is important for the witnesses concerned to be heard and their evidence must be necessary for the establishment of the truth.”).

¹⁷⁴ UN Human Rights Committee, General Comment No. 32, *supra* 30, ¶ 39.

¹⁷⁵ UN Human Rights Committee, *Larrañaga v. The Philippines*, U.N. Doc. CCPR/C/87/D/1421/2005, July 24, 2006, ¶ 7.7

¹⁷⁶ See, e.g., European Court of Human Rights, *Khodorkovsky & Lebedev v. Russia* (No. 2), App. Nos. 51111/07 and 42757/07, Jan. 14, 2020, ¶¶ 475,485.

¹⁷⁷ European Court of Human Rights, *Murtazaliyeva v. Russia*, App. No. 36658/05, Dec. 18, 2018, ¶ 167.

found that by dismissing “all questions concerning [the witness]’s criminal record, . . . as well as concerning possible pressure on him from the prosecuting authorities,” the domestic court had violated the applicant’s fair trial rights.¹⁷⁸

Here, the domestic court’s behavior was similar to that of the domestic court in *Pichugin*. For instance, the court repeatedly struck questions going to the motivations Mr. Artemenko’s grandson may have had for cooperating with the authorities: Mr. Navalny sought multiple times to ask Mr. Artemenko’s grandson about his occupation (in order to explore his financial situation), but the court repeatedly rejected the questions; and when Mr. Navalny sought to ask Mr. Artemenko’s grandson whether he had been coached, the judge prompted the witness that he could decline to answer questions.

Likewise, Mr. Artemenko’s nurse testified that Mr. Artemenko’s grandson had asked her to show Mr. Artemenko Mr. Navalny’s comments. Mr. Artemenko’s grandson, by contrast, testified that he had told her not to show them to Mr. Artemenko. As this potential contradiction was being explored by the defense, the court called for a recess. The defense also sought to question Mr. Artemenko’s grandson about a second apparent discrepancy: How the complaint in the case file had come to be prepared. Mr. Artemenko’s grandson testified that nobody had filed a complaint, but the case file contained a complaint by Mr. Artemenko. When this was being discussed, the court again recessed—this time for the day. At the next hearing, Mr. Artemenko’s grandson testified that he must not have been aware that his grandfather had filed a complaint. He also explained that he did not think his grandfather would have been able to write a complaint himself. But then the court curtailed Mr. Navalny’s effort to explore how Mr. Artemenko could have been able to file the complaint himself—including identifying the appropriate investigating officer to whom to send it. The court also struck questions directed at establishing whether Mr. Artemenko’s grandson frequently signed documents for Mr. Artemenko. Eventually, the court ended the cross-examination of Mr. Artemenko’s grandson entirely and declined to permit Mr. Navalny’s lawyer to ask questions, either.

The domestic court justified its limitations on Mr. Navalny’s ability to cross-examine Mr. Artemenko’s grandson on the tenor of Mr. Navalny’s questioning and on an argument that some of the questions were not relevant.¹⁷⁹ But Mr. Navalny’s questions, while perhaps phrased aggressively, were not sufficiently aggressive as to give rise to a valid basis to pretermitt cross-examination—at a minimum by Mr. Navalny’s lawyers even if not by Mr. Navalny himself.¹⁸⁰ Likewise, they were not irrelevant; indeed, questions regarding a witness’s potential motive to cooperate with the authorities or the provenance of documents are appropriate for cross-examination.

Moreover, the court’s justification was insufficiently reasoned. The court said that Mr. Navalny’s questions were not relevant to the ‘facts of the case,’ which seemed here to mean the charges against Mr. Navalny. But in *Murtazaliyeva v. Russia*, the European Court noted that testimony could be relevant if it contributed to “arguably strengthen[ing] the position of the defence”¹⁸¹ and stressed that “the reasoning of the courts must be

¹⁷⁸ European Court of Human Rights, *Pichugin v. Russia*, App. No. 38623/03, Oct. 23, 2012, ¶¶ 172, 210-212.

¹⁷⁹ Cf. European Court of Human Rights, *Perna v. Italy*, App. No. 48898/99, May 6, 2003, ¶¶ 31-32.

¹⁸⁰ In *Ly v. Vietnam*, for instance, the UN Working Group on Arbitrary Detention found fair trial violations where the court removed a defendant who had shouted “Down with the Communist Party of Viet Nam!” UN Working Group on Arbitrary Detention, *Ly v. Viet Nam*, No. 06/2010, ¶ 11.

¹⁸¹ European Court of Human Rights, *Murtazaliyeva v. Russia*, App. No. 36658/05, Dec. 18, 2018, ¶ 160 (listing grounds for calling witnesses, including “influenc[ing] the outcome of a trial”

commensurate, i.e. adequate in terms of scope and level of detail, with the reasons advanced by the defence.”¹⁸² Given the clear relevance of the issues Mr. Navalny sought to pursue to strengthening his defense, the court’s response was inadequate.

The court’s handling of Mr. Artemenko’s testimony also violated the defendant’s rights. Mr. Artemenko was initially called to testify via video-link, without the prosecution or court having given advance notice of this arrangement to the defendant—or even permitting the defense to inquire as to who else might be present during the video testimony and what their role was.¹⁸³ (The defense was concerned that they might be coaching Mr. Artemenko.) Mr. Artemenko’s testimony was then truncated due to illness. While illness is a valid reason for postponing testimony,¹⁸⁴ the UN Human Rights Committee has found a violation where an illness was temporary and testimony could have presumably been rescheduled.¹⁸⁵

Instead, the prosecutor introduced, and the court admitted, a statement, ostensibly from Mr. Artemenko, during the second day of hearings. But the European Court has made clear that the right to examine witnesses applies equally to witnesses who provide depositions.¹⁸⁶ Further, in other cases involving Russia, the European Court has repeatedly held that defendants should be able to test the regularity of materials prepared by investigating authorities—for instance, where police reports were the key evidence, the Court has insisted on the need to be able to examine the authors.¹⁸⁷

In any event, even if the court were to have properly decided to admit Mr. Artemenko’s statement without further opportunity to examine him or the statement’s provenance, it should not have been given significant weight.¹⁸⁸ That is especially so in light of Mr. Artemenko’s grandson’s testimony casting doubt on his grandfather’s ability to prepare such statements. Indeed, in *Schatschaschwili v. Germany*, the European Court stressed that where “domestic courts approached the untested evidence of an absent witness with caution,” this “has been considered by the Court to be an important safeguard.”¹⁸⁹ The inverse is likewise true.

¹⁸² *Id.* ¶ 164.

¹⁸³ Recusal Motion (“[T]he defence team was not informed in advance about the examination of witnesses via video-conferencing, while the prosecutor was duly informed and even knew who was based in which location.”).

¹⁸⁴ *Cf.* European Court of Human Rights, *Zadumov v. Russia*, App. No. 2257/12, Dec. 12, 2017, ¶¶ 54–56; see also Judgment at 15 (“[H]e has a number of serious, chronic diseases, which are the reason for his statement to be announced in court.”).

¹⁸⁵ UN Human Rights Committee, *Y.M. v. Russia*, UN Doc. CCPR/C/116/D/2059/2011, Mar. 31, 2016, ¶ 9.9 (“[N]othing in the submissions indicates that C.H.A. was permanently unavailable.”).

¹⁸⁶ European Court of Human Rights, *Mirilashvili v. Russia*, App. No. 6293/04, Dec. 11, 2008, ¶ 163 (discussing witnesses who participate at the pre-trial stage and not at trial and noting that “[a]s a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him or her either when that witness is making a statement or at a later stage of the proceedings”). Likewise, the UN Human Rights Committee has found violations of Article 14(3)(e) ICCPR where the prosecution has introduced written statements and the defense has been denied the “opportunity” to cross-examine the authors of those statements. See UN Human Rights Committee, *Dugin v. Russian Federation*, U.N. Doc. CCPR/C/81/D/815/1998, July 5, 2004, ¶ 9.3

¹⁸⁷ European Court of Human Rights, *Butkevich v. Russia*, App. No. 5865/07, Feb. 13, 2018, ¶ 102 (“[I]t was indispensable for the courts to use every reasonable opportunity to verify their incriminating statements.”).

¹⁸⁸ European Court of Human Rights, *Lawless v. United Kingdom*, App. No. 44324/11, Oct. 16, 2012, ¶¶ 35–36 (“At the very least, [the jury] must be warned as to the inherent limitations in evidence which has not been subjected to full cross-examination and as to the dangers in accepting that evidence.”).

¹⁸⁹ European Court of Human Rights, *Schatschaschwili v. Germany*, App. No. 9154/10, Dec. 15, 2015, ¶ 126; see also *id.* ¶ 131 (“The defendant must further be afforded the opportunity to give his own version of the events and to cast doubt on the credibility of the absent witness.”).

Here, the court dismissed all questions of the defense, saying in the judgment that “[t]he arguments of the Defense that the victim I. S. Artemenko did not apply for the protection of his rights, and the criminal case file in this part was falsified in order to conduct malicious criminal prosecution against A. A. Navalny are invalid and refuted by the weight of the aforementioned evidence.”¹⁹⁰ Indeed, the court noted that the defense had not proven falsification of documents,¹⁹¹ but it precluded them from pursuing such evidence. Instead, the domestic court gave credence to Mr. Artemenko’s statements, coming to the conclusion that Mr. Navalny had committed slander “on the ground of the victim’s statement,”¹⁹² among other reasons, and referring to the “statement of the victim” to support the holding “that A. A. Navalny’s statements were insulting and slanderous toward a specific person.”¹⁹³ The court’s lack of counter-balancing measures—indeed, the court’s presumption of regularity in all respects of the prosecution’s case—is inconsistent with European Court jurisprudence: The domestic court’s approach did not permit “a fair and proper assessment of the reliability of that evidence.”¹⁹⁴

Taken together, these limits on Mr. Navalny’s ability to cross-examine prosecution witnesses are inconsistent with international standards governing the right to call and examine witnesses.

Right to Counsel

Article 14(3)(b) of the ICCPR provides that a defendant is entitled to “have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.” Article 6(3)(b) and (c) of the European Convention likewise provide that a defendant is entitled “to have adequate time and facilities for the preparation of his defense” and “to defend himself in person or through legal assistance of his own choosing.” This means the defendant must be able to meet with counsel and discuss their case, including during the trial. In *Rayos v. The Philippines*, for example, the UN Human Rights Committee found a violation of Article 14(3)(b) where a defendant “was only granted a few moments each day during the trial to communicate with counsel.”¹⁹⁵ Moreover, defense counsel must be able to “to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications.”¹⁹⁶ The European Court has stressed this point in *Gorbunov & Gorbachev v. Russia*, explaining that “[a]n accused’s right to communicate with his lawyer without the risk of being overheard by a third party is one of the basic requirements of a fair trial in a democratic society.”¹⁹⁷

Here, prior to the first hearing, the defense requested additional time to consult, which was granted. But they were unable to speak in confidence. As defense counsel explained to the court, there were at least 14 court employees present during consultations. This is inconsistent with the right to confidential communication.

¹⁹⁰ Judgment at 14.

¹⁹¹ *Id.* at 15 (“The arguments of the Defense about the falsification of the victim’s signature on his statements, as well as on other documents, were not objectively proved in the trial.”).

¹⁹² *Id.* at 19.

¹⁹³ *Id.* at 18.

¹⁹⁴ European Court of Human Rights, *Schatschaschwili v. Germany*, App. No. 9154/10, Dec. 15, 2015, ¶ 125.

¹⁹⁵ UN Human Rights Committee, *Rayos v. Philippines*, U.N. Doc. CCPR/C/81/D/1167/2003, July 27, 2004, ¶ 7.3.

¹⁹⁶ UN Human Rights Committee, General Comment No. 32, *supra* note 130 ¶ 34. 9

¹⁹⁷ European Court of Human Rights, *Gorbunov & Gorbachev v. Russia*, Apps. Nos. 43183/06 and 27412/07, Mar. 1, 2016, ¶ 31 (quoting *Sakhnovskiy v. Russia*, App. No. 21272/03, Nov. 2, 2010).

Moreover, the defense team was unable to consult in real-time due to the fact that Mr. Navalny was in a glass enclosure. In *Yaroslav Belousov v. Russia*, for instance, the European Court considered a similar case in which the defendants were kept in a small glass cabin. The European Court noted that the glass enclosure “made it impossible for the applicant to have confidential exchanges with his legal counsel.” It found a violation of the defendant’s right to “receive practical and effective legal assistance.”¹⁹⁸

Right to a Reasoned Judgment

Article 14(5) of the ICCPR provides for a right to appeal. As the UN Human Rights Committee has explained, in order effectively to exercise this right a defendant must have a “duly reasoned” written judgment: without this, a defendant cannot effectively challenge the judgment before a higher tribunal.¹⁹⁹ Likewise, Article 6 of the ECHR requires that judgments “adequately” explain their reasoning.²⁰⁰

Here, as discussed above, the judgment did not adequately substantiate its findings on at least two critical points: whether Mr. Navalny’s Telegram post and tweet included one or more statements of fact and whether Mr. Navalny’s post was specific, or rather applied generally to all participants in the RT video. As to the former, the domestic court relied heavily on the opinion of the prosecution’s expert. As to the latter, the court’s analysis was even more spare, simply noting that Mr. Artemenko had been captioned as a veteran in the RT video and making a vague reference to “the examination of the physical evidence, expert report, statement of the victim and testimonies of witnesses.”²⁰¹

D. OTHER FAIRNESS CONCERNS

Right to Freedom of Expression

Article 19 of the ICCPR and Article 10 of the European Convention protect the right to freedom of expression. Under the ICCPR, any restriction on speech must: i) be prescribed by law (the principle of legality); ii) serve a legitimate objective; and iii) be necessary to achieve and proportionate to that legitimate objective. Similarly, under the European Convention, restrictions on speech must be “‘proportionate to [a] legitimate aim pursued’ and . . . the reasons adduced by the national authorities to justify [the restriction] [must be] ‘relevant and sufficient.’”²⁰²

Speech on matters of public concern warrants heightened protection. The UN Human Rights Committee has said for instance that “the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.”²⁰³ Likewise, the European Court of Human Rights has explained that “there is little scope under Article 10

¹⁹⁸ See European Court of Human Rights, *Yaroslav Belousov v. Russia*, App. Nos. 2653/13 & 60980/14, Oct. 4, 2016, ¶¶ 74, 153.

¹⁹⁹ UN Human Rights Committee, General Comment No. 32, *supra* note 130 ¶ 49

²⁰⁰ European Court of Human Rights, *Hadjianastassiou v. Greece*, App. No. 12945/87, Dec. 16, 1992, ¶ 33.

²⁰¹ Judgment at 18.

²⁰² European Court of Human Rights, *Morice v. France*, App. No. 29369/10, Apr. 23, 2015, ¶ 124.

²⁰³ UN Human Rights Committee, General Comment 34, UN Doc. CCPR/C/GC/34, Sep. 12, 2011, ¶ 34.

§ 2 of the Convention for restrictions on freedom of expression in two fields, namely political speech and matters of public interest.”²⁰⁴

One of the potential bases for limiting freedom of expression is respect for the reputation of others.²⁰⁵ At the same time, the European Court has been attuned to the extent to which an individual “knowingly lays himself open to close scrutiny.”²⁰⁶ For instance, in one case, the plaintiff in a defamation case had “organised a public gathering and spoke about his views to the audience.” In the European Court’s view, this meant that “he should have had a higher degree of tolerance to criticism.”²⁰⁷ Likewise, in another case before the European Court, the Court found that a private association that “participated in public discussions on [a] matter [of public concern] . . . ought to have shown a higher degree of tolerance to criticism.”²⁰⁸

Most pertinently, the European Court has also established a distinction between statements of fact and value judgments in its jurisprudence on restrictions on speech based on respect for the rights of others. The Court has clarified that where the national legislation or courts make no distinction between statements of fact and value judgments—which amounts to requiring proof of the truth of a value judgment—this is an “indiscriminate approach to the assessment of speech” and a per se violation of the right to freedom of expression.²⁰⁹

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For instance, in *Grinberg v. Russia*, the Court found that a civil defamation claim violated Article 10 where the speech at issue constituted a value judgment. In particular, in that case, the applicant had said of the recently elected Governor of Ulyanovsk Region (Oblast), “No shame and no scruples!”²¹⁰ The European Court emphasized that “the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10.”²¹¹ It went on to hold that “the

²⁰⁴ See, e.g., European Court of Human Rights, *Bédat v. Switzerland*, App. No. 56925/08, Mar. 29, 2016, ¶ 49.

²⁰⁵ ICCPR art. 19(3)(a) (“For respect of the rights or reputations of others”); ECHR art. 10(2) (“for the protection of the reputation or rights of others”).

²⁰⁶ European Court of Human Rights, *Grinberg v. Russia*, App. No. 23472/03, July 21, 2005, ¶ 25.

²⁰⁷ European Court of Human Rights, *Karman v. Russia*, App. No. 29372/02, Dec. 14, 2006, ¶ 35.

²⁰⁸ European Court of Human Rights, *Jerusalem v. Austria*, App. No. 26958/95, Feb. 27, 2001, ¶ 39.

²⁰⁹ European Court of Human Rights, *Gorelishvili v. Georgia*, App. No. 12979/04, June 5, 2007, ¶ 38 (“Notably, Article 18 of the Civil Code made no distinction between value-judgments and statements of fact, referring uniformly to ‘information’ (cnobebi), and required that the truth of any such ‘information’ be proved by the respondent party. Such an indiscriminate approach to the assessment of speech is, in the eyes of the Court, per se incompatible with freedom of opinion, a fundamental element of Article 10 of the Convention.”); see also European Court of Human Rights, *Fedchenko v. Russia*, App. No. 33333/04, Feb. 11, 2010, ¶ 37 (“The Court reiterates in this regard that, according to its established case-law, a distinction has to be drawn between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof.”).

²¹⁰ European Court of Human Rights, *Grinberg v. Russia*, App. No. 23472/03, July 21, 2005, ¶ 9.

²¹¹ *Id.* ¶ 30.

contested comment was a quintessential example of a value judgment that represented the applicant's subjective appraisal of the moral dimension of [the governor-elect's] behaviour."²¹²

The European Court came to a similar conclusion with respect to use of the term "neo-fascist" in the case of *Karman v. Russia*.²¹³ While the European Court has generally held that the classification of a statement as factual or a value judgment is for the domestic courts,²¹⁴ the European Court has where appropriate rejected the classification of a statement by domestic authorities.²¹⁵

The European Court has also distinguished between defamation and generalized criticism. For instance, in *Dyuldin & Kislov v. Russia*, the European Court expressly noted that "a fundamental requirement of the law of defamation is that in order to give rise to a cause of action the defamatory statement must refer to a particular person. If all State officials were allowed to sue in defamation in connection with any statement critical of administration of State affairs, even in situations where the official was not referred to by name or in an otherwise identifiable manner, journalists would be inundated with lawsuits."²¹⁶ Likewise, in *Reznik v. Russia*, the Court clarified that a subjective perception that one is the target of a statement is not sufficient; rather, "an objective link between the impugned statement and the person suing in defamation" is necessary.²¹⁷

Finally, with respect specifically to the *criminalization* of defamation, the UN Human Rights Committee has suggested that a high-bar should apply: "[T]he application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty."²¹⁸ Likewise, the European Court of Human Rights has previously said that in assessing the proportionality of a restriction on speech, one "factor on which the Court places particular reliance is that the applicant was not subjected to a civil or disciplinary sanction, but instead to a criminal one."²¹⁹

Here, the defense argued—and adduced expert evidence to the effect that—that Mr. Navalny's speech was a value judgment, not a statement of fact. The words used fit squarely within the European Court's precedents. Just as in *Grinberg*, where the phrase '[n]o shame and no scruples' was considered a value judgment, so too here, the words 'shameless' and 'corrupt' should not have been understood as factual statements. Likewise, just as in *Karman*, where the term "neo-fascist" was not considered a literal ascription of membership in a fascist party, so too here the term "traitor" should have been understood figuratively.

The domestic court, by contrast, found that while Mr. Navalny's statement may have been a 'judgment,' "an opinion containing a negative judgment is not always exclusively hypothetical and subjective, but on the contrary [it] can be verified for accuracy."²²⁰

²¹² *Id.* ¶ 31.

²¹³ European Court of Human Rights, *Karman v. Russia*, App. No. 29372/02, Dec. 14, 2006, ¶ 41 ("local neofascist' is to be regarded as a value-judgment rather than a statement of fact.").

²¹⁴ European Court of Human Rights, *Peruzzi v. Italy*, App. No. 39294/09, June 30, 2015, ¶ 48 ("The characterisation of remarks as statements of fact and value judgments falls primarily within the ambit of the margin of appreciation afforded to national authorities, in particular the domestic courts.").

²¹⁵ See, e.g., European Court of Human Rights, *Feldek v. Slovakia*, App. No. 29032/95, July 12, 2001.

²¹⁶ European Court of Human Rights, *Dyuldin & Kislov v. Russia*, App. No. 25968/02, July 31, 2007, ¶ 43.

²¹⁷ European Court of Human Rights, *Reznik v. Russia*, App. No. 4977/05, Apr. 4, 2013, ¶ 45.

²¹⁸ UN Human Rights Committee, General Comment No. 34, *supra* note 189, ¶ 47.

²¹⁹ European Court of Human Rights, *Raichinov v. Bulgaria*, App. No. 47579/99, Apr. 20 2006, ¶ 50.

²²⁰ Judgment at 16.

Chiefly, the domestic court appears to have relied on the possibility of verifying whether someone indeed committed the offense of treason in reaching this conclusion.²²¹

This is inconsistent with *Karman*. Instead of the kind of contextual analysis called for by *Karman*, the domestic court relied instead principally on the opinion of the prosecution's expert, as well as that of the witnesses;²²² the court further suggested that because the word 'traitor' was juxtaposed with the phrase "disgrace to the country,"²²³ it should be understood literally. But of course, 'disgrace to the country,' is equally capable of being a figurative phrase.

Further, the defense argued that Mr. Navalny's comments were not specific to Mr. Artemenko. In this regard, this case is similar to *Reznik*: There, the President of the Moscow City Bar had made general comments on TV, following footage of a particular detention center. The domestic court found that this was sufficient to establish the requisite linkage between the statement and the individuals who alleged that they had been defamed.²²⁴ The European Court disagreed, explicitly finding that "the extent of the applicant's liability in defamation must not go beyond his own words The fact remains that there was nothing in the applicant's statement to permit identification of the plaintiffs whom he described impersonally as 'men,' without mentioning their names or employer."²²⁵ So too here: Mr. Navalny did not mention Mr. Artemenko's name and the domestic court's decision is inconsistent with European Court jurisprudence.

Even if a statement is a value judgment, "the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive."²²⁶ Thus, even if the domestic court were correct that the statement was an assertion of fact, and even assuming it were deemed to refer sufficiently to Mr. Artemenko, the next step in the inquiry would be to determine whether the response was proportionate. In *Scharsach and News Verlagsgesellschaft mbH v. Austria*, a case in which the applicant had accused a politician of being a 'closet Nazi,' the European Court explained that value-based criticism does not require the same level of factual support as a criminal charge: "The standards applied when assessing someone's political activities in terms of morality are different from those required for establishing an offence under criminal law."²²⁷ That is, an exacting approach to analysis of statements is not appropriate.

Here, counseling in favor of finding that this restriction was disproportionate are (1) that Mr. Navalny's comments were on a topic of significant public interest and debate (namely, amendments to the Russia Constitution); (2) that the alleged victim had inserted himself into that public debate by participating in a promotional video meant for wide public consumption; and (3) that the sanctions imposed were criminal. Indeed, with particular reference to the character of the sanctions, the fact that only a fine was imposed is not

²²¹ *Id.* ("[O]n the contrary, the examined evidence proves that the victim I. S. Artemenko is not and was not a traitor, a disgrace to the country.").

²²² *Id.* at 19.

²²³ *Id.* at 13-14.

²²⁴ European Court of Human Rights, *Reznik v. Russia*, App. No. 4977/05, Apr. 4, 2013, ¶ 21 ("The NTV channel showed the building at 18 Matrosskaya Tishina Street, and the defendant Mr Reznik later made the contested statements. In those circumstances, the professional reputation of remand prison no. 1 had been undermined and it had standing to seek judicial protection from defamation.").

²²⁵ *Id.* ¶ 45.

²²⁶ European Court of Human Rights, *Jerusalem v. Austria*, App. No. 26958/95, Feb. 27, 2001, ¶ 43.

²²⁷ European Court of Human Rights, *Scharsach and News Verlagsgesellschaft mbH v. Austria*, App. No. 39394/98, Nov. 13, 2003, ¶ 43.

dispositive. As the European Court has explained, “the fact of a person’s conviction may in some cases be more important than the minor nature of the penalty imposed.”²²⁸

Moreover, the domestic court’s approach—taking Mr. Navalny’s reference to ‘traitors’ quite literally and requiring proof sufficient to sustain a criminal accusation—was not appropriate under *Scharsach and News Verlagsgesellschaft*. That is, in light of international jurisprudence, even if one were to take the view that Mr. Navalny had made a false factual assertion, his criminal conviction was disproportionate and meets the standards for finding a violation of his right to freedom of expression.

Ulterior Motive

Article 18 of the European Convention provides that restrictions permitted by the Convention “shall not be applied for any purpose other than those for which they have been prescribed.” Thus, the Convention forbids the use of the criminal justice system for ‘ulterior purposes.’ Here, the authorities restricted Mr. Navalny’s rights under Articles 6 and 10 of the Convention for political reasons. Moreover, it is not necessary for the ‘ulterior purpose’ to be the sole reason the prosecution was pursued. Even assuming that there was a legitimate interest in protecting the reputation of Mr. Artemenko, the restriction on Mr. Navalny’s rights may “still infringe Article 18 [if] it was chiefly meant for another purpose.”²²⁹ And that is the case here.

Among the factors the European Court has considered in assessing whether criminal proceedings had an ‘ulterior purpose’ are: the political context, including whether “there was a political impetus behind the charges”²³⁰; whether authorities took action against the defendant despite an “increasing awareness that the practices in question were incompatible with Convention standards”²³¹; how the criminal proceedings were conducted²³²; and whether the judgment was reasoned.²³³

Here, all of these factors lead to the conclusion that the authorities brought Mr. Navalny to trial not—or at least not predominantly—in order to see justice done, but rather in order to suppress his political activities. First, the political context is extremely grave. The European Court has previously found with respect to Mr. Navalny that “the authorities [have become] increasingly severe in their response to the conduct of the applicant, in the light of his position as opposition leader, and of other political activists.”²³⁴ Moreover, the situation has only grown more dire: Mr. Navalny was poisoned and the Russian judiciary has ordered him detained on the basis of a conviction previously found by the European Court to have been deeply flawed.

The second factor described above—i.e., the extent to which Russia knew that its application of the law in this case was inconsistent with international standards—is also compelling. The European Court has had repeated occasion to opine on Russia’s defamation laws. Indeed, two of the key cases on the difference between value judgments and factual statements emerge from Russia. And yet, as one author has put it, “the ECtHR suggested that the failure to make a clear distinction between facts and opinions has

²²⁸ European Court of Human Rights, *Stoll v. Switzerland*, App. No. 69698/01, Dec. 10, 2007, ¶ 154.

²²⁹ European Court of Human Rights, *Merabishvili v. Georgia*, App. No. 72508/13, Nov. 28, 2017, ¶ 305.

²³⁰ *Id.* ¶¶ 320, 322.

²³¹ European Court of Human Rights, *Navalnyy v. Russia*, App. No. 29580/12, Nov. 15, 2018, ¶ 171.

²³² *Id.*

²³³ European Court of Human Rights, *Nastase v. Romania*, App. No. 80563/12, Nov. 18, 2014, ¶ 107.

²³⁴ European Court of Human Rights, *Navalnyy v. Russia*, App. No. 29580/12, Nov. 15, 2018, ¶ 172.

remained the most common problem of Russian justice concerning defamation.”²³⁵ It is precisely that distinction that was at issue in this case—and one to which the domestic court gave cursory treatment. Nor is the European Court the only body to weigh in on the topic: in its most recent review of Russia’s compliance with the ICCPR, the UN Human Rights Committee expressed concern with the re-criminalization of defamation.²³⁶ Likewise, one of the key precedents on the need for specificity regarding the object of a statement emerged from Russia—and it too was disregarded.²³⁷

Finally, as discussed above, the last two factors point in the same direction. The criminal proceedings in this case were marred by the domestic court’s behavior with respect to the examination of witnesses and the judgment the court ultimately rendered was not reasoned.

For these reasons, Russia’s prosecution of Mr. Navalny was abusive and meets the threshold to find a violation of Article 18 of the European Convention.

²³⁵ Elena Sherstoboeva, Defamation Law in Russia in the Context of the Council of Europe (COE) Standards on Media Freedom, 9 J. Int’l Media and Entertainment Law, 69, 84.

²³⁶ UN Human Rights Committee, Concluding Observations on the Seventh Periodic Report of the Russian Federation, UN Doc. CCPR/C/RUS/CO/7, Apr. 28, 2015, ¶ 19.

²³⁷ See *supra* note 210-211.

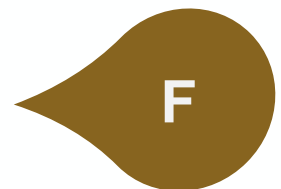
CONCLUSION AND GRADE



In this case, the domestic court ran roughshod over key precedents of the European Court of Human Rights governing the balance to be struck between protection of reputation and the right to freedom of expression, and defense arguments and evidence on this score: The domestic court at once adopted a cramped understanding of what could be relevant to the defense case while taking a broad view of what Mr. Navalny’s criticism of a pro-Putin video could have meant. This cannot but leave one with the sense that the charges were nothing but a pretext for tarring Mr. Navalny as hostile to Russian veterans—a sense that is further confirmed by the way that Russia is seeking to paint the war in Ukraine as akin to World War II by arguing that the Ukrainian government is riddled with ‘Nazis’ and ‘fascists.’²³⁸

Not only should Mr. Navalny’s conviction be reversed, but Russia should take further steps to ensure respect for European Court of Human Rights decisions on freedom of expression. While Russia will soon no longer be party to the European Convention on Human Rights, this does not act retrospectively to absolve it of its obligations under the Convention or the decisions of the Court as they concern Mr. Navalny, particularly given the Court has made clear that it will continue to have jurisdiction over Russia until September 16, 2022.

GRADE



F

²³⁸ See Rachel Treisman, Putin's Claim of Fighting Against Ukraine 'Neo-Nazis' Distorts History, Scholars Say, NPR, Mar. 1, 2022 (noting that “Russian President Vladimir Putin invoked World War II to justify Russia's invasion of Ukraine”), available at <https://www.npr.org/2022/03/01/1083677765/putin-denazify-ukraine-russia-history>.



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,”²³⁹ 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.

²³⁹ ICCPR, Article 26.