



**Russian Federation  
vs.  
Svetlana Prokopyeva**

January 2021

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

## ABOUT THE AUTHOR

**Covington & Burling LLP** is an international law firm headquartered in Washington, D.C. David Pinsky is a partner in the firm's international arbitration practice whose practice focuses on disputes arising in Russia and elsewhere in the former Soviet Union. Jack Nelson, Alexander Gudko, and Tyler Holbrook are associates in the firm's litigation and investigations practice. Elena Postnikova is an associate in the firm's international trade practice.

## ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE

The **Clooney Foundation for Justice's TrialWatch initiative** monitors and grades the fairness of trials of vulnerable people around the world, including journalists, women and girls, minorities, LGBTQ+ persons, and human rights defenders. Using this data, TrialWatch advocates for victims and is developing a Global Justice Ranking measuring national courts' compliance with international human rights standards.

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



## **Covington & Burling LLP assigned this trial a grade of D:**

On July 6, 2020, a Russian military court convicted Svetlana Prokopyeva, a journalist, of “justifying terrorism” for a radio broadcast that commented critically on Russia’s repressive political climate and its effect on a teenager who detonated a bomb at a local office of Russia’s Federal Security Service in the city of Arkhangelsk.

Ms. Prokopyeva’s trial was characterized by serious violations of international standards that both affected the trial’s outcome and undermined freedom of speech in Russia. In essence, a military court tried and convicted a civilian journalist for exploring the possible reasons behind the bombing, and for expressing criticism of the Russian government. The prosecution of a journalist based on her work, the substantial evidentiary gaps in the prosecution’s case, and the failure of the court to sufficiently explain its judgment suggest that Russian authorities brought the charges against Ms. Prokopyeva for political reasons and that those same authorities abused the criminal process in order to curtail speech critical of the government.

Following a one-sided criminal trial in which the court ignored extensive defense evidence and disregarded the apparent flaws in the prosecution’s case, Ms. Prokopyeva was convicted of justifying terrorism and ordered to pay a large fine. A thorough review of the case file suggests that Ms. Prokopyeva’s trial was not in line with international human rights law. In particular, we concluded that the court violated Ms. Prokopyeva’s rights to a fair trial, including the right to be presumed innocent, the right to obtain the attendance and examination of witnesses, the right to an impartial, independent, and competent tribunal, and the right to a duly reasoned judgment in order to facilitate the ability to appeal. In addition, we concluded that Ms. Prokopyeva’s prosecution in general demonstrated Russian authorities’ abuse of process and violation of her right to freedom of expression.

# BACKGROUND INFORMATION



## A. POLITICAL AND LEGAL CONTEXT

Svetlana Prokopyeva's trial is emblematic of growing restrictions in Russia on free expression and a free press, as Russian authorities move to tamp down growing civic activism.<sup>1</sup> Russia's recent implementation of laws nominally addressing "anti-extremism," "foreign agents," and "undesirable foreign organizations" have, according to the most recent U.S. State Department human rights report, in fact been used to suppress criticism of the state by journalists and on social media.<sup>2</sup>

Although the Russian Constitution includes free-speech protections,<sup>3</sup> vague laws aimed at "extremism" grant authorities broad discretion to restrict forms of expression that lack state support, including in the media. Russian legislation against terrorism, extremism, and incitement is often construed broadly and misused to criminalize opposition and silence critical voices.<sup>4</sup> In recent years, the Russian government has also used anti-terrorism laws to target journalists.<sup>5</sup>

While major media outlets are controlled directly or indirectly by the state, the small number of independent news outlets that survive are often located abroad.<sup>6</sup> Legislation adopted in 2019, which was passed by a parliament controlled by President Vladimir Putin's United Russia party,<sup>7</sup> also allows the government to declare reporters working for outlets identified as foreign agents as foreign agents themselves.<sup>8</sup> Authorities can use this law to fine organizations that fail to include the proper "foreign agent" disclosures in

<sup>1</sup> See, e.g., Andrei Kolesnikov, *Civil Unrest in Yeltsin's City*, Moscow Times (May 16, 2019), <https://www.themoscowtimes.com/2019/05/16/civil-unrest-in-yeltsins-city-a65594>.

<sup>2</sup> *Country Reports on Human Rights Practices: Russia 2019 Human Rights Report*, U.S. Dep't of State 2 (2020), <https://www.state.gov/wp-content/uploads/2020/03/RUSSIA-2019-HUMAN-RIGHTS-REPORT.pdf>.

<sup>3</sup> Constitution of the Russian Federation, Chapter 2, Article 29, <http://www.constitution.ru/en/10003000-03.htm>.

<sup>4</sup> See, e.g., *Rights in Extremis: Russia's Anti-extremism Practices From an International Perspective*, Article 19 (Sept. 23, 2019), <https://www.article19.org/resources/rights-in-extremis-russias-anti-extremism-practices-from-an-international-perspective/>; Russia Jails Members of 'Non-existent' Terror Group Set, BBC (Feb. 10, 2020), <https://www.bbc.com/news/world-europe-51443169>.

<sup>5</sup> See, e.g., *Russia Charges Independent Journalist with Terrorism Offenses*, Committee to Protect Journalists [hereinafter "CPJ"] (June 26, 2018), <https://cpj.org/2018/06/russia-charges-independent-journalist-with-terrori/> (reporting that a journalist was charged with incitement of terrorism, justification of terrorism, and terrorist propaganda); *Russian Journalist Abdulmumin Gadzhiev: Jailed 'Without a Single Proof of his Guilt'*, CPJ (Aug. 17, 2020), <https://cpj.org/2020/08/russian-journalist-abdulmumin-gadzhiev-jailed-without-a-single-proof-of-his-guilt/> (reporting that a journalist was arrested on terrorism charges and accused of participating in an extremist organization).

<sup>6</sup> *Freedom in the World: Russia 2020*, Freedom House (2020), <https://freedomhouse.org/country/russia/freedom-world/2020>.

<sup>7</sup> *Russian Election: Big Victory for Putin-Backed Party United Russia*, BBC (Sept. 19, 2016), <https://www.bbc.com/news/world-europe-37403242>.

<sup>8</sup> *Freedom in the World: Russia 2020*, Freedom House (2020) <https://freedomhouse.org/country/russia/freedom-world/2020>.

<sup>8</sup> *Id.*

their publications,<sup>9</sup> and to require members of designated organizations to register and be regulated as foreign agents.<sup>10</sup>

Like the media, the Russian judiciary is subject to pressure from President Putin's state apparatus, including the military and state security services.<sup>11</sup> President Putin makes judicial appointments in a process with little transparency,<sup>12</sup> and trials are almost always decided in favor of the state.<sup>13</sup> When defendants are held in detention, defense attorneys report receiving limited access to their clients and being subject to electronic monitoring of conversations. At trial, judges frequently deny the defense the opportunity to cross-examine prosecution witnesses.<sup>14</sup>

In general, Russian courts rely extensively on the opinions of forensic experts in linguistics and psychology in almost all cases involving extremism. Although Russian law requires that forensic experts make their conclusions "within [their] corresponding competence,"<sup>15</sup> in practice, experts are often asked questions that paraphrase statutory language or use explanatory language from notes to the relevant law.<sup>16</sup> Thus, experts are

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<sup>9</sup> See *Russia: Independent Magazine Faces Huge Fine*, Human Rights Watch (Nov. 2, 2018), <https://www.hrw.org/news/2018/11/02/russia-independent-magazine-faces-huge-fine> (reporting that a court in Moscow issued a stifling 22.25 million rubles (US \$337,000) fine to *The New Times*, an independent Russian magazine, for supposed failure to report foreign funding).

<sup>10</sup> *Freedom in the World: Russia 2020*, Freedom House (2020), <https://freedomhouse.org/country/russia/freedom-world/2020>.

<sup>11</sup> See, e.g., *Lubyanka Federation: How the FSB Determines the Politics and Economics of Russia*, Atlantic Council (Oct. 5, 2020), <https://www.atlanticcouncil.org/in-depth-research-reports/report/lubyanka-federation/> (stating that it is widely reported in the press that Russian security services "exercise[] informal control over judges and may influence their decision-making, although on paper the judicial system is independent"); Tatyana Beschastna, *Freedom of Expression in Russia as it Relates to Criticism of the Government*, 27 Emory Int'l L. Rev. 1105, 1107 (2013), <https://law.emory.edu/eilr/content/volume-27/issue-2/comments/freedom-expression-russia.html> ("Russia's dependent judiciary inherited from the Soviet era" is "influenced by Putin's government" and "is considered independent on the books, however, in practice, there could be no real independence while the judges are taken off cases, or are even fired from their jobs, by request of government officials and following government criticism.").

<sup>12</sup> *Russian Federation: Appointment and Promotion of Judges; Security of Tenure*, International Commission of Jurists (June 16, 2014), <https://www.icj.org/cijlcountryprofiles/russian-federation/russian-federation-judges/russian-federation-appointment-and-promotion-of-judges-security-of-tenure/#:~:text=In%20Russia%2C%20Judges%20of%20the,rules%20fixed%20by%20federal%20law>.

<sup>13</sup> Oliver Carroll, *Russian Justice System Criticised After Acquittal Rate Drops to 0.25%*, The Independent (May 30, 2019), <https://www.independent.co.uk/news/world/europe/russia-justice-system-low-acquittal-rate-uk-crown-court-a8935016.html>; see also Marc Bennetts, *Russian Conviction Rate Is Higher Than Under Stalin*, The Times (Aug. 14, 2017), <https://www.thetimes.co.uk/article/russian-conviction-rate-is-higher-than-under-stalin-hj2v7f0bg>.

<sup>14</sup> *Country Reports on Human Rights Practices: Russia 2020*, U.S. Dep't of State 16 (2020), <https://www.state.gov/wp-content/uploads/2020/03/RUSSIA-2019-HUMAN-RIGHTS-REPORT.pdf>.

<sup>15</sup> See Article 8 of Law No. 73-FZ *On State Forensic Expertise in Russian Federation* (May 31, 2001); see also The Supreme Court of the Russian Federation, Resolution No. 11 of the Plenary Meeting of the Supreme Court Regarding Judicial Practice in Criminal Cases Involving Crimes of Extremism (June 28, 2011) ("[W]hen an expert examination is being assigned in extremist cases, the expert should not be questioned on legal issues concerning the assessment of an offence, which is outside their competence and within the competence of the court only. In particular, experts cannot be asked whether a text contains calls for extremist activity or whether informational materials are aimed at incitement of hatred or enmity.").

<sup>16</sup> For example, in Ms. Prokopyeva's case, the experts were asked to assess whether her text could accurately be described as an "expression of support for the recognition of ideology and practice of

often tasked with determining whether speech meets the definition of extremism, which goes beyond their expertise and effectively requires them to reach legal conclusions. As a result, courts often refer to experts' conclusions regarding the extremist nature of the text at issue without conducting their own legal analysis.<sup>17</sup>

## B. CASE HISTORY

Svetlana Prokopyeva is a freelance journalist based in Pskov, a Russian city near the Estonian border.<sup>18</sup> She is a contributor to the U.S. Congress-funded Radio Free Europe/Radio Liberty's Russian service,<sup>19</sup> and the Pskov affiliate of Ekho Moskvyy,<sup>20</sup> a Moscow-based radio station that is often critical of the Kremlin.<sup>21</sup> Ms. Prokopyeva's alleged crimes arise from her work as a journalist.

On October 31, 2018, a 17-year-old technical-school student named Mikhail Zhlobitsky detonated a homemade bomb inside the local offices of the Russian Federal Security Service (the FSB) in Archangelsk, a city in Russia's far north.<sup>22</sup> The bomb killed Mr. Zhlobitsky and injured three FSB employees. In a statement posted online shortly before the bombing, Mr. Zhlobitsky wrote that he planned to attack the building because the FSB "got some nerve" and "fabricates cases and tortures people."<sup>23</sup>

A week later, on November 7, 2018, Ms. Prokopyeva commented on the bombing while hosting a radio show on the Pskov affiliate of Ekho Moskvyy. Speaking on air, Ms. Prokopyeva said that Mr. Zhlobitsky was "a teenager who grew up under Putin's rule," in a "ruthless state" where restrictions on other forms of political activism had "raised someone who saw violence as the only path."<sup>24</sup> A transcript of her broadcast was

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terrorism as a correct activity that needs to be supported and followed." This language is a direct quote from the definition of "public justification of terrorism" set forth in the Note to Article 205.2.

<sup>17</sup> *Rights in Extremis: Russia's Anti-Extremism Practices from an International Perspective*, Article 19 (Apr. 19, 2019), <https://www.article19.org/resources/rights-in-extremis-russias-anti-extremism-practices-from-an-international-perspective/>.

<sup>18</sup> Andrew Higgins, *Russian Court Convicts Journalist for 'Justifying Terrorism'*, N.Y. Times (July 6, 2020), [nyti.ms/2D86cTO](https://www.nytimes.com/2020/07/06/world/europe/russia-journalist-convicted.html).

<sup>19</sup> *Independent Media Outlets Show Support for Embattled Russian Journalist*, Radio Free Europe/Radio Liberty (Oct. 1, 2019), <https://www.rferl.org/a/svetlana-prokopyeva-/30193410.html>.

<sup>20</sup> *Id.*

<sup>21</sup> See, e.g., *Russia's Ekho Moskvyy Hit with Official Sanctions*, Radio Free Europe/Radio Liberty (Nov. 1, 2014), <https://www.rferl.org/a/russian-ekho-moskvyy-gets-official-warning/26669585.html>; Anna Nemtsova, *The Kremlin Is Killing Echo of Moscow, Russia's Last Independent Radio Station*, The Daily Beast (Apr. 14, 2017), <https://www.thedailybeast.com/the-kremlin-is-killing-echo-of-moscow-russias-last-independent-radio-station>.

<sup>22</sup> Andrew Roth, *Russian Suicide Bomb Kills One and Injures Three in FSB Offices*, The Guardian (Oct. 31, 2018), <https://www.theguardian.com/world/2018/oct/31/russia-suicide-bomb-kills-injures-fsb-arkhangelsk>.

<sup>23</sup> Svetlana Prokopyeva, *Repressions for the State*, Pskov Newslines (Nov. 8, 2018).

<sup>24</sup> *Activists See Press-Freedom Issue in Russia's Probe of Pskov Journalist for 'Justifying Terrorism'*, Radio Free Europe/Radio Liberty, (Feb. 8, 2019), <https://www.rferl.org/a/activists-see-press-freedom-issue-in-russia-probe-of-pskov-journalist-for-justifying-terrorism-/29759310.html>.

published on the website of Ekho Moskv in Pskov, and later published as an article *Repressions for the State* on Pskov Newsline, a local news aggregator.<sup>25</sup>

In the broadcast, Ms. Prokopyeva stated that she viewed the Arkhangelsk bomber's actions as part of a larger picture. An entire generation of Russian citizens, she noted, had been raised in a state with a law-enforcement system more interested in punishing offenders than in enforcing the law. She characterized this terrorist attack as a political act, like bombings carried out by "narodovoltsy," the 19<sup>th</sup>-century Russian students who fought czarism. Even now, she observed, in a supposedly democratic Russia, the Arkhangelsk bomber still saw no other avenue for protest.<sup>26</sup>

Ms. Prokopyeva continued: "This bombing, in my opinion, better than any column by a political analyst or a Human Rights Watch report, proves that there are no conditions for political activism in Russia."<sup>27</sup> She noted that the Arkhangelsk bomber did not send an open letter demanding "to stop fabricating cases and torturing people," petition his representatives, convene a local rally, or advocate for change within a political organization.<sup>28</sup> Rather, she suggested, he felt those avenues were closed to him.<sup>29</sup>

Ms. Prokopyeva expressed frustration that law enforcement in Russia is focused on punishment and proving guilt, rather than on facts. She stated that the generation growing up under these conditions understands that activism is punished and "courts will not give them justice," and she expressed concern that such long-term restrictions on political and civil freedoms create a "repressive state," where empowered officials "feel they have a duty to use their power against the citizens."<sup>30</sup> Ms. Prokopyeva suggested that the bomber's actions were responsive to that treatment, observing: "cruelty breeds cruelty," and, a "ruthless state gave birth to a citizen who made death his argument."<sup>31</sup> Her broadcast and article ended with a warning: "Just hope that he is an exception."<sup>32</sup>

In early December 2018, Russia's state telecommunications watchdog, Roskomnadzor, issued a warning to the outlets that had broadcast her comments and published the article, and both promptly removed the materials. On February 6, 2019, a Pskov court fined the radio station 150,000 rubles (approximately US \$2,280) and Pskov Newsline 200,000 rubles (approximately US \$3,040).<sup>33</sup> That same day, authorities raided Ms.

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<sup>25</sup> *Russian Authorities Detain Reporter Over Commentary on Bombing*, Radio Free Europe/Radio Liberty, (Feb. 7, 2019), <https://www.rferl.org/a/russia-journalist-charged-for-commentary-on-bombing-prokopyeva/29757823.html>.

<sup>26</sup> Svetlana Prokopyeva, *Repressions for the State*, Pskov Newsline (Nov. 8, 2018).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Russia Investigates Reporter, Seizes Property Over Allegations of 'Justifying Terrorism'*, CPJ (Feb. 8, 2019), <https://cpj.org/2019/02/russia-investigates-reporter-seizes-property-over-/>.

Prokopyeva's home, seizing computers, phones, and documents.<sup>34</sup> Ms. Prokopyeva was interrogated in the presence of her lawyer and released.<sup>35</sup>

On September 20, 2019, prosecutors charged Ms. Prokopyeva with publicly justifying terrorism through the use of mass media and the internet, under Article 205.2(2) of the Russian Criminal Code.<sup>36</sup> The charge carried a potential sentence of up to seven years in prison and/or a fine of up to one million rubles (approximately US \$12,500).<sup>37</sup>

The case went to trial in June 2020 before a three-judge panel. Although the trial was held in Pskov, the judges were from the Moscow-based Second Western District Military Court. At the conclusion of the trial, the prosecutor recommended a sentence of six years in prison and a four-year ban on working as a journalist.<sup>38</sup> On July 6, 2020, the court found Ms. Prokopyeva guilty<sup>39</sup> and imposed a fine of 500,000 rubles (approximately US \$6,950).<sup>40</sup> The laptop she used to write articles was confiscated as a tool of the crime for which she was convicted.

Ms. Prokopyeva's trial primarily turned on expert examinations of her recorded radio broadcast and the article published in Pskov Newline. The text of the article was nearly identical to the broadcast, but it was published under the heading, "Repressions for the State" and was accompanied by a photo of Mr. Zhlobitsky entering the FSB building in Archangelsk moments before the bombing. Before trial, investigators ordered three psychological and linguistic examinations of her remarks. In order to bring charges against Ms. Prokopyeva and prove her guilt, law enforcement officials requested that the experts establish the following:

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*; see also *Russia: Journalist Faces Unjustified Criminal Charges*, Human Rights Watch (Feb. 7, 2019), [https://www.hrw.org/news/2019/02/07/russia-journalist-faces-unjustified-criminal-charges?fbclid=IwAR3c9CCC61CahDUaJY58ZkUz6gyLLINUQ8gIm2wWRGlnaTnGZ\\_C\\_I1ZkQGk](https://www.hrw.org/news/2019/02/07/russia-journalist-faces-unjustified-criminal-charges?fbclid=IwAR3c9CCC61CahDUaJY58ZkUz6gyLLINUQ8gIm2wWRGlnaTnGZ_C_I1ZkQGk).

<sup>36</sup> Prokopyeva Indictment at 3-4. Article 205.2 criminalizes "public calls for terrorist activity, [and] public justification or propaganda of terrorism," and imposes an increased penalty if such crimes are committed through the use of mass media or internet. The Note to Article 205.2 clarifies that "public justification of terrorism" means "a public expression of support for the recognition of ideology and practice of terrorism as a correct activity that needs to be supported and followed," and that "propaganda of terrorism" means "distribution of materials and/or information aimed at developing the ideology of terrorism, convincing a person of its attractiveness or creating the sense of permissibility with respect to terrorist activities."

<sup>37</sup> Svetlana Prokopyeva, *Seven Years in Two Pages of Text*, Radio Free Europe/Radio Liberty (Sept. 30, 2019), <https://www.severreal.org/a/30191938.html?fbclid=IwAR1lI9zBKbdjwXJF6q4-caqSbz8kWTkTRH9UZrV2ZCKk0uNriOnX9ktRDso>.

<sup>38</sup> Under Article 205.2, the penalty for public justification of terrorism with the use of mass media or internet could include a fine in the amount from 300,000 to 1,000,000 rubles or the amount equal to the annual income of the convicted person for three to five years, or imprisonment from five to seven years, with a prohibition from serving in certain positions or engaging in certain professional activities for up to five years. See also Anna Smolchenko, *Russia Seeks 6 Years Jail for Journalist in 'Terror Case'*, Moscow Times (July 4, 2020), <https://www.themoscowtimes.com/2020/07/03/russia-seeks-6-years-jail-for-journalist-in-terror-case-a70779>.

<sup>39</sup> Art. 205.2 of the Russian Criminal Code.

<sup>40</sup> Prokopyeva Judgment at 14-15.



- (1) Whether her broadcast and article contained public calls to commit terrorist activities or public justification or propaganda of terrorism;
- (2) Whether her broadcast and article employed any rhetorical devices meant to influence the reader or listener, and, if so, whom they targeted and how any such rhetorical devices were expressed;
- (3) Ms. Prokopyeva's main communicative goals;
- (4) Whether the broadcast and article expressed her attitude towards the terrorist attack in Archangelsk, what that attitude was, and how it was expressed;
- (5) The genre of the text (e.g., whether it was an opinion piece) and whether it could be considered a public statement recognizing and encouraging terrorism; and
- (6) Whether the text of her article could accurately be described as an "expression of support for the recognition of ideology and practice of terrorism as a correct activity that needs to be supported and followed."<sup>41</sup>

During the pre-trial stage, law-enforcement authorities in Pskov initially engaged two independent groups of experts to prepare reports based on their examination of Ms. Prokopyeva's broadcast and article. The first report was completed by Viktor Kislyakov, a psychologist, and Alexey Ryzhenko, a linguist, both affiliated with the Southern Expert Center located in the city of Volgograd, in southwest Russia. The second report was prepared by Natalya Pikaleva, a linguist, and Anastasiya Lapteva, a psychologist, both at the North-Western Regional Center of Forensic Examinations with the Russian Ministry of Justice. When it turned out that the findings of these two reports did not align, the prosecutors ordered a supplemental linguistic and psychological examination to resolve the inconsistencies. The third report was commissioned from LLC Consortium and was completed by Olga Yakotsuts, a psychologist, and Yulia Baykova, a linguist. All three reports were used by law enforcement to support the indictment against Ms. Prokopyeva on charges that the text of her article justified terrorism. As discussed below, the authors of the first two reports provided trial testimony, but the authors of the last — most controversial — report, were not invited to testify.

The defense presented four of its own expert reports to the court. The defense reports were prepared by: (1) Igor Zharkov, Alexander Mamontov, and Galina Trofimova, all linguists affiliated with the Moscow-based Guild of Linguistic Experts on Documentation and Information-related Disputes (GLEDIS), (2) Elizaveta Koltunova, a linguist, and Sergey Davydov, a psychologist, both affiliated with the Nizhny Novgorod State University and the Koltunov and Partners Consultancy LLC, and (3) Yulia Safonova, a linguist and one of the authors of the official Methodology for Conducting Forensic Psychological and

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<sup>41</sup> See Notes to Art. 205.2 of the Russian Criminal Code.

Linguistic Examination of Materials in Cases Related to Countering Extremism and Terrorism. The authors of all three defense reports were allowed to testify at trial.

The findings of the various experts are discussed below.

## **Prosecution Experts**

### ***Expert Report of Viktor Kislyakov and Alexey Ryzhenko***<sup>42</sup>

Messrs. Kislyakov's and Ryzhenko's expert report concluded that Ms. Prokopyeva's broadcast and article contained "linguistic and psychological devices [and] rhetorical influence" aimed at justifying terrorism. The experts concluded that Ms. Prokopyeva had intended to offer a sympathetic portrayal of the Arkhangelsk bomber by describing him as a fighter against a "repressive state" and a "victim" of the authorities, who had "high goals" and "noble motives" to commit the attacks. Yet, the report failed to identify any specific statements or words from the broadcast or article that justified or supported terrorism.<sup>43</sup>

During his trial testimony, Mr. Kislyakov, the psychologist, clarified that Ms. Prokopyeva had in fact expressed a neutral attitude toward the attack, but that her lack of condemnation of the attack and comments about the bomber having no other options to express his protest other than blowing himself up were sufficient to justify terrorism.<sup>44</sup> On cross-examination, Mr. Ryzhenko, the linguist, did not provide any examples of words or phrases used by Ms. Prokopyeva to justify terrorism. Instead, he based his findings on the "reasoning as a whole" and concluded that Ms. Prokopyeva had justified terrorism because she "[did] not express a negative view" of terrorism.<sup>45</sup>

### ***Expert Report of Natalya Pikaleva and Anastasiya Lapteva***<sup>46</sup>

The prosecution's second expert report concluded that Ms. Prokopyeva's article contained "a range of linguistic and psychological features aiming to justify the commission of destructive activities" (i.e., the bombing in the Archangelsk FSB). These features included the title, "Repressions for the State," a photo of Mr. Zhlobitsky entering the FSB building, and several accentuated passages.<sup>47</sup> However, unlike Messrs. Kislyakov and Ryzhenko, the experts concluded that the audio broadcast did not have features justifying terrorism, because it did not have the title or the photograph.<sup>48</sup> On cross-examination, Ms. Pikaleva, the linguist, and Ms. Lapteva, the psychologist, stood

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<sup>42</sup> Southern Expert Center, *Comprehensive Psychological and Linguistics Forensic Examination No. 007/19* (Jan. 23, 2019) by V.P. Kislyakov and A.Yu. Ryzhenko.

<sup>43</sup> *Id.* at 25-26. The experts also ignored the fact that Ms. Prokopyeva unequivocally opposed the explosion, instead listing accepted forms of civic activism, like protest and voting, as alternatives.

<sup>44</sup> Corrections to the Trial Transcript, Examination of V.P. Kislyakov (June 22, 2020).

<sup>45</sup> Trial Transcript, Examination of A. Y. Ryzhenko (June 23, 2020).

<sup>46</sup> The Ministry of Justice of the Russian Federation, North-Western Regional Center of Forensic Examinations, *Comprehensive Psychological and Linguistics Forensic Examination No. 687 / 15-1 688 / 15-1* (Apr. 12, 2019) by N.A. Pikaleva and A.V. Lapteva.

<sup>47</sup> *Id.* at 27-29.

<sup>48</sup> *Id.* at 28-29.

by their findings, but they could not confirm whether Ms. Prokopyeva was responsible for selecting the photograph or accentuating the passages in the article, or whether this was the work of an editor.<sup>49</sup>

### ***Expert Report of Olga Yakotsuts and Yulia Baykova***<sup>50</sup>

Because the prosecution's first two expert reports reached inconsistent conclusions with respect to Ms. Prokopyeva's broadcast (i.e., the first report concluded that the broadcast justified terrorism, while the second report concluded that it did not), prosecutors refused to proceed to trial and instead returned Ms. Prokopyeva's case to law-enforcement authorities for further investigation.<sup>51</sup> In January 2020, investigators ordered a supplemental linguistic and psychological examination to resolve the discrepancies in the two prior expert reports.<sup>52</sup>

To conduct the examination, investigators retained LLC Consortium ("Consortium"), a company in the Republic of Khakassiya. Russian law requires expert examinations to be conducted by non-profit organizations, while Consortium was a for-profit entity. However, investigators instructed Consortium to engage experts who would complete the report in their individual capacity, one of whom, Ms. Yakotsuts, was Consortium's owner and general director. Yet when the report was completed, it was published on the letterhead of Khakassiya State University, an educational institution that, like Consortium, was not accredited to conduct forensic expert examinations.<sup>53</sup> Furthermore, when contacted by defense counsel, Khakassiya State University claimed that it had never been engaged to conduct a forensic expert examination relating to Ms. Prokopyeva's case and that the letterhead used for the report was fake.<sup>54</sup>

The supplemental examination concluded that both Ms. Prokopyeva's broadcast and article contained "linguistic and psychological features" justifying and propagandizing terrorism.<sup>55</sup> The experts claimed that, by reading Ms. Prokopyeva's article, readers would develop negative views of Russia, as well as negative and hostile attitudes towards law enforcement and the government.<sup>56</sup> They concluded that Ms. Prokopyeva intended to convince the public that suicide bombing is "the only historically accurate and effective way to influence the decision-making by the government," and an

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<sup>49</sup> Trial Transcript, Examination of N. Pikaleva (June 25, 2020).

<sup>50</sup> The Khakassiya State University named after N.F. Katanov and LLC Consortium, *Supplemental Comprehensive Psychological and Linguistics Forensic Examination No. 117/5* (Feb. 17, 2020) by O.L. Yakotsuts and Yu.S. Baykova [hereinafter "Yakotsuts Report"].

<sup>51</sup> Trial Transcript, Oral Arguments, Defense Attorney Cherkasov (July 3, 2020) (referring to Pskov Prosecutor's Proclamation).

<sup>52</sup> *Id.* (referring to order by the investigator).

<sup>53</sup> Complaint to the Military Court of Appeal (July 16, 2020) at 17 [hereinafter "Prokopyeva Appeal"].

<sup>54</sup> Letter from Khakassiya State University to Ms. Prokopyeva's attorney V.V. Cherkasov (May 28, 2020) (in Russian).

<sup>55</sup> Yakotsuts Report at 30.

<sup>56</sup> *Id.*

appropriate way to “express your protest against the use of torture and fabrication of criminal cases.”<sup>57</sup>

Notably, Ms. Yakotsuts and Ms. Baykova insisted on an illogical reading of Ms. Prokopyeva’s statement: “This bombing, in my opinion, better than any column by a political analyst or a Human Rights Watch report, proves that there are no conditions for political activism in Russia.”<sup>58</sup> Instead of reading “better” as a modification of the verb, “to prove,” the experts insisted that “better” referred to the terrorist act itself. Relying on this error in interpretation, they concluded that Ms. Prokopyeva had expressed a view that terrorist attacks were “better” than political columns or human rights reports and thus expressed approval of “the ideology and practice of activities that intimidate others and pose a threat to human lives.”<sup>59</sup> They also incorrectly attributed to Ms. Prokopyeva the statements made by the bomber (“FSB got some nerve!”), distorting the meaning of her broadcast.<sup>60</sup>

Ms. Yakotsuts and Ms. Baykova did not testify during the investigation or at trial. Nevertheless, the prosecution extensively cited their report in the indictment to substantiate the charges against Ms. Prokopyeva. Similarly, the court devoted four pages of its verdict to discussing this report – four times the amount devoted to discussing the other two expert reports combined.

Ms. Prokopyeva’s defense attorneys filed a motion for Ms. Yakotsuts and Ms. Baykova to testify at trial, arguing that their testimony was particularly important since the indictment largely relied on the conclusions in their report.<sup>61</sup> The defense also argued that both experts lacked the necessary qualifications, competency, and impartiality to conduct the examination at issue, pointing out that Ms. Yakotsuts had filed a defamation suit against Ms. Prokopyeva on the same day she submitted her expert report.<sup>62</sup> The court denied the motion without explanation and similarly refused the defense’s subsequent motion to exclude the report from evidence.<sup>63</sup>

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<sup>57</sup> *Id.* at 32.

<sup>58</sup> *Id.* at 34.

<sup>59</sup> *Id.* at 34. This statement is part of the Russian legal definition of the term “terrorism.”

<sup>60</sup> *Id.* at 32.

<sup>61</sup> Prokopyeva Appeal at 28.

<sup>62</sup> Ms. Yakotsuts claimed that Ms. Prokopyeva had published defamatory information about her on Facebook, after law enforcement authorities retained LLC Consortium to conduct the supplemental examination, and demanded that Ms. Prokopyeva delete this information and pay her 500,000 rubles as moral compensation. See Pskov City Court, *Yakotsuts v. Prokopyeva*, No. 2-1575-2020 (Aug. 12, 2020). The lawsuit was dismissed on August 12, 2020, and the dismissal was upheld on appeal on November 17, 2020.

<sup>63</sup> Prokopyeva Judgment at 12. The court determined that the experts’ advanced degrees qualified them to conduct the examination. Regarding the unauthorized use of Khakassia University letterhead, the court concluded that this “does not prove the illegality of these experts’ conclusions.” Further, the court rejected the defense’s claims that, since Ms. Yakotsuts filed a defamation lawsuit against Ms. Prokopyeva, she had a personal interest in the outcome of the proceedings against Ms. Prokopyeva. The court acknowledged that Ms. Yakotsuts filed her complaint on the same day that she submitted her report, but reasoned that

### ***Ms. Prokopyeva's Defense Experts***

Ms. Prokopyeva did not appear to have had any obstacles in engaging expert witnesses or making the witnesses available to testify at trial. The defense presented four expert reports completed by seven experts in linguistics and psychology, all of whom concurred in their findings that Ms. Prokopyeva's article did not contain expressions of support for terrorism. One of those experts, Yulia Safonova, was among the authors of the official Methodology for Conducting Forensic Psychological and Linguistic Examination of Materials in Cases Related to Countering Extremism and Terrorism, which all expert witnesses in Ms. Prokopyeva's case were required to follow.

During the trial, neither the judges nor the prosecution questioned the legitimacy of the defense experts' findings or their qualifications. During a brief cross-examination, the prosecutor did not ask any questions relating to the merits of their findings and did not offer any reasons to doubt their conclusions.<sup>64</sup> Moreover, neither the prosecution nor the judges asked any questions to establish whether any of the experts had a personal interest in the outcome of the proceedings that would interfere with their ability to conduct an unbiased and balanced examination of Ms. Prokopyeva's article and radio broadcast.

Nevertheless, in its verdict, the court dismissed all four defense expert reports and disregarded the expert witnesses' testimony, on the grounds that all of the experts could have had an interest in the outcome of the proceedings, despite the fact that neither the court nor the prosecution questioned the experts on this subject during cross-examination.<sup>65</sup> The court's conclusion was instead based on the discovery of a text message on Ms. Prokopyeva's phone from the day before the criminal investigation against her was initiated, in which she discussed with a friend where she could obtain her own independent forensic expert examination of her broadcast and article.<sup>66</sup> This friend had no involvement in the investigation or trial proceedings, but the court nonetheless concluded that the text exchange undermined the defense experts' independence. Furthermore, the court concluded that because the defense experts did not have the "necessary level of access" to the original materials of the criminal case, "there is no reason to consider the completeness and validity of their conclusions."<sup>67</sup> However, the defense experts were provided with the same materials for the examination as the prosecution's experts: a copy of Ms. Prokopyeva's article published in Pskov Newline and an audio recording of her radio program.

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since the complaint was filed later in the day, *after* Ms. Yakotsuts submitted her findings, the complaint did not demonstrate a bias against Mr. Prokopyeva for purposes of the report. *Id.* at 13.

<sup>64</sup> Trial Transcript (June 29, 2020).

<sup>65</sup> Prokopyeva Judgment at 13.

<sup>66</sup> *Id.* at 13-14. Ms. Prokopyeva testified at trial that, at the time she sent that message, she did not know she would become a suspect or a target of a criminal investigation, but was looking for experts in connection with the investigation that Roskomnadzor was conducting against the media outlets that distributed her broadcast and article. She explained that she found Roskomnadzor's findings vague and unsubstantiated, and she was looking for experts who would conduct textual analysis.

<sup>67</sup> *Id.* at 14.

# METHODOLOGY



## A. THE MONITORING PHASE

The Clooney Foundation for Justice monitored this case through audio and video recordings of each hearing. The monitor, who speaks Russian, listened to audio recordings of the first three hearings. Following a successful petition by defense counsel, the remaining hearings were broadcast live on YouTube. The monitor was then able to watch these YouTube videos and observed the remaining hearings in that manner.

The monitor used a standardized TrialWatch questionnaire to record what transpired at trial and the degree to which the defendant's fair trial rights were respected. The monitor's responses to the questionnaire and notes were shared with Covington & Burling LLP for purposes of evaluating the fairness of the trial.

## B. THE ASSESSMENT PHASE

To evaluate the trial's fairness and arrive at a grade, Covington attorneys reviewed the notes taken by the Clooney Foundation for Justice trial monitor regarding the proceedings and the monitor's responses to the standardized questionnaire, as well as various court documents, including the indictment, expert reports, judgment, trial transcripts, as well as audio and video recordings. The attorneys also conducted factual research in the public domain and interviewed Ms. Prokopyeva's trial counsel.

# ANALYSIS



## A. APPLICABLE LAW

This report draws upon the International Covenant on Civil and Political Rights (“ICCPR”), a multilateral treaty adopted by the U.N. General Assembly in 1966, which is part of the International Bill of Human Rights<sup>68</sup>; jurisprudence from the United Nations Human Rights Committee, which is tasked with monitoring implementation of the ICCPR; the European Convention on Human Rights (“ECHR”); and jurisprudence from the European Court on Human Rights (“ECtHR”), 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 USSR’s obligations under the covenant in 1991.<sup>69</sup> Russia ratified the ECHR in 1998, subject to certain reservations.<sup>70</sup>

## B. VIOLATIONS AT TRIAL

### Right to Presumption of Innocence

Article 14(2) of the ICCPR guarantees that “everyone charged with a criminal offense shall have the right to be presumed innocent until proven guilty according to law.” As described by the UN Human Rights Committee, “[t]he presumption of innocence, which is fundamental to the protection of human rights, 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 the doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle.”<sup>71</sup>

Likewise, Article 6(2) of the ECHR provides that “everyone charged with a criminal offense shall be presumed innocent until proved guilty according to law.” Like Article 14(2) of the ICCPR, Article 6(2) requires that the relevant judicial authority not predetermine the outcome of the case. Such impermissible predetermination may be inferred from the presence of “some reasoning suggesting that the court or the official regards the accused as guilty” even prior to the verdict.<sup>72</sup>

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<sup>68</sup> International Covenant on Civil and Political Rights Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter “ICCPR”].

<sup>69</sup> *International Covenant on Civil and Political Rights*, United Nations Treaty Collection 2020 [https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=\\_en&mtdsg\\_no=IV-4&src=IND](https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND).

<sup>70</sup> *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>.

<sup>71</sup> Human Rights Committee, *Saidova v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015 (Sept. 20, 2018) ¶ 9.4.

<sup>72</sup> European Court of Human Rights, *Garycki v. Poland*, App. No. 14348/02 (Feb. 6, 2007) ¶ 66. See also European Court of Human Rights, *Daktaras v. Lithuania*, App. No. 42095/98 (Oct. 10, 2000) ¶ 41; European Court of Human Rights, *Nestak v. Slovakia*, App. No. 65559/01 (Feb. 27, 2009) ¶ 88.

The record from Ms. Prokopyeva's trial suggests that she was not afforded the benefit of the doubt in her case, in violation of Article 14(2) of the ICCPR and Article 6(2) of the ECHR. Most notably, neither the indictment nor the court's judgment presented any specific quotes from Ms. Prokopyeva's broadcast or article that purportedly justified terrorism. Instead, both relied entirely on the legal conclusions of the prosecution's experts. In treating the prosecution's expert conclusions as fact, and failing to conduct its own legal analysis of Ms. Prokopyeva's statements, the court operated from a presumption of guilt at the outset, placing the burden on Ms. Prokopyeva to prove her own innocence.<sup>73</sup>

The ECtHR has also held that an insufficiently reasoned judgment of conviction can constitute a violation of Article 6(2) of the ECHR.<sup>74</sup> The ECtHR has further held that this principle is violated where a court rejects relevant testimony from a defense witness in issuing a conviction, while failing to provide justification for why the testimony of the defense witness(es) lacked probative value.<sup>75</sup>

As explained more fully below, the trial court's judgment of conviction for Ms. Prokopyeva was not sufficiently reasoned, in that it did not include an independent legal analysis of the evidence presented. Instead, the court simply adopted verbatim the conclusory assertion of the prosecution that Ms. Prokopyeva's broadcast and article had broken the law.<sup>76</sup> The court also entirely ignored the defense's argument that the indictment had failed to identify any specific statements by Ms. Prokopyeva that it believed justified terrorism.<sup>77</sup>

Taken together, the court's failure to conduct its own legal analysis and rejection, without adequate explanation, of defense arguments meant that Ms. Prokopyeva's right to be presumed innocent was violated.

### **Equality of Arms: Right to Obtain the Attendance and Examination of Witnesses**

The ICCPR provides that all parties in a judicial proceeding have the right to be treated equally.<sup>78</sup> This right to "equality of arms" requires that "the procedural conditions at trial and sentencing must be the same for all parties. It calls for a 'fair balance' between the

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<sup>73</sup> See Human Rights Committee, *Ashurov v. Tajikistan*, U.N. Doc. CCPR/C/89/D/1248/2005 (Mar. 20, 2007) ¶¶ 2.8, 6.6; Human Rights Committee, *Larranaga v. Philippines*, U.N. Doc. CCPR/C/87/D/1421/2005 (July 24, 2006) ¶ 7.4.

<sup>74</sup> European Court of Human Rights, *Melich and Beck v. Czech Republic*, App. No. 35450/04 (July 24, 2008) ¶ 49-55; European Court of Human Rights, *Ajdaric v. Croatia*, App. No. 20883/09 (Dec. 13, 2011) ¶¶ 46-52.

<sup>75</sup> See European Court of Human Rights, *Melich and Beck v. Czech Republic*, App. No. 35450/04 (July 24, 2008) ¶¶ 52-55; Human Rights Committee, *Iskandarov v. Tajikistan*, U.N. Doc. CCPR/C/101/D/1499/2006 (Apr. 28, 2011) ¶ 6.6; Human Rights Committee, *Khostikoev v. Tajikistan*, U.N. Doc. CCPR/C/97/D/1519/2006 (Dec. 3, 2009) ¶¶ 7.2-7.3.

<sup>76</sup> Prokopyeva Judgment at 14.

<sup>77</sup> *Id.* at 13-14.

<sup>78</sup> ICCPR, Art. 14(1).



parties, requiring that each party should be afforded a reasonable opportunity to present the case under conditions that do not place her/him at a substantial disadvantage vis-à-vis the opponent.”<sup>79</sup> In criminal cases, adherence to the principle of equality of arms between the state and the accused is essential to prevent the repressive use of criminal law.<sup>80</sup>

The equality-of-arms principle is reflected in part in Article 14(3)(e) of the ICCPR, which entitles defendants “[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.” This right “is important for ensuring an effective defense by the accused and their counsel and thus guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.”<sup>81</sup> Although defendants do not have an unlimited right to obtain the attendance of witnesses, they do have the “right to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses against [them] at some stage of the proceedings.”<sup>82</sup>

Similarly, Article 6(3)(d) of the ECHR guarantees everyone charged with a criminal offense the right “to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.” The ECtHR has repeatedly stated that, as a general rule, Articles 6(1) (which guarantees a fair trial) and (3)(d) require that defendants be given adequate and proper opportunity to challenge and question any witness who testifies against them.<sup>83</sup> The term “witness” under Article 6(3) also includes expert witnesses.<sup>84</sup>

The court’s refusal to allow the defense to call Ms. Yakotsuts and Ms. Baykova, the authors of the prosecution’s third expert report, to testify at trial violated Ms. Prokopyeva’s right to examine witnesses against her, which is guaranteed by Article 14(3)(e) of the ICCPR and Article 6 of the ECHR, thus violating the principle of equality of arms.

In *Saidov v. Tajikistan*, the UN Human Rights Committee found a violation of Article 14(3)(e) of the ICCPR when the trial court in Tajikistan refused to call witnesses relevant

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<sup>79</sup> *Legal Digest of International Fair Trial Rights*, Organization for Security and Cooperation in Europe 110 (2012), [osce.org/files/f/documents/1/f/94214.pdf](https://osce.org/files/f/documents/1/f/94214.pdf).

<sup>80</sup> See *id.*; Human Rights Committee, *Bondar v. Uzbekistan*, U.N. Doc. CCPR/C/101/D/1769/2008 (Apr. 28, 2011) ¶ 7.5; Human Rights Committee, *Nazarov v. Uzbekistan*, U.N. Doc. CCPR/C/81/D/911/2000 (Aug. 19, 2004) ¶ 6.3.

<sup>81</sup> Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) ¶ 39.

<sup>82</sup> Human Rights Committee, *Saidov v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015 (Sept. 20, 2018) ¶ 9.6.

<sup>83</sup> See, e.g., European Court of Human Rights, *Khodorkovsky & Lebedev v. Russia* (No. 2), App. Nos. 51111/07 and 42757/07 (Jan. 14, 2020) ¶ 95.

<sup>84</sup> See, e.g., European Court of Human Rights, *Balsytė-Lideikienė v. Lithuania*, App. No. 72596/01 (Nov. 4, 2008).

to the defense without explanation.<sup>85</sup> Likewise, in *Litvin v. Ukraine*, the Committee concluded that the trial court in Ukraine violated the principle of equality of arms, guaranteed by Article 14(3)(e), when the court ignored defense counsel's requests to call and examine several important witnesses who had testified during the preliminary investigation, without providing any justification for its refusal.<sup>86</sup>

In the same vein, ECtHR case law makes clear that "the defence must have the right to study and challenge not only an expert report as such, but also the credibility of those who prepared it, by direct questioning."<sup>87</sup> In *Khodorkovsky & Lebedev v. Russia (No. 2)*, a Russian trial court denied the defendants' requests to confront the prosecution's expert witnesses. The ECtHR observed that, by refusing to call the expert witnesses to testify at trial, the court's conclusions were based solely on evidence that was never examined during the hearing. The ECtHR found that the court's failure to consider the testimony of the expert witnesses whose reports were later used against the defendants was a violation of Articles 6(1) and (3)(d) of the ECHR, in particular the guarantees for adversarial proceedings and equality of arms.

In Ms. Prokopyeva's case, it was particularly important to cross-examine Ms. Yakotsuts and Ms. Baykova because their conclusions provided the basis for the indictment. The defense presented credible evidence that the experts lacked the necessary qualifications and competency to conduct the examination, and that Ms. Yakotsuts in particular had a personal interest in the outcome of the proceedings due to her defamation suit against Ms. Prokopyeva. However, like the trial courts in *Saidov* and *Litvin*, the court in Ms. Prokopyeva's case dismissed the requests to examine these witnesses, finding – without any explanation – that their testimony was unnecessary and that any claims of incompetence or bias were unsubstantiated. Moreover, despite the fact that the defense was not allowed to question Ms. Yakotsuts or Ms. Baykova at any stage of the proceeding, the court relied on their report as the primary basis for its guilty verdict. The prosecution, on the other hand, did not have any obstacles in cross-examining witnesses presented by the defense. Thus, the trial court violated the principle of equality of arms in Article 14(3)(e) of the ICCPR when it refused – without explanation – to call Ms. Yakotsuts or Ms. Baykova for questioning.<sup>88</sup> It likewise violated Ms. Prokopyeva's rights under Article 6(1) and (3)(d) of the ECHR.

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<sup>85</sup> Human Rights Committee, *Saidov v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015 (Sept. 20, 2018) ¶ 9.6.

<sup>86</sup> Human Rights Committee, *Litvin v. Ukraine*, U.N. Doc. CCPR/C/102/D/1535/2006 ¶ 10.4.

<sup>87</sup> See, e.g., European Court of Human Rights, *Khodorkovsky & Lebedev v. Russia* (No. 2), App. Nos. 51111/07 and 42757/07 (Jan. 14, 2020) ¶ 482; European Court of Human Rights, *Brandstetter v. Austria*, App. Nos. 11170/84; 12876/87; 13468/87 (Aug. 28, 1991) ¶ 42; European Court of Human Rights, *Mirilashvili v. Russia*, App. No. 6293/04 (Dec. 11, 2008) ¶ 158; European Court of Human Rights, *Matytsina v. Russia*, App. No. 58428/10 (Mar. 27, 2014) ¶ 177.

<sup>88</sup> Human Rights Committee, *Saidov v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015 (Sept. 20, 2018) ¶ 9.6.

## Right to an Impartial, Independent, and Competent Tribunal

Under Article 14(1) of the ICCPR, all defendants facing criminal charges “shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” Article 6(1) of the ECHR also guarantees a right to a fair trial and mandates that “[i]n the determination of . . . criminal charges against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” These rules apply to any courts or other bodies that exercise judicial functions in accordance with domestic law.

Impartiality requires the absence of prejudice or bias on the part of a judge hearing the case. The UN Human Rights Committee and the ECtHR apply both subjective and objective criteria for assessing the impartiality of judges. The subjective criteria concern whether there is actual prejudice or bias, and focus on the behavior and personal conviction of the judge. The objective criteria concern whether the court provided the appropriate objective guarantees to dispel any legitimate doubt over its impartiality.<sup>89</sup> With respect to the latter, the ECtHR determines whether there are ascertainable facts that may raise an objectively justified concern as to any judge’s lack of impartiality.<sup>90</sup> For a court to have the appearance of impartiality, it must provide the appropriate objective guarantees to dispel any legitimate doubt over its impartiality.

Independence calls for the protection of judicial officers from any form of political influence in their decision-making, including any threat to their term of office, security, remuneration, or conditions of service.<sup>91</sup> The ICCPR also explicitly requires judicial tribunals to be competent, requiring “the appointment of suitably qualified and experienced persons to act as judicial officers.”<sup>92</sup>

The question of a lack of judicial impartiality may arise in two types of situations. *First*, partiality may be functional in nature and relate to the hierarchy of the criminal-justice system or the way judicial functions are exercised. *Second*, partiality may be of personal character, derived from a particular judge’s relationship with the actors in the proceedings or judge’s conduct in a particular case.<sup>93</sup> Ms. Prokopyeva’s case presents impartiality and independence concerns that are both functional and personal in nature.

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<sup>89</sup> See, e.g., European Court of Human Rights, *Micallef v. Malta*, App. No. 17056/06 (Oct. 15, 2009) ¶ 93; European Court of Human Rights, *Boyan Gospodinov v. Bulgaria*, App. No. 28417/07 (May 4, 2018) ¶ 49.

<sup>90</sup> See, e.g., European Court of Human Rights, *Parlov-Tkalčić v. Croatia*, App. No. 24810/06 (Dec. 22, 2009) ¶ 80; European Court of Human Rights, *Ócalan v Turkey*, App. No. 46221/99 (Mar. 12, 2003) ¶ 114.

<sup>91</sup> Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, U.N. Doc. A/63/223 (Aug. 6, 2008) ¶ 23.

<sup>92</sup> *Id.*

<sup>93</sup> See Guide on Article 6 of the European Convention on Human Rights, ¶ 256 (updated Aug. 31, 2020).

## ***Partiality and dependence of military-court judges in criminal cases involving civilians***

Ms. Prokopyeva's case was heard by a three-judge panel of the Second Western Circuit Military Court, in Moscow. That court conducted an offsite hearing on the premises of a local court in the city of Pskov.<sup>94</sup> Notably, only several military courts in Russia are authorized to hear cases involving charges of terrorism.<sup>95</sup>

Until 2009, Russian law required that only members of the military could serve as judges of military courts.<sup>96</sup> All three judges on the panel that convicted Ms. Prokopyeva were initially appointed to serve as judges of military courts before 2009, meaning they all were appointed as members of the military.<sup>97</sup>

The use of military courts to prosecute civilians raises serious fair-trial issues. As the UN Special Rapporteur on the independence of judges and lawyers observed more than two decades ago, "international law is developing a consensus as to the need to restrict drastically, or even prohibit, that practice."<sup>98</sup> The UN High Commissioner for Human Rights has expressed concern that "a number of countries [have] made use of military courts to try civilians, or created special courts to deal with terrorism-related cases," even though military courts "often lack independence and impartiality of the judiciary."<sup>99</sup> And there are concerns about the independence and impartiality of military courts "even where instructions are given to members of a court that they are to act independently."<sup>100</sup> This suggests that lack of independence and impartiality are inherent in military courts when civilians are on trial.

The UN Working Group on Arbitrary Detention has developed rules for military tribunals, requiring that "military justice . . . should be incompetent to try civilians."<sup>101</sup> The UN Human Rights Committee has issued numerous recommendations for domestic

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<sup>94</sup> See, e.g., Irina Tumukova, *The Case and the Verdict Are Extremely Shameful*, Novaya Gazeta, (July 6, 2020), <https://novayagazeta.ru/articles/2020/07/06/86165-i-delo-i-prigovor-pozorneyshie> (in Russian).

<sup>95</sup> See Vladislav Kulikov, *Terrorism Cases to Be Heard Only by Four Military Courts*, RG.ru (June 8, 2017), <https://rg.ru/2017/06/08/dela-o-terrorizme-budut-rassmatrivat-tolko-chetyre-voennyh-suda.html> (in Russian).

<sup>96</sup> Federal Constitutional Law No. 3-FKZ, Art. 1 (June 29, 2009), <http://ivo.garant.ru/#/document/195809/paragraph/1:2> (allowing civilians to serve as military court judges).

<sup>97</sup> Judge Morozov was appointed in 1999. See <https://xn--d1aiaa2aleeao4h.xn--p1ai/sudii/view/id/21150/from/1>. Judge Pluzhnikov was appointed in 1995. See <https://xn--d1aiaa2aleeao4h.xn--p1ai/sudii/view/id/21153/from/1>. Judge Borisov was appointed in 2005. See <https://xn--d1aiaa2aleeao4h.xn--p1ai/sudii/view/id/21143/from/1>.

<sup>98</sup> Report of the Special Rapporteur on the Independence of Judges And Lawyers On His Mission to Peru, U.N. Doc. E/CN.4/1998/39/Add.1 (2008) ¶ 78.

<sup>99</sup> Report of the United Nations High Commissioner for Human Rights on the Protection of Human Rights And Fundamental Freedoms While Countering Terrorism, U.N. Doc. A/HRC/16/50 (2010) ¶ 31.

<sup>100</sup> Report of the Special Rapporteur On the Promotion And Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, U.N. Doc. A/63/223 (Aug. 6, 2008) ¶ 25. In particular, the Special Rapporteur pointed out the following concerns: the cumulative effect of simplified provisions for dismissal of judges sitting in military courts, the lack of security of tenure of judges, the fact that often judges are serving (military) officers appointed by the executive.

<sup>101</sup> Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/1999/63 (Dec. 18, 1998) ¶ 80.

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

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

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

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

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

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

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

<sup>105</sup> *Id.* ¶ 68.

<sup>106</sup> *Id.* ¶¶ 72-73.

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

<sup>108</sup> *Id.*

fairness guarantees and that judges remain vulnerable to political and economic influence.<sup>109</sup>

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

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

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

<sup>110</sup> Russian Federation Law No. 3132-1, *On the Status of Judges in the Russian Federation*, Art. 6(4) (June 26, 1992), [http://www.supcourt.ru/en/judicial\\_system/law\\_status\\_judges/](http://www.supcourt.ru/en/judicial_system/law_status_judges/).

<sup>111</sup> Federal Constitutional Law No. 1-FKZ, *On Military Courts of the Russian Federation*, Art. 27 (June 23, 1999), [http://www.supcourt.ru/en/judicial\\_system/law\\_Military\\_courts/](http://www.supcourt.ru/en/judicial_system/law_Military_courts/).

<sup>112</sup> *Id.* Art. 5.

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

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

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

### ***Facts suggesting lack of impartiality at trial***

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

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

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

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

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

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

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

### **Right to Appeal: Duly Reasoned Judgment**

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

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

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

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



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

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

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

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

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

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

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

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

<sup>123</sup> Prokopyeva Judgment at 14.

## C. OTHER FAIRNESS CONCERNS

### Right to Freedom of Expression

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

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

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

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

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

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

<sup>125</sup> Law on Mass Media, Art. 47.

<sup>126</sup> European Convention on Human Rights, Art. 10 (1950).

<sup>127</sup> International Covenant on Civil and Political Rights, Art. 19 (1966).

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

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

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

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

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

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<sup>128</sup> European Convention on Human Rights, Art. 10 (1950)

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

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

<sup>131</sup> *Guide on Article 10 of the European Convention on Human Rights*, European Court of Human Rights 19 (Mar. 31, 2020) [https://www.echr.coe.int/Documents/Guide\\_Art\\_10\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf).

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

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

<sup>134</sup> Art. 205.2 of the Russian Criminal Code.

<sup>135</sup> Svetlana Prokopyeva, *Repressions for the State*, Pskov Newline (Nov. 8, 2018).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **Abuse of Process**

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

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

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

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

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

<sup>145</sup> *Id.* at 4.

<sup>146</sup> *Id.* at 7.

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

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

prosecution was brought<sup>149</sup>; whether the court was independent from executive authorities<sup>150</sup>; whether “there was a political impetus behind the charges”<sup>151</sup>; whether authorities took action against the defendant despite an “increasing awareness that the practices in question were incompatible with Convention standards”<sup>152</sup>; whether the prosecution had reasonable suspicion to bring the charges<sup>153</sup>; how the criminal proceedings were conducted<sup>154</sup>; and whether the ultimate decision was well-reasoned and based on law.<sup>155</sup>

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

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

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<sup>149</sup> European Court of Human Rights, *Guide on Article 18 of the European Convention of Human Rights, Limitations on Use of Restrictions and Rights*, (Aug. 31, 2018) ¶ 57, [https://www.echr.coe.int/Documents/Guide\\_Art\\_18\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_18_ENG.pdf) (citing European Court of Human Rights, *Merabishvili v. Georgia*, App. No. 72508/13 (Nov. 28, 2017) ¶ 322; European Court of Human Rights, *Khodorkovskiy v. Russia*, App. No. 5829/04 (May 31, 2011) ¶ 257; European Court of Human Rights, *Khodorkovskiy and Lebedev v. Russia*, App. Nos. 11082/06 and 13772/05 (July 25, 2013) ¶ 901; European Court of Human Rights, *Nastase v. Romania*, App. No. 80563/12 (Nov. 18, 2014) ¶ 107; European Court of Human Rights, *Rasul Jafarov v. Azerbaijan*, App. No. 69981/14 (Mar. 17, 2016) ¶¶ 159-61; European Court of Human Rights, *Mammadli v. Azerbaijan*, App. No. 47145/14 (Apr. 19, 2018) ¶ 103; European Court of Human Rights, *Rashad Hasanov and Others v. Azerbaijan*, App. No. 148653/13 (June 7, 2018) ¶ 124).

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

<sup>151</sup> *See id.* ¶ 320.

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

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

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

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

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

<sup>157</sup> *See, e.g.*, Robyn Dixon, *Russia’s Activists and Independent Journalists Face New Wave of Crackdowns*, Washington Post (July 26, 2020), [https://www.washingtonpost.com/world/europe/russia-journalists-opposition-arrests-putin/2020/07/25/6ec32804-c784-11ea-a825-8722004e4150\\_story.html](https://www.washingtonpost.com/world/europe/russia-journalists-opposition-arrests-putin/2020/07/25/6ec32804-c784-11ea-a825-8722004e4150_story.html); *Russia: Dozens of Journalists Detained for Peaceful Protests*, Human Rights Watch (July 10, 2020), <https://www.hrw.org/news/2020/07/10/russia-dozens-journalists-detained-peaceful-protests>.

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

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

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

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

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

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

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

## CONCLUSION AND GRADE



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

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

**GRADE:**

**D**





## GRADING METHODOLOGY

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

- The severity of the violation(s) that occurred;
- Whether the violation(s) affected the outcome of the trial;
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,”<sup>161</sup> 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.

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<sup>161</sup> ICCPR, Article 26.