Old Habits Die Hard: Aleksandr Nikitin, the European Court of Human Rights, and Criminal Procedure in the Russian Federation

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OLD HABITS DIE HARD: ALEKSANDR NIKITIN, THE EUROPEAN COURT OF HUMAN RIGHTS, AND CRIMINAL PROCEDURE IN THE RUSSIAN FEDERATION

ALEXANDER SEVERANCE*

Abstract: With the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms, the Russian Federation agreed to subject itself to international scrutiny through the European Court of Human Rights. The Russian Federation's espionage case against Aleksandr Nikitin provides an illustrative example of the conflict between the Russian Federation's new treaty obligations and its existing Code of Criminal Procedure. The Nikitin case illustrates the shift of some power from Russia's executive branch to its judicial branch, and a move towards the rule of law. This Note concludes that the Code of Criminal Procedure must be revised if the Russian Federation is to comply with its treaty obligations under the Convention.

The [c]ourt drew attention to the fact that the KGB must now pay attention not only to their own interests, but to the evidence. . . . Because the court is guided by reasons of law, not reasons of KGB "necessity" . . . although we have a new president and although Putin was head of the FSB . . . the verdict will stand. And lawyers throughout the world will be able to see whether Russia is a state based on the law, or whether the law is just a smoke screen to hide any arbitrariness.

—Sergei Golets, presiding judge in the Nikitin Case

INTRODUCTION

On September 13, 2000, the Presidium of the Supreme Court of the Russian Federation rejected a bid by the Procurator General to

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reopen the treason case against Aleksandr Konstaninovich Nikitin. The decision, affirming an earlier decision by the Judicial Collegium of the Supreme Court, is final and marks the first ever acquittal of a Russian charged with treason in Soviet or post-Soviet times. As such, the acquittal is evidence of the further erosion of control of the Russian court system by the Federal Security Service (FSB) and the Procuracy, and an important stride by the Russian judiciary towards the rule of law. This decision stands along side earlier decisions that have helped strengthen the credibility and legitimacy of the judiciary in Russia. However, the judiciary's hesitancy in challenging the legal opinions of the FSB and Procuracy can be inferred by the length of the process - the trial lasted almost five years. It marks yet another of the new Russia's growing pains, where Soviet-era training and western ideals come into direct conflict.

With the deposit of the ratification documents for the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) with the European Council on May 5, 1998, Russia's internal policies became subject to international scrutiny. Ratification notwithstanding, Nikitin, who became Amnesty International's first post-Soviet prisoner of conscience in September, 1996, continued to suffer alleged violations of his basic human rights as defined by both the Convention and the Constitution of the Russian Federation (Constitution). Nikitin currently plans to bring suit against the Russian Federation in the European Court of Human Rights in Strasbourg.

This Note addresses the issue of whether Russian law, as it was applied to the Nikitin treason case, violated the presumption of innocence and the right to the determination of guilt or innocence protected by both the Russian Constitution and the Convention. Part II of this Note provides background information about Russian criminal

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3 See id.
4 See id.
6 See Reuters, supra note 2.
7 See generally WILLIAM E. BUTLER, RUSSIAN LAW 242 (1999).
10 Reuters, supra note 2.
procedure, the structural arrangements of the judicial system, and the history of the Nikitin case. Part III of this Note examines the articles relevant to Nikitin's presumption of innocence in the Convention that might have been violated by the Russian Federation during his trial, and relevant case law from the European Court of Human Rights. Further, Part III outlines analogous guarantees provided for by Russian legislation, and uses the Nikitin case to illustrate how the application of the Code of Criminal Procedure can conflict with the Convention's guaranty of the presumption of innocence and the right to the determination of guilt or innocence. Part IV of this Note advocates necessary changes in the Russian Criminal Procedure Code to bring Russia into compliance with the Convention. Part V of this Note makes the following conclusions: (1) the Russian Federation's procuratorial behavior and procedural legislation have placed it in violation of the Convention; (2) A new Code of Criminal Procedure is long overdue, and the laws governing the Procuracy and judiciary must be brought in line with the Russian Constitution; (3) procuratorial misconduct should be discouraged through the imposition of procedural consequences; and (4) all legislation must be amended or drafted to include the obligations imposed by the ratification of the Convention for the Protection of Fundamental Freedoms and Human Rights.

I. BACKGROUND/HISTORY

A. Russian Criminal Procedure

The 1960 Russian Soviet Federated Socialist Republic Code of Criminal Procedure (Code), as amended, remains in force today and continues to be the central document applicable in criminal proceedings. The introduction of the new Constitution in 1993, however, has superimposed democratic principles upon the Code, which was drafted for a social and legal system that has officially, if not actually, ceased to exist. Exacerbating the confusion are numerous pieces of legislation addressing the role of the courts and the Procuracy, and

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11 Butler, supra note 7, at 242.
12 Id.
13 See id. The Procuracy is an all-encompassing federal executive body charged with supervising the observance of the Constitution and law, the actions of ministries, criminal investigations, etc. See also O Prokurature Rossiskoi Federatsii (v redaktsii federal'nogo zakona ot 17 noyabrya 1995 goda N. 168 F3) [On the Procuracy of the Russian Federation (in the edition of the federal law from 17 Nov. 1995 No. 168-F3)], Sobr. Zakonod, RF, 1995, No. 47 [Nov. 20, 1995], Art. No. 2 (Russ.) [hereinafter Procuracy].
an active Constitutional Court that views dimly a number of Code provisions. Finally, ratification of twentieth century international treaties has changed Russian criminal procedure, through either legislation or judicial interpretation of Russia’s new obligations under those treaties.

At its core, Russian criminal procedure is a variant of the inquisitorial model of continental Europe, differing materially from the Anglo-American adversarial model. A Russian criminal proceeding is "event-oriented," meaning the fact of the occurrence or alleged occurrence of a crime is investigated instead of inquiring into the guilt of a particular person. The function of the court proceeding is to inquire into the events surrounding the criminal offense.

Throughout the course of the inquiry, the roles of the Procuracy, investigative agencies, and the court differ significantly from the American system of justice. All Russian courts, procurators, investigators, or agencies of inquiry are required to initiate a criminal case whenever the indicia of a crime are disclosed in accordance with procedures established by law. All parties actively engage in this fact-finding inquiry, most notably the judge.

The investigation of serious offenses is entrusted to an investigator, who is required to conduct a comprehensive, balanced, and exhaustive investigation of all of the evidence. Based on the evidence he collects, the investigator decides whether or not to prepare an conclusion to indict a particular person. Unlike the French or German systems, the investigator is not subject to judicial control, but to that of the Procuracy or other state agencies. Instead, the investigator conducts the preliminary investigation, and then presents a conclusion of indictment to the procurator. The procurator can then either reject the conclusion of the investigator as illegal and un-

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14 Butler, supra note 7, at 242.
15 Id. at 243.
16 Id. at 243; see also Smith, supra note 5, at 139.
17 Butler, supra note 7, at 244.
18 Smith, supra note 5, at 139.
19 Butler, supra note 7, at 243.
20 Id. at 244.
21 Smith, supra note 5, at 139.
22 Butler, supra note 7, at 243.
23 Id.
24 Id.
founded, send the case back for supplemental investigation, extend the period of inquiry and pre-trial detention, suspend or dismiss the case, confirm the conclusion of indictment and transfer it to the court, or draft a new conclusion of indictment and transfer it to the court. If the court finds the inquiry, preliminary investigation, or the resulting indictment to be insufficient, it must send the case back to the procurator for supplemental investigation. This can occur even during trial, at the request of the procurator, judge, or defense counsel. Russian law imposes time limits for the initial investigation, but numerous extensions are possible, and no penalty is specified for failing to comply with these time limits.

The Russian Procuracy was abolished by the Bolsheviks in 1917 and replaced by “worker tribunals” in an attempt at citizen-controlled justice. However, the Bolsheviks reestablished a Soviet Procuracy in 1922, and invested it with the power to supervise the legality of administrative officials, agencies, and citizens. The Soviet Procuracy was involved in every stage of the criminal process: arrest, search for evidence, preliminary investigation, trial, review or appeal of cases, the supervision of prisons, prisoner complaints, parole, the release of prisoners, supervisions of the police and secret police, supervision of juvenile commissions, supervision of the courts, and supervision of the legal conduct of all government bodies, enterprises, social organizations, officials, and citizens. Throughout the Soviet era, the Procuracy worked closely with the KGB, the Soviet predecessor to the FSB, in investigating, arresting, and prosecuting dissidents. By the time of communist party chief Leonid Brezhnev’s death in November, 1982, Soviet citizens had come to fear greatly the Procuracy as an organization of state-sponsored coercion closely linked with the KGB.

26 Id. art. 211(2).
27 Id. art. 211(8).
28 Id. art. 211(7).
29 Id. art. 211(11).
30 UPK RF, supra note 25, art. 217.
31 Id.
32 Id. art. 232.
34 Id. at 500–01.
35 SMITH, supra note 5, at 105.
36 Id.
37 Id. at 106.
38 Id. at 108.
39 Id.
The Procuracy was slow to respond to the challenges of President Mikhail Gorbachev's reforms. In January, 1992, the Russian legislature, the Duma, passed the federal law, "On the Procuracy of the Russian Federation," in an attempt to balance the reformers' demands for greater judicial independence with the established legal culture of a centralized, unified, and powerful Procuracy with broad-ranging authority to supervise compliance with the laws of the Federation. The new legislation's most important change was the elimination of procuratorial supervision of the courts. Nonetheless, the Procuracy preserved its long-standing power to submit cassation protests, or appeals, against unlawful or unfounded court decisions and retained its supervisory authority over the conduct of investigatory bodies. The Procuracy managed to prevent the inclusion of a section in the 1993 Constitution that would have delineated its powers. The law "On the Procuracy" was eventually amended on October 18, 1995, to incorporate the provisions of the new Constitution.

Legislation defining the role of the judiciary in Russian criminal proceedings is unclear and in conflict. Russian judges, consistent with continental European practice, are active in eliciting the facts of the case at trial. Indeed, the phrase from the Code commonly translated as "trial" is literally translated as "judicial examination." The judge is charged with employing "all measures to assure a complete and objective investigation of the facts of the case from all sides." Judges, similar to the continental practice, may call for evidence and question witnesses—generally before either the prosecution or the defense. The Russian Constitution, however, speaks of "adversary principles and equality of the parties [in all] judicial proceedings."

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40 SMITH, supra note 5, at 109.
41 Id. at 119.
42 Id. at 121.
43 Id. at 120.
44 Id.
45 SMITH, supra note 5, at 126.
46 See BUTLER, supra note 7, at 176.
47 See SMITH, supra note 5, at 129-30.
48 DANILENKO & BURNHAM, supra note 33, at 511.
49 Id.
50 Id.; see also UPK RF, supra note 25, art. 20. But see id. art. 429 (describing the concept of adversarial parties and equality of parties within the context of jury trials).
51 SMITH, supra note 5, at 140.
52 DANILENKO & BURNHAM, supra note 33, at 511; see also KONSTITUTSIJA RF [CONSTITUTION OF THE RUSSIAN FEDERATION], art. 123(3) (Russ.) (1993) [hereinafter KONST. RF].
The array of possible stages in a criminal proceeding is bewildering. In fact, the proceeding may pass through several stages before it reaches trial: initiation of a criminal case, inquiry, preliminary investigation, and an administrative session with a judge. The trial itself consists of a judicial examination, similar to a pre-trial hearing, the judicial investigation, and pleadings. The court, after hearing final statements and suggestions from all parties, retires to pass judgment. All judgments are subject to appeal.

There are five distinguishable types of appeals: appeals of actions of the criminal investigators, cassation appeals, cassation protests, private appeals, and private protests. Russian appellate procedures in criminal proceedings differ from most Western European procedures in that appeals may be filed not only by the convicted person or his defense counsel, but also by the victim. Further, the procurator must protest against any illegality in the trial proceedings, even on behalf of the accused.

Cassation appeals and protests must be filed within seven days from the date of judgment. The filing of a cassation appeal suspends the execution of the judgment. The cassation court, the immediate court of appeal, must hear the appeal or protest within ten to twenty days, depending on the court. The court is not bound by the grounds of the appeal, but is obliged to verify both the legality and the rationality of the judgment with respect to all persons in the case. The cassation court may reject the appeal or protest, refer the case for new investigation or judicial examination, vacate the judgment and terminate the case, or change the judgment.

Following the resolution of any cassation appeals, the judgment enters into legal force. At this point, review by judicial supervision is still possible, but only upon a protest by a procurator, a court chair, or

53 Butler, supra note 7, at 245, 246, 248, 252.
54 Id. at 253–55.
55 Id. at 255.
56 See Konst. RF, supra note 52, art. 50(3).
57 Smith, supra note 5, at 146. “Appeals” representing action by the accused, “protests” denoting an action by the victim or procurator. Id.
58 Butler, supra note 7, at 269.
59 Id.
60 Id.
61 Id.
62 Id.
63 Butler, supra note 7, at 269.
64 Id.
65 Id.
their deputy chairs.\textsuperscript{66} Even a judgment of acquittal (excluding acquittal by jury verdict) may be reviewed through judicial supervision within a year of entering into legal force.\textsuperscript{67}

Anyone entitled to bring protest may do so on the basis of their own analysis of lower court decisions, or by virtue of representations by an aggrieved person who has the right to petition for review.\textsuperscript{68} Many cases are reviewed on the initiative of higher courts seeking to identify judicial error or unequal application of the law.\textsuperscript{69} Cases may also be reopened on the basis of newly-discovered facts or circumstances.\textsuperscript{70} The theoretical possibilities of appeal and review are virtually unlimited under the present Code of Criminal Procedure.\textsuperscript{71}

B. Facts of the Case

Although the Nikitin case itself lasted just under five years, the story actually started in 1992, when Aleksandr Nikitin retired as a Captain of the First Rank from the Russian Navy.\textsuperscript{72} He served in the Northern Fleet, studied the use and repair of naval nuclear reactors at the Kuznetsov Naval Academy in St. Petersburg (previously Leningrad) and served in Moscow at the Inspection of Nuclear Safety of Nuclear Installations of the Defense Ministry of the Russian Federation.\textsuperscript{73} On October 10, 1992, shortly before retiring, Nikitin signed a document promising not to disclose information pertaining to state secrets which he had been entrusted with or had learned in the course of his service.\textsuperscript{74}

On September 7, 1993, almost a year after Nikitin left the Navy, Defense Ministry Decree 071:93 entered into force, although it was never officially published.\textsuperscript{75} This decree included a "Temporary List of Secret Information in the Armed Forces of the Russian Federa-

\textsuperscript{66} Id.
\textsuperscript{67} Id. at 269–70.
\textsuperscript{68} BUTLER, supra note 7, at 270.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Nikitin Case Verdict St. Petersburg City Court, 29 December, 1999, Supreme Court 2000 Judicial Files, at http://www.bellona.no/imaker?id=14177&sub=1 (last visited Sept. 18, 2000) [hereinafter City Court Verdict].
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Jon Gauslaa, The Prosecution of Nikitin Lacks Legal Foundation, at http://www.bellona.no/imaker?id=9654&sub=1 (Jan. 29, 1999) [hereinafter Gauslaa, The Prosecution of Nikitin].
tion." Fourteen days later, the federal law, "On State Secrets" was officially published.

On December 12, 1993, the Constitution of the Russian Federation was adopted by referendum. In order to avoid a legal vacuum, the drafters of President Yeltsin’s new constitution were forced to include transitional provisions. Part 2, Article 2 of the Constitution provides "[l]aws and other legal enactments which were in force on the territory of the Russian Federation prior to the entry into force of the present Constitution are applied to the extent to which they do not contravene the Constitution of the Russian Federation." To the extent that they did not violate the new Constitution, both the Code and the Law on State Secrets remained in effect.

According to the procurator, on August 8, 1995, Nikitin, using his expired military identification card, entered the special library of the Kuznetsov Naval Academy and allegedly read through books describing nuclear accidents on nuclear submarines. Between September 19th and 23rd of 1995, he prepared a report titled "The Northern Fleet—Sources of Radioactive Contamination" for Bellona, a Norwegian environmental organization, describing nuclear accidents in the Russian atomic submarine fleet.

After the FSB was notified of the contents of the report, Investigator Osipenko carried out a warrantless search of Nikitin’s apartment on October 5, 1995, and confiscated a blue notebook containing the notes Nikitin had written in the library. Simultaneously, the FSB raided Bellona’s Murmansk office. They also brought Nikitin in for questioning and confiscated his passport.

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76 To the Collegium on Criminal Cases of the Supreme Court of the Russian Federation, Supreme Court 2000 Juridical Files, at http://www.bellona.no/imaker?id=15981&sub=1 [hereinafter Appeal to the Supreme Court].
77 O Gosudarstvennoi Taine [On State Secrets] art. 5 (Russ.).
78 Konst. RF, supra note 52.
79 See generally id. § 2 (containing the Concluding and Transitional Provisions for the shift of power between the collapsed Soviet system and the new Russian government).
80 Id. § 2, art. 2.
81 See id.
82 City Court Verdict, supra note 72.
83 Gauslaa, Analysis, supra note 8, § 1; City Court Verdict, supra note 72.
84 Id.
85 See Jon Gauslaa, Aleksandr Nikitin vs. the Russian Federation, Background, §1.1, at http://www.bellona.no/imaker?id=9653&sub=1 (Jan. 29, 1999) [hereinafter Gauslaa, Background].
86 See id.
Almost 400 miles away, President Yeltsin signed Edict 1203:95 on
November 12, 1995, which listed information to be considered “se­
cret.”87 On December 20, 1995, in a landmark case, the Constitu­tional
Court of the Russian Federation held that there could only be crimi­
nal liability for the transfer of state secrets if the laws classifying the
information were officially published.88 This case reinforced the basic
premises of Article 15.3 of the Constitution of the Russian Federa­
tion.89

Despite the fact that no legislation classifying the information
had been published at the time Nikitin had gathered it,90 the FSB ar­
rrested Nikitin on February 6, 1996.91 The first indictment against
Nikitin, issued by the FSB that day, charged him with violating Articles
275, state treason in the form of espionage, and 283(2), disclosure of
state secrets with serious consequences, of the Criminal Code of the
Russian Federation.92

During his detention, several significant events occurred. After
almost two months in detention, on March 27, 1996, the Constitu­
tional Court of the Russian Federation ruled that Nikitin was entitled
to exercise his constitutional right to choose his own counsel.93 On
April 4, the FSB issued a second indictment against Nikitin.94

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87 Ukaz Prezidenta Rossisskoi Federatsii Ob utverzhdenii perecheny svedenii, otno­
cenyx k gosudarstvenoi taine [Edict of the President of the Russian Federation on the
Confirmation of the List of Information Attributed to State Secrets], Sobr. Zakonod RF,
88 Konstitutsionnyi Sud Rossisskoi Federatsii Postanovlenie ot 25 dekabrya 1995 goda N
17-P], Sobr. Zakonod. RF, 1996, No. 1 [Jan. 1,1996], Art. No. 54 (Russ.); City Court Verdict,
supra note 72.
89 KoNST. RF, supra note 52, art. 15(3) (“Laws are subject to official publication. Un­
published laws are not applied. Any normative legal enactments affecting human and civil
rights, freedoms and duties cannot be applied unless they have been officially published
for universal information.”).
90 Supreme Court Verdict, Supreme Court 2000 Juridical Files (May 9, 2000), at
http://www.bellona.no/imaker?id=16713&sub=1 [hereinafter Supreme Court Verdict].
91 Eighth Charge Brought Against Former Russian Naval Officer, INTERFAX NEWS
AGENCY, July 15, 1999, available at LEXIS, Nexis Library, Russia Country files; Suzanne Thompson,
Nexis Library, The Moscow Times.
92 City Court Verdict, supra note 72; see also UGOLOVNYI KODEKS RF [CRIMINAL
CODE OF THE RUSSIAN FEDERATION] [UK RF] art. 275, 283(2) (Russ.).
93 Gauslaa, Background, supra note 85, § 1.1; see also Konstitutsionnyi Sud Rossisskoi Fed­
eratsii Postanovlenie ot 27 marta 1996 goda N 8-P [Constitutional Court of the Russian
Federation Decree from 27 March 1996 No. 8-p], Sobr. Zakonod. RF, 1996, No. 15, [Apr. 8,
1996], Art. No. 1768 (Russ.).
94 See Gauslaa, Background, supra note 85, § 1.3; see also UPK RF, supra note 25, art.
214(2).
tember 1, the Defense Ministry issued yet another secret decree, 055:96, which was never published.95 It contained the "List of Information to be classified in the Armed Forces of the Russian Federation," replacing the temporary list that came into force on January 1, 1994.96 On September 13, 1996, the third indictment against Nikitin was issued.97 Nikitin remained in pretrial detention for over ten months, and was released on December 14, 1996, on the condition that he not travel beyond St. Petersburg.98 Two days prior to his release, the preliminary investigation had concluded, and Nikitin's case was sent to court.99 The defense appealed this decision and the case was referred to the Procurator General of the Russian Federation.100

The year of 1997 was relatively eventful for Nikitin. On January 27th, the Procurator General prolonged the preliminary investigation, in part due to the acknowledgement that use of retroactive or secret decrees to find criminal liability was unconstitutional.101 Nonetheless, on May 27th, an expert panel found that state secrets had been transferred, basing their opinion on the definition of information constituting state secrets in Presidential Decree 1203:95 (retroactive), Defense Ministry Decree 071:93 (unpublished), and Defense Ministry Decree 055:96 (retroactive and unpublished).102 On June 17th, a fourth indictment was issued,103 and a fifth indictment followed on September 9th.104 This indictment was based on a presidential decree signed on November 30, 1996.105 At this point, Nikitin had

95 Gauslaa, The Prosecution of Nikitin, supra note 75, § 2.1.
96 Appeal to the Supreme Court, supra note 76.
97 Gauslaa, Background, supra note 85, § 1.3.
98 But see List of declarations for Russia, to Human Rights Situation on 01/10/00, Treaty no. 005: Convention for the Protection of Human Rights and Fundamental Freedoms, available at http://www.conventions.coe.int/treaty/EN/cadreprincipal.htm (last visited Sept. 18, 2000) (declaring that, in regards to the length of pretrial detention, Russia has maintained a reservation with respect to Article 5, points 3 and 4, until such time as Russian legislation can be brought in line with the terms of the treaty).
100 See id.
101 See id.
102 Gauslaa, The Prosecution of Nikitin, supra note 75, § 2.1.
103 Gauslaa, Background, supra note 85, § 1.3.
104 Id.
become the first person in Russia ever to be charged with the same crime five times.\textsuperscript{106}

On October 6, 1997, Article 5 of the law "On State Secrets" was finally amended, thereby changing the "List of Information that may be attributed to a State Secret" into the "List of Information constituting State Secrets."\textsuperscript{107} This amendment corrected the most fundamental error in the relevant substantive legislation by including a published list of what information was actually classified within the law "On State Secrets," as opposed to the types of information that might be classified.\textsuperscript{108}

A sixth indictment was issued on February 24, 1998.\textsuperscript{109} It is unclear how this indictment differed from the first five.\textsuperscript{110} However, all six alleged that Nikitin had violated a secret Defense Ministry decree that itself was so secret that Nikitin was not allowed to see its text.\textsuperscript{111} On April 24th, the city procurator received an order from the Deputy General Procurator of the Russian Federation,\textsuperscript{112} and subsequently issued a directive to FSB investigators asking that all accusations based on retroactive or secret charges be removed from the charges.\textsuperscript{113} On May 8th, a seventh indictment against Nikitin was issued, where all references to the retroactive and secret decrees were removed.\textsuperscript{114} This indictment was finally approved by the Procurator General on June 29, 1998,\textsuperscript{115} and the case was referred to the City Court of St. Petersburg, under Judge Sergei Golets, on June 30th.\textsuperscript{116}

The trial began on October 20, 1998. Nine days later, Judge Golets declared the indictment illegally vague and sent it back to the

\begin{footnotes}
\item[107] Gauslaa, \textit{Analysis, supra} note 8, § 4.3; see also \textit{On State Secrets, supra} note 77, art. 5.
\item[108] See Gauslaa, \textit{Background, supra} note 85, § 1.3 (noting that the Duma had found no legal means of enforcing the law \textit{On State Secrets} and that the Duma had requested that President Yeltsin draft and submit the List of State Secrets before November 5, 1995).
\item[109] Id.
\item[111] Id.
\item[113] Unauthorized Translation, \textit{supra} note 112.
\item[114] Gauslaa, \textit{Analysis, supra} note 8, § 2.
\item[115] Gauslaa, \textit{Background, supra} note 85, § 1.1.
\item[116] Amnesty, \textit{Court's Rejection, supra} note 9; see also UPK RF, \textit{supra} note 25, art. 217.
\end{footnotes}
Office of the Procurator and the FSB for supplementary investigation. This was apparently the first time that a charge of treason had ever been rejected and sent back for supplementary investigation. It was a victory for Nikitin, but an incomplete victory at best.

Left in a legal limbo, Nikitin appealed the City Court's decision to send the case back for supplementary investigation to the Supreme Court on November 5, 1998. On February 4, 1999, the Supreme Court upheld the City Court's decision declaring the indictment illegally vague, and sent the case back for further investigation. On July 15, 1999, the Supreme Court allowed a revised, eighth indictment to be brought against Nikitin. Finally, after ten and a half months of trial, on December 29, 1999, the City Court of St. Petersburg acquitted Aleksandr Nikitin. Four days later, the Procurator protested the acquittal to the Supreme Court. The acquittal was not affirmed by the Judicial Collegium on Criminal Cases of the Supreme Court until April 17, 2000.

The prosecution again appealed, this time to the Presidium of the Supreme Court. The Presidium represents Russia's final court of appeal, and consists of the Chairman of the Supreme Court, its First Deputy Chairman, the six deputy chairmen, and five other Supreme Court judges. Only the prosecution has the right to appeal to the Presidium, and only 0.4% of Russian criminal cases in 1998 ended with an acquittal. As a result, very few criminal cases reviewed by the three-judge panels of the Supreme Court make it to the Presidium. On September 13, 2000, the Presidium made history by

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117 Gauslaa, Background, supra note 85, § 1.2; Amnesty, Court's Rejection, supra note 9.
118 Gauslaa, Background, supra note 85, § 1.2.
119 See id. § 1.3.
121 Gauslaa, Background, supra note 85, § 1.3.
122 See Amnesty, Afraid, supra note 120.
123 Eighth Charge Brought Against Former Russian Naval Officer, supra note 91.
124 See City Court Verdict, supra note 72, at 34.
125 Appeal to the Supreme Court, supra note 76, at 1.
126 See Supreme Court Verdict, supra note 90, at 5.
127 Appeal by the Prosecutor General, Supreme Court 2000 Juridical Files, at http://www.bellona.no/imaker?id=17382&sub=1 (last visited Sept. 18, 2000) [hereinafter Appeal to the Presidium].
128 For a further explanation of the Presidium's structure, see Jon Gauslaa, The Reputation of the Presidium, at http://www.bellona.no/imaker?id=17852&sub=1 (Sept. 11, 2000).
129 Id.
130 Id.
rejecting the Procurator's bid to reopen the case against Nikitin. After nine indictments for the same crime and years of uncertainty, Aleksandr Nikitin had become the first Russian to be completely acquitted of a charge of high treason in the Soviet or post-Soviet era.

II. VIOLATIONS OF THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

A. Article 6: Right to a Fair Trial

Article 6 of the Convention guarantees the right to a fair trial. Section 1 states in part, "[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Returning the case to the Procurator effectively takes the case out of the hands of the court. Because the judge is obligated to return the case to the Procurator when the indictment is insufficient or the investigative bodies have violated the rules of criminal procedure, the accused is effectively prevented from having the charges against him determined in a court of law, thereby violating his rights under the Constitution and the Convention. By allowing eight different revisions of the indictment to be considered, the criminal justice system in place prevented an ultimate "determination" of even the nature of the criminal charges against Nikitin.

Section 2 of Article 6 of the Convention provides, "[e]veryone charged with a criminal offence shall be presumed innocent until proven guilty according to law." In Adolf v. Austria, the court held that it may be a violation of Article 6(2) if a criminal case concludes

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131 Reuters, supra note 2.
132 Id.; see also Supreme Court Verdict, supra note 90.
133 See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6, Europ. T.S. No. 5 [hereinafter Convention].
134 See id. art. 6(1).
135 See id.; Konst. RF, supra note 52, art. 47(2); UPK RF, supra note 25, art. 232(2).
136 Convention, supra note 133, art. 6(1); see also D. J. Harris et al., Law of the European Convention on Human Rights 217 (1995) (stating that freedom from double jeopardy guaranteed in the Seventh Protocol does not necessarily mean that it is not protected by Article 6(1) of the Convention).
137 Convention, supra note 133, art. 6(2).
without a decision on the question of guilt. In Nikitin's case the investigation was closed and re-opened on several occasions. In addition, it is also debatable whether allowing the indictment to be revised eight times for the same action is indicative of a system that presumes the innocence of the accused.

B. Article 7: No Punishment Without Law

Article 7(1) of the Convention provides, "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed." This has been expanded on in Kokkinakis v. Greece, where the court held that Article 7.1:

is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law.

The present Code of Criminal Procedure does not allow the accused to read through the material of his case before the investigative authorities have declared the investigation to be completed. Furthermore, because they themselves were "secret," Nikitin was not given access to the decrees that formed the basis of the charges against him until October 20, 1998, more than three years after the case had begun.

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139 Id. at 324.
140 Jon Gauslaa, Aleksandr Nikitin vs. the Russian Federation, The City Court's Verdict and the EC on HR, § 3.2.2, at http://www.bellona.no/imaker?id=9655&sub=1 (Jan. 29, 2000) [hereinafter Gauslaa, City Court].
141 Convention, supra note 133, art. 7(1).
143 Id.
144 Gauslaa, City Court, supra note 140, § 3.2.2; see also UPK RF, supra note 25, art. 201.
145 Gauslaa, City Court, supra note 140, § 3.2.4.
C. Relevant Russian Legislation

1. Russian Legislation Analogous to Article 6 of the Convention

Article 47 of the Russian Constitution roughly corresponds to Article 6(1) of the Convention. Regarding determination, "[a]nyone accused of having committed a crime has the right to have the case against him heard by a court and jury as provided by federal law."\(^{146}\) No one can be deprived of that right.\(^{147}\) However, it should be noted that the Russian Constitution fails to indicate the time within which the case must be heard. As a result, the "reasonable time" requirement of Article 6(1) of the Convention should be controlling.

Tracking Article 6(2) of the Convention, Article 49 of the Constitution addresses the assumption of innocence. In its entirety, Article 49 states:

1) Each person accused of having committed a crime is presumed innocent until his guilt is proved as provided by federal law and established by means of a legitimate court sentence.
2) The accused is not obliged to prove his innocence.
3) Any undispelled doubts regarding the individual’s guilt are interpreted in the accused’s favor.\(^{148}\)

2. Russian Legislation Analogous to Article 7 of the Convention

Article 7(1) of the Convention is mirrored by Article 54 points 1 and 2 of the Constitution, which guarantee:

1) No law establishing or mitigating liability can be retroactive. 2) No one can be held liable for any act which, at the time it was committed, was not considered to be in breach of the law. If liability for a breach of the law is abolished or mitigated after an act has been committed, the new law is applied.\(^{149}\)

In addition, Article 15(3) of the Constitution guarantees that, "[l]aws are subject to official publication. Unpublished laws are not applied. Any normative legal enactments affecting human and civil rights,\(^{146}\) Konst. RF, supra note 52, art. 47(2).
\(^{147}\) Id. art. 47(1).
\(^{148}\) Id. art. 49.
\(^{149}\) Id. art. 54(1), (2); see also UK RF, supra note 92, art. 10.
freedoms and duties cannot be applied unless they have been officially published for universal information."¹⁵⁰ Thus, in Russia, the application of unpublished or retroactive laws, to the detriment of the accused, would be considered a violation of both Article 7 of the Convention and Articles 15 and 54 of the Constitution.

D. The Nikitin Case as an Illustrative Example of the Potential for Procedural Abuse

1. Prior Knowledge of the Legal Inadequacy of the Secrecy Laws

As early as March 16, 1995, the chairman of the Security Committee of the Russian Duma, the federal legislative body, was aware that an incredibly absurd situation existed where, technically, nothing was secret.¹⁵¹ The Duma stated that since a List of Data pertaining to State Secrets had not been submitted to the President, “the law enforcement organs of the country [were] deprived of legal means to fulfill the functions imposed on them.”¹⁵²

The FSB was also aware that Nikitin had been charged with retroactive and secret decrees.¹⁵³ All charges brought before May 8, 1998 accused Nikitin of having “handed over to a foreign organization information classified as state secrets according to Article 5 of the Federal Law on State Secrets, paragraphs 6 and 7 of the List of Information related to the State Secrets formalized by Presidential Decree dated November 30, 1995 No. 1203, and various paragraphs of the secret decrees No. 071:93 and 055:96 from the Ministry of Defense.”¹⁵⁴ In the FSB’s answer of February 24, 1998, it was admitted that:

these decrees were introduced after Nikitin’s actions. If one follows the logic of the defenders, Russian Law has no normative documents that stipulate the level of secrecy of information. And there are no such documents that could be used in connection with an expert evaluation of the informa-

¹⁵⁰ Konst. RF, supra note 52, art. 15(3).
¹⁵¹ See Gauslaa, Background, supra note 85, § 1.3 (referencing Letter No. 314–569 of March 16, 1995, from the chairman of the Security Committee of the Russian State Duma to the Russian Government; Letter No. 314–1982, placing the question on the Duma’s plenary agenda; Resolution No. 1271–1GD, placing the question on the Duma’s plenary agenda; Resolution No. 1271–1GD, requesting the Government to draft the List of Secrets, found in Russian Federation, Law Files Volume 45, Nov. 6, 1995, page 4291).
¹⁵² See id.
¹⁵³ Gauslaa, Analysis, supra note 8, § 2.
¹⁵⁴ Id.
tion that was collected by Nikitin and handed over to a foreign organization. According to this logic, the experts would have nothing else to base their conclusion on [other] than the Law on State Secrets.\textsuperscript{155}

After six attempts to have the decrees included in the indictment, the FSB struck all direct reference of retroactive and secret decrees from the May 8, 1998 charges and the June 29, 1998 legal part of the document.\textsuperscript{156}

On January 27, 1997, the Deputy of the Procurator General of the Russian Federation, M. B. Katushev, in signing the “Resolution About Prolongation of the Time Limit for the Preliminary Investigation,” stated that, “the case was sent to court too early. There are a series of important mistakes, the charges presented are not concrete, while the juridical norms applied did not comply with the Russian Constitution.”\textsuperscript{157} He went on to write, “[t]he claim presented by the defense lawyers that the expert committee illegally used normative acts in establishing which information should be considered state secrets is herewith sustained.”\textsuperscript{158} Finally, he declared, “the violation of Nikitin’s rights in the prior evaluation must be eliminated.”\textsuperscript{159} Nonetheless, in accordance with Articles 133 and 211 of the Code, he extended the preliminary investigation from twelve to fifteen months.\textsuperscript{160}

On April 27 of 1998, the local procurator, A. V. Gutsan, admitted that the first six indictments contained mistakes.\textsuperscript{161} Specifically, the procurator was aware that Nikitin had been “accused of having violated normative acts which were not published officially for general knowledge, and normative acts which were published after the alleged transferal of state secrets had taken place.”\textsuperscript{162} He specifically acknowledged that this violated Article 15 of the Constitution.\textsuperscript{163} Accordingly, he ordered that the mistakes in the FSB’s indictment be corrected.\textsuperscript{164} Even so, the seventh indictment was so vague that the City Court stated, in its verdict of October 29, 1998, that the indictment deprived

\begin{flushleft}
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Prolongation, supra note 99.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Unauthorized Translation, supra note 112.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\end{flushleft}
Nikitin of his right "to defend himself with legal means." This could be considered a violation of the accused's right to the determination of criminal charges against him under the Convention.

According to the Code, without legal means to define the indicia of a crime, a proceeding may not be initiated and any initiated proceedings are subject to dismissal. Charging someone with a crime not established by law violates Article 4 of the Code, and Article 7(1) of the Convention.

2. Procedural Maneuvering by the Procuracy

By intentionally submitting an indictment containing a mistake to the court, the Procuracy has legal grounds to protest any undesirable decision. The procurator is obligated to protest any illegality in the proceedings, even his own mistakes. This procedural Trojan horse was used against Nikitin by the Procuracy when the Office of Procurator General submitted its appeal of the Supreme Court's decision, reasoning in part that, "the need to send the case for further investigation to correct its shortcomings and eliminate violations [against Nikitin] is obvious." Thus, the Procuracy has the ability to guarantee an appeal at its discretion.

With the ability to demand a review of both the findings of fact and law of a court's decision, and the right to introduce new evidence, the Procuracy also has the de facto right to try a suspect in court more than once. The Procurator can wait for up to a year after a decision has come down before requesting review by way of judicial supervision. Cases can be reopened on the basis of newly discovered evidence. In essence, the case against the accused can remain undetermined indefinitely. This is a violation of Article 6(1) of the Convention, which entitles everyone to have the criminal charges against him determined within a reasonable time. It also appears to be a de facto violation of Article 50(1) of the Constitution.

165 Gauslaa, City Court, supra note 140, § 3.1.1.
166 See Convention, supra note 133, art. 6(1).
167 See UPK RF, supra note 25, art. 5(2).
168 See Convention, supra note 133, art. 7(1); UPK RF, supra note 25, art. 4.
169 See id. arts. 341, 342.
170 See id.
171 See Appeal to the Presidium, supra note 127.
172 See BUTLER, supra note 7, at 269.
173 See id.
174 See id. at 270.
175 See Convention, supra note 133, art. 6(1).
which provides that “[n]o one can be tried a second time for the same crime.”

CONCLUSION

Russia must revise its Code of Criminal Procedure. Initially drafted in the Krushchev era, it no longer serves the needs of a new democracy. Because Russia’s previous experiences with “swift” justice are predominantly negative, the issue of what constitutes a “reasonable time” has not been addressed. However, there remains fundamental issues of predictability, fairness, and the roles of the participants in an adversarial system.

Allowing the Procuracy time to revise the indictments of the investigative bodies seems prudent. However, once the indictment is sent to the court, the Procuracy should be bound to pursue it as it stands. Inadequate or flawed indictments should be grounds for dismissal for the same reason. Requiring the Procuracy to commit to the legal documents and factual evidence it intends to present at trial would necessarily raise the level of professionalism of procurators.

The obligation of the Russian courts to return the case to the Procuracy for procuratorial mistakes, combined with the Procuracy’s right to demand review by supervision, discourages procuratorial professionalism, encourages procuratorial sloth, and unfortunately provides grounds for later procuratorial protest of unfavorable decisions. In essence, there are no negative consequences for drafting intentionally vague or flawed indictments; the worst that will happen is the court will return the documents.

In addition, the court is forced to explain what is necessary for the indictment to be satisfactory to the court. It is not the explanation itself that is problematic, but the return of the document with the explanation that creates situations where the judge ends up explaining to the procurator what he believes must be done in order to convict the accused. In doing so, the door is opened for potential violations of the presumption of innocence. Again, insufficient or flawed indictments should be grounds for dismissal of the case. Procurators should be the means of guaranteeing the safety of the populace, not the source of endless unresolved indictments against the accused.

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176 See Konst. RF, supra note 52, art. 50(1).
177 See UPK RF, supra note 25, art. 232.
Finally, the right of the Procuracy to appeal the factual aspects of a case or reopen a case on the basis of new evidence allows the accused to be essentially tried twice for the same crime. This arguably violates the accused's right to the determination of criminal charges against him. Within a system nominally committed to an adversarial judicial process, requiring the Procuracy to appeal even its own mistakes creates a schizophrenic understanding of the role of the procurator, one that leaves procurators uncertain as to their obligations. Placing the burden of appeal of procuratorial mistakes on the defense would help to allievate this confusion and would allow the procurator to serve in an adversarial role, as a prosecutor.

The Russian Federation's past procuratorial behavior and procedural legislation places it in violation of the Convention for the Protection of Fundamental Freedoms and Human Rights. The present Code of Criminal Procedure dates from 1960, the middle of the Khrushchev era. With the adoption of the new Constitution in 1993, and the ratification of the Convention in 1998, the Code is no longer responsive to the needs and obligations of the Russian Federation. All the existing legislation must be amended or redrafted to include the obligations imposed by the Convention's ratification. A new Code of Criminal Procedure is long overdue, and the laws governing the Procuracy and judiciary must also be amended and brought in line with the new Constitutional guarantees of an adversarial system and the presumption of innocence for the accused.