

Fordham International Law Journal

Volume 39, Issue 5

2016

Article 7

The Right to Reputation and the Case for Boris Nemtsov

Thomas M. Callahan*

*

Copyright ©2016 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

NOTE

THE RIGHT TO REPUTATION AND THE CASE FOR BORIS NEMTSOV

*Thomas M. Callahan**

INTRODUCTION	1290
I: A SHORT BIOGRAPHY OF BORIS E. NEMTSOV	1298
II: RIGHT TO REPUTATION IN THE RUSSIAN AND INTERNATIONAL LEGAL FRAMEWORK.....	1306
1. Defamation Generally	1307
2. Right to Reputation in Russian Federal Statutory Law	1309
a. Honor: Definitions and Implementation in the Russian Constitution	1311
b. Defamation: Attacks on Reputation in the Russian Criminal Code.....	1314
c. Dignity: Intangible Goods and the Right to Rebuttal in the Russian Civil Code	1317
d. The Right to Information in the Mass Media Law	1320
3. Right to Reputation in the International Human Rights Context	1321
a. The Universal Declaration of Human Rights	1322
b. The International Covenant on Civil and Political Rights and its Individual Complaint Component.....	1323
c. The European Convention on Human Rights.....	1330
III. REPUTATION IN RUSSIAN COURTS AND AT THE INTERNATIONAL HUMAN RIGHTS TRIBUNALS.....	1332

* J.D., 2016, and Crowley Scholar in International Human Rights Law, Fordham University School of Law; M.A., 2010, New York University; B.A., 2007, Fordham College. This Note would not have been possible without the guidance of Roman Rybakov. Karen Dawisha, Chiara Coppotelli, the staff of the Rembrandt Hotel Bangkok, and members of the JOURNAL'S Executive Board also gave crucial support in the writing and editing stages. The Note is dedicated to the memory and legacy of Boris Nemtsov.

1. Defamation in the Russian Courts	1332
2. Privacy, Honor, and Reputation at the Human Rights Committee	1336
a. The Unsuccessful Article 17 Claims against the Russian Federation	1336
b. Successful Honor and Reputation Claims against other States Parties	1338
3. Interference with Private Life at the European Court	1345
IV: THE DEFAMATION CASE FOR BORIS NEMTSOV	1350
CONCLUSION	1353

INTRODUCTION

Following the assassination of leading Russian opposition politician Boris Efimovich Nemtsov on February 27, 2015, international media and others speculated on the Russian government's degree of involvement, if any, in the murder.¹ A year later, Mr. Nemtsov's allies assert that the culprit will likely never be found due to a Kremlin-orchestrated cover-up.² Leaving aside the question of who, if anyone, ordered the killing, this Note asserts that Russian State acts or omissions regarding Mr. Nemtsov's reputation in Russian society were a proximate cause of his assassination, and

1. *See, e.g.*, Owen Matthews, *Who Really Killed Boris Nemtsov?*, NEWSWEEK (Mar. 23, 2015, 9:22 AM), <http://www.newsweek.com/who-really-killed-boris-nemtsov-315705> (outlining disputes over Kremlin involvement in the murder); Catherine A. Fitzpatrick, *Reichstag Redux: The Boris Nemtsov Murder Conspiracy Theories*, DAILY BEAST (Mar. 1, 2015, 3:23 PM), <http://www.thedailybeast.com/articles/2015/03/01/who-killed-boris-nemtsov-a-rundown-of-the-conspiracy-theories.html> (describing the main theories of Mr. Nemtsov's murder, including four mutually exclusive theories put forth by federal investigators); J. Paul Goode, *The Question to Ask About Boris Nemtsov's Murder is not Who but Why?*, WASH. POST (Mar. 3, 2015), <https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/03/03/the-question-to-ask-about-boris-nemtsovs-murder-is-not-who-but-why/> (noting that "For Nemtsov's supporters and admirers, the Kremlin's brand of hateful, anti-opposition and 'fifth column' propaganda serves as explanation" for Mr. Nemtsov's killing).

2. *Id.*; Shaun Walker, *Boris Nemtsov murder investigators name Chechen mastermind*, GUARDIAN (Dec. 29, 2015), <http://www.theguardian.com/world/2015/dec/29/boris-nemtsov-investigators-name-chechen-mastermind> (noting opposition leader Ilya Yashin's allegation that "investigators are carrying out a political order to cover up the real culprits"); Sarah Rainsford, *Boris Nemtsov killing: Grief, fear and anger one year on*, BBC NEWS (Feb. 27, 2016), <http://www.bbc.com/news/world-europe-35675221> (quoting Nemtsov family counsel Vadim Prokhorov as fearing a "cover-up").

that since these acts or omissions were violative of Russian and international law, his family has the right to seek damages in a defamation action at one of the international human rights tribunals whose jurisdiction Russia recognizes. The Note concludes that both the United Nations Human Rights Committee (“Committee”), the tribunal attached to the International Covenant on Civil and Political Rights (“ICCPR”); and the European Court of Human Rights (“European Court”), the tribunal attached to the European Convention on Human Rights (“ECHR”), are proper venues given not only the explicit protections to reputation contained in the former treaty and implicit protections in the latter, but also the sheer obviousness of Mr. Nemtsov’s case.

This Note pursues the case of Boris Nemtsov to explore the concept of character assassination as a counterpart to guaranteed protections to honor and reputation in Russian and international law. In response to liberal objections based on freedom of expression concerns, this Note takes the position of the Supreme Court of the Russian Federation (“Supreme Court”) as it pertains to defamation in the press, which is that speech is a proper subject of administrative regulation.³

Mr. Nemtsov was edged out of the most influential Russian political circles as his criticism of the government of Vladimir Vladimirovich Putin grew stronger in the years leading up to his murder.⁴ This was largely a result of the fact that media that were or

3. Пленум Верховного Суда Российской Федерации, Постановление от 24 февраля 2005 г. N 3, *О судебной практике по делам о защите чести и достоинства граждан, а также деловой репутации граждан и юридических лиц* (Plenum of the Supreme Court of the Russian Federation of Feb. 24, 2005 No. 3, *On Juridical Practice in Cases of the Protection of Honor and Dignity of Citizens, as well as Business Reputation of Citizens and Legal Entities*) [hereinafter Plenary Directive], ¶ 4 (“The protection of honor, dignity, and business reputation from untrue, defamatory statements constitutes a necessary restriction of the freedoms of expression and of the media in cases of abuse of these rights.”). This and all subsequent translations from Russian to English are by the author.

4. Andrew E. Kramer, *Fear Envelops Russia After Killing of Putin Critic Boris Nemtsov*, N.Y. TIMES (Feb. 28, 2015), <http://www.nytimes.com/2015/03/01/world/europe/killing-of-boris-nemtsov-putin-critic-breeds-fear-in-russia.html> (describing Mr. Nemtsov’s status as dissident years after serving as a deputy prime minister); Isabella Kolar, “*Wer stirbt zuerst: Putin oder Russland?*”: Interview mit Boris Nemzow (“*Who Dies First: Putin or Russia?*”: Interview with Boris Nemtsov), DEUTSCHLANDRADIO KULTUR (Jan. 18, 2014), <http://www.deutschlandradiokultur.de/interview-mit-boris-nemzow-von-2014-wer-stirbt-zuerst-putin.979.de.html> (interview with German radio in which Mr. Nemtsov quips of fears that he will be killed).

are fully or substantially owned by the Russian government engaged in a concerted effort to destroy Mr. Nemtsov's credibility and reputation in the final two years of his life, painting him as an "enemy" of Russia aligned with insidious non-Russian interests in a bid to destabilize the country.⁵ This Note explores the right to reputation provisions of the ICCPR as the source of a strong case at the Committee, which oversees compliance with that treaty but also acts as a tribunal on claims of State violations of Covenant provisions, with a cause of action based on this media campaign.⁶ The Note also sees the protections to reputation built into the ECHR's privacy provision — though not as clear as the protections in the ICCPR — as a strong basis for a successful claim at the European Court, which oversees compliance with that treaty.⁷ But given both tribunals'

5. Ivan Nechepurenko, *Analysts Blame Nemtsov's Death on Russia's 'Legitimized Hate'*, *MOSCOW TIMES* (Feb. 28, 2015), <http://www.themoscowtimes.com/article.php?id=516716> (quoting political scientist Alexei Makarkin stating that Mr. Nemtsov's killing demonstrates how "hatred has been legitimized or even sanctioned in Russia"); Liubov Borusyak and Aleksei Levinson, *Анатомия ненависти: как возникло посткрымское единство россиян (Anatomy of Hate: What Happened to Russian Unity Post-Crimea)*, *RBK* (Mar. 18, 2015, 4:14 PM), <http://www.rbc.ru/opinions/society/18/03/2015/550973de9a7947327e5f3a1c> (describing the "fifth column" theory); Maria Lipman, *Putin's Enemy Within: Demonising the "Fifth Column"*, *EUROPEAN COUNCIL ON FOREIGN REL.* (Mar. 26, 2015), http://www.ecfr.eu/article/commentary_putins_enemy_within_demonising_the_fifth_column311513 (further describing the "fifth column" theory of Russian opposition politics).

6. G.A. Res. 2200A (XXI), Optional Protocol to the International Covenant on Civil and Political Rights (Dec. 19, 1966) [hereinafter First Optional Protocol], art. 1 ("A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.").

7. *Compare* Annex to G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966) [hereinafter ICCPR] art. 17 ("1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.") with Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (Nov. 4, 1950), E.T.S. No. 5 [hereinafter European Convention or ECHR] art. 8 ("1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."); ECHR, art. 19 ("To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as 'the Court'. It shall function on a permanent basis.").

domestic exhaustion requirements, explained below, Mr. Nemtsov's representatives would first have to sue in the Russian court system.⁸ In that connection, this Note explains the Russian federal statutes treating defamation, including a relevant provision of the Russian Constitution.⁹

Notably, Russia recognizes the jurisdiction of multiple international human rights tribunals, while its Constitution protects reputation and honor analogously to the ICCPR provision on right to reputation — and even more firmly than the ECHR.¹⁰ Also, Russia constitutionally guarantees the freedoms of expression, association, and privacy, among others.¹¹ Many provisions of the Human and Civil Rights and Freedoms section of the Russian Constitution are nearly identical to the equivalent provisions of the ECHR and the ICCPR.¹²

A successful regional and national politician in the final moments of the Soviet government and in the subsequent Russian government of President Boris Nikolaevich Yeltsin, Mr. Nemtsov was central to the introduction of capitalism to the Russian economy following the dissolution of the Soviet Union.¹³ Mr. Nemtsov later became a prominent and acerbic critic of the Russian government under President Putin (and of Mr. Putin personally), asserting that the Russian government was taking a turn for the authoritarian.¹⁴ He also

8. *Infra* Part II(3)(b-c).

9. *Infra* Part II.

10. *See supra* note 7 and accompanying text.

11. КОНСТИТУЦИЯ РОССИЙСКОЙ ФЕДЕРАЦИИ [КОНСТ. РФ] [CONSTITUTION] (Russ.) [hereinafter KRF] art. 29 (“1. Everyone shall be guaranteed the freedom of ideas and speech.”); art. 30 (“1. Everyone shall have the right to association, including the right to create trade unions for the protection of his. The freedom of the activities of public associations shall be guaranteed.”); art. 23 (“1. Everyone has the right to the inviolability of private life, personal and family secrets, and the protection of his honor and good name. 2. Everyone has the right to privacy of his correspondence, telephone conversations, mail, telegraph, and other messages. Limitations to this right are permitted only by court order.”).

12. *See infra* note 109 and accompanying text.

13. Yelena Dikun, *Profile of Boris Nemtsov: Russia's Newest First Deputy Premier*, JAMESTOWN FOUNDATION (Apr. 18, 1997, 3:00 AM), http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=19613&tx_ttnews%5BbackPid%5D=219#.Vo6Pxyospsc (providing the general contours of Mr. Nemtsov's political career from the late 1980s through mid 1990s); Jonathan Steele, *Boris Nemtsov Obituary*, GUARDIAN (March 1, 2015, 1:31 PM), <http://www.theguardian.com/world/2015/mar/01/boris-nemtsov> (calling Mr. Nemtsov a “leading pro-market reformer in the first, tumultuous post-Soviet decade”).

14. Steele, *supra* note 13 (noting Mr. Nemtsov's opposition to Kremlin policy); *Prominent Russians: Boris Nemtsov*, RUSSIAPEDIA, <http://russiapedia.rt.com/prominent->

claimed a culture of unbridled malversation in Russia, which was further illustrated in his multiple publications beginning in 2008.¹⁵ Given the Putin government's perceived tolerance of political killings, in early 2015 Mr. Nemtsov went on the record with fears that Mr. Putin would arrange his murder.¹⁶

The same month, Mr. Nemtsov was shot several times on Moscow's Bolshoi Moskvoretsky Bridge, just steps from the Kremlin walls – one of the most heavily surveilled areas in all of Russia.¹⁷ Bullets struck his head, heart, liver, and stomach.¹⁸ He died at the scene only hours after calling on the public to march in protest of Russia's ongoing military engagement in Ukraine.¹⁹ About a week later, two men from Russia's volatile North Caucasus region were

russians/politics-and-society/boris-nemtsov/ (last visited Jan. 7, 2016) (noting Mr. Nemtsov's participation in mass anti-Putin demonstrations).

15. See generally VLADIMIR MILOV & BORIS NEMTSOV, *PUTIN. RESULTS. 10 YEARS: THE INDEPENDENT EXPERT REPORT* (2010) (alleging widespread corruption touching the upper echelons of Russian society); NATIONAL FREEDOM PARTY, *PUTIN. CORRUPTION. THE INDEPENDENT EXPERT REPORT* (2011) (alleging same).

16. *Борис Немцов: Боюсь того, что Путин меня убьет* (*Boris Nemtsov: I Fear that Putin Will Kill Me*), SOBESEDNIK (Feb. 10, 2015), <https://web.archive.org/web/20150301202856/http://sobesednik.ru/politika/20150210-boris-nemcov-boyus-togo-cto-putin-menya-ubet> (describing Mr. Nemtsov's comments regarding the possibility of his assassination); *Russia opposition politician Boris Nemtsov shot dead*, BBC NEWS (Feb. 28, 2015), <http://www.bbc.com/news/world-europe-31669061> (noting Mr. Nemtsov's stated fears that the Kremlin would arrange his killing).

17. *Прохоров: Немцов погиб как мужчина* (*Prokhorov: Nemtsov Died Like a Man*), RIA NOVOSTI (Feb. 28, 2015), <http://ria.ru/society/20150228/1050174998.html> (describing Mr. Nemtsov's murder); *Убийство Бориса Немцова: вся хроника субботы* (*The Murder of Boris Nemtsov: A Full Chronology of Saturday*), МОСКОВСКИЕ КОМСОМОЛЕТЫ (Feb. 28, 2015), <http://www.mk.ru/politics/2015/02/28/ubiystvo-borisa-nemcova-vsya-poslednyaya-informaciya-onlayntranslyaciya.html> (providing a timeline of the moments following Mr. Nemtsov's murder); *Борис Немцов погуб от пули, попавшей в сердце* (*Boris Nemtsov Killed by a Bullet to the Heart*), LIFE NEWS (Feb. 28, 2015), <http://lifenews.ru/news/150510> (reporting Mr. Nemtsov's assassination). See also ул. Большой Москворецкий мост (Bolshoi Moskvoretsky Bridge Street), GOOGLE MAPS, <https://www.google.com/maps/place/ul.+Bolshoy+Moskvoretskiy+most,+Moskva,+Russia/@55.7494048,37.620296,17z/data=!4m2!3m1!1s0x46b54af8bcce78ad:0xb4a432d1fc127aa2> (showing the Bolshoi Moskvoretsky Bridge and its placement roughly 75 feet from the Kremlin walls).

18. See *id.*

19. See *supra* note 2 and accompanying text. Boris Nemtsov (@BorisNemtsov), TWITTER (Feb. 27, 2015, 9:36 PM), <https://twitter.com/BorisNemtsov/status/571378284933619713> (providing the route of the planned anti-war march).

arrested and charged with Mr. Nemtsov's murder.²⁰ Documented irregularities in those arrests have been a subject of international discussion and inquiry, including at the Committee.²¹

As Mr. Nemtsov increased his criticism of Russia's 2014 annexation of Crimea and troop incursion in Ukraine, Russian media began a major campaign to discredit him.²² A key feature of this campaign was the clear placement of Mr. Nemtsov in a cabal of supposed "national traitors" who were allegedly beholden to insidious non-Russian interests and bent on destabilizing the country.²³ Mr. Nemtsov was regularly described in major media as a leader of the "fifth column," a sinister group of Western-backed interloper-agitators in Russian society.²⁴ This media campaign has also been noted in discussions at the Committee.²⁵ On one occasion, then-Prime Minister Putin publicly accused Mr. Nemtsov of being a political opportunist who had stolen massive amounts of money from state coffers in the 1990s, and who was seeking once again to "line his pockets."²⁶

20. Walker, *supra* note 2 (describing the arrests connected to Mr. Nemtsov's killing); Rainsford, *supra* note 2 (noting the arrests of Chechen men in purported connection to Mr. Nemtsov's murder).

21. U.N. Hum. Rights Council, Communications Report of Special Procedures Sent, 1 March to 31 May 2015; Replies received, 1 May to 31 July 2015, U.N. Doc. A/HRC/30/27 (Sept. 4, 2015) [hereinafter Special Procedures Report] at 11 ("The Government has opened an investigation into his death; however Government officials have made public judgments in relation to the killing that may prejudice the investigation.")

22. Nechepurenko, *supra* note 5 (describing media efforts to discredit Mr. Nemtsov); Special Procedures Report, *supra* note 21, at 11 (noting that Mr. Nemtsov "had been accused by State media and public officials of being an 'enemy of Russia.'")

23. В Рунете запустили сайт со списком «предателей Родины» (*On RuNet, List of "National Traitors" Launches*), LENTA.RU (Mar. 7, 2014), <http://lenta.ru/news/2014/03/07/predatel/> (noting Mr. Nemtsov's rhetorical placement among alleged "traitors" of Russia); Борис Немцов – предатель: независимое расследование (*Boris Nemtsov, the Traitor: Independent Investigation*), NEWSLAND (Dec. 30, 2011), <http://newsland.com/news/detail/id/854794/> (dubious report purporting to show Mr. Nemtsov's "betrayal" of Russia); Борис Немцов – предатель России (*Boris Nemtsov: Traitor to Russia*), POLITIKUS.RU (Jan. 9, 2012), <http://politikus.ru/video/105-boris-nemcov-predatel-rossii.html> (pseudo-documentary purporting to prove Mr. Nemtsov's alignment with anti-Russian forces).

24. *See id.*; Lipman, *supra* note 5.

25. Special Procedures Report, *supra* note 21, at 11 ("Mr. Nemtsov was previously arrested in connection with his role in peaceful protests and had been accused by State media and public officials of being an 'enemy of Russia.'")

26. Путин призвал не допустить во власть тех, кто "поураганил" в 90-е годы (*Putin Urges to Keep from Power Those Who "Churned" In the 1990s*), RIA NOVOSTI (Dec.

The media atmosphere in Russia has been characterized as one of “legitimized hate” following the campaign to discredit Mr. Nemtsov and others like him.²⁷ In Russia, television media – which is nearly universally owned by Kremlin-friendly entities – is the primary source of information.²⁸ There is nothing to substantiate any claim that the Kremlin called on national media to discontinue or even soften the allegations of Mr. Nemtsov’s collusion with non-Russian powers in a bid to subvert the stability of the country. For these reasons, Mr. Nemtsov’s family has recourse under the right to reputation provisions of the Russian Constitution, the Russian Criminal and Civil Codes, the ICCPR, and the privacy provision of the ECHR.²⁹

Part I of this Note gives a brief history of Mr. Nemtsov’s place in Russian politics and society generally in order to demonstrate his stature. It begins with his late Soviet political activism in Nizhny Novgorod, then called Gorky, an industrial hub 400 kilometers (250 miles) east of Moscow. It then discusses his ascendancy through elite Russian politics during the post-Soviet Russian government of Mr. Yeltsin, which corresponds roughly to the 1990s. Finally, it explains Mr. Nemtsov’s marginalization following well-documented publications purporting to expose corruption and other features of the Putinist system of governance.

Part II discusses protections to reputation and honor, including liability for defamation generally. This begins by briefly addressing legal academic understandings of defamation, and is followed by

16, 2010), <http://ria.ru/politics/20101216/309511640.html> (quoting Prime Minister Putin's comments regarding Mr. Nemtsov's political motivations in the 1990s and the present day).

27. Nechepurenko, *supra* note 5 (describing the media-fueled atmosphere of “legitimized hate” in modern Russia).

28. *Кому принадлежат основные СМИ в России (Who Owns Major Media in Russia)*, RIA NOVOSTI (Jan. 27, 2012), <http://ria.ru/infografika/20120127/550041009.html> (infographic showing Russian television, print, and radio media as majority owned (in terms of number of outlets) by government agencies, State-owned entities, and instrumentalities of the City of Moscow); *Кто владеет СМИ в России: ведущие холдинги (Who Owns the Media in Russia: Leading Holdings)*, BBC RUSSIAN BUREAU (July 11, 2014), http://www.bbc.com/russian/russia/2014/07/140711_russia_media_holdings (describing Russian government holdings in media, as well as the holdings of state-held entities); *see also* Svetlana Pasti, Mikhail Chernysh, & Luiza Svitich, *Russian Journalists and Their Profession*, in *THE GLOBAL JOURNALIST IN THE 21ST CENTURY* 267, 268 (David H. Weaver and Lars Willnat eds., 2012) (noting the holdings of the Kremlin and State-owned entities in Russian media).

29. *See infra* note 109 and accompanying text.

Russian and international statutory law. It refers to relevant provisions of the Russian Constitution and Criminal and Civil Codes, as well as to analogous provisions in the ICCPR and ECHR. It also includes an examination of the domestic Russian and international recourse available to Russian nationals who face attacks on their reputation, with Mr. Nemtsov in mind.

Part III considers the practical application of the laws discussed in Part II. For example, this Part discusses some procedural restrictions to the international human rights tribunals. Also included is a brief discussion of the legal status of Committee Views, the Committee's rulings on ICCPR violation complaints. Further, this Part outlines right to reputation jurisprudence at the Supreme Court, the Committee, and the European Court in order to illustrate how those courts treat the concept.

Given Russia's domestic and international statutory obligations to protect its nationals from attacks on their honor and reputation, this Note argues in Part IV that Mr. Nemtsov's family should begin the litigation process within the Russian court system against individual media outlets for their defamatory claims. Such a suit could be filed based on Russian constitutional, criminal, and civil law, but with a view to continuation if necessary at one of the two international human rights tribunals whose jurisdiction Russia recognizes.

Acknowledging the sheer strength of Mr. Nemtsov's case, the fundamental question for his representatives is one of recourse should the case reach an international tribunal. In the case that his representatives favor money damages for the Russian media's slander campaign against Mr. Nemtsov in the final years of his life, the European Court of Human Rights would be the preferable forum.³⁰ But, in the case that they prefer public refutations of the allegations that constituted this campaign in the very media that broadcast the claims in the first place, the United Nations Human Rights Committee is the preferable forum.³¹ All of this assumes, of course, that the Russian court system does not provide the quite strong recourse available under various sections of the Russian Civil Code and Criminal Code, discussed in Part II(2).³²

30. *See infra* Part II(3).

31. *See infra* Part II(2).

32. *See infra* Part II(2).

To be clear, this Note does not assert that there are *any* clear grounds to sue the Russian government in direct relation to Mr. Nemtsov's murder. It also takes no position on the rightness or wrongness of Mr. Nemtsov's activities or political stances as a leader of Russia's government or, later, its opposition movement. Rather, it is the project of this Note to demonstrate how the Russian government is liable in tort for acts and, more importantly, omissions facilitating a political atmosphere that observers agree was a proximate cause of Mr. Nemtsov's murder regardless of who pulled the trigger.

Given the protections to reputation in Russian law, the ICCPR, and the ECHR, the Russian government would ultimately be liable as a result of the defamation cause of action outlined here even if Mr. Nemtsov were still alive today.³³ In that connection, the intended readership of this Note is first and foremost Mr. Nemtsov's representatives including legal counsel, and the international tribunal of their choice should they choose to litigate a defamation claim at that tribunal. To a lesser extent, this Note touches on questions of Russian defamation law in both the civil and criminal contexts in a manner that could be of interest for students of international, foreign, and comparative public law.

I: A SHORT BIOGRAPHY OF BORIS E. NEMTSOV

Born in Sochi in 1959 and raised in Gorky (today, Nizhny Novgorod), Boris Nemtsov graduates the Physics Department of Gorky State University (today's Lobachevsky State University of Nizhny Novgorod) in 1981.³⁴ In 1985, at 25 years old, he defends a Ph.D. in Physics and Mathematics at the same institute.³⁵ In the following years he publishes prolifically on thermodynamics and

33. *Infra* Parts II-III.

34. *Nemtsov Boris (Efimovich)*, ACADEMIC.RU (2006), http://dic.academic.ru/dic.nsf/fin_enc/25740/Немцов [hereinafter ACADEMIC.RU] (providing a timeline of Mr. Nemtsov's life from 1959-2006); *Биография Бориса Немцова (Biography of Boris Nemtsov)*, RIA NOVOSTI (Feb, 28, 2015), <http://ria.ru/spravka/20150228/1050127398.html> [hereinafter *Biography of Boris Nemtsov*] (describing Mr. Nemtsov's academic life).

35. *Biography of Boris Nemtsov*, *supra* note 34 (describing Mr. Nemtsov's academic life); *Биография Бориса Немцова (Biography of Boris Nemtsov)*, TASS (Feb, 28, 2015), <http://tass.ru/info/1798210> [hereinafter *Biography of Boris Nemtsov (TASS)*] (noting Mr. Nemtsov's doctoral work at Gorky State).

acoustics questions as a fellow at the Radiophysical Research Institute, also in Gorky-cum-Nizhny Novgorod.³⁶

He enters electoral politics in 1989 in a losing bid for People's Deputy of the Soviet Union.³⁷ In 1990, Mr. Nemtsov runs as a Gorky representative to the Supreme Soviet of the Russian Republic.³⁸ The only non-Communist candidate, he is elected as a member of the Democratic Russia bloc.³⁹ President Yeltsin appoints Mr. Nemtsov governor of the Nizhny Novgorod Region the same year; he is elected to a second term in the post in 1995 with nearly sixty percent of the vote.⁴⁰

Governor Nemtsov oversees a regional reform program through the dissolution of the Soviet Union and the early post-Soviet period.⁴¹ Chaotic free-market policies rule, and when there is not enough currency available, Mr. Nemtsov issues his own to be exchanged later for Russian rubles.⁴² The Nizhny Novgorod region experiences a unique level of economic growth during this period, drawing significant foreign direct investment.⁴³

In 1993, Mr. Nemtsov is elected to the Federation Council — the upper house of the Federal Assembly, Russia's parliament — with

36. List of Publications by Boris E. Nemtsov, HARVARD UNIVERSITY SAO/NASA ASTROPHYSICS DATA SYSTEM, http://adsabs.harvard.edu/cgi-bin/nph-abs_connect?return_req=no_params&author=Nemtsov,%20B.%20E.&db_key=PHY (showing 42 articles and abstracts of Mr. Nemtsov's academic work on topics including, for example, "Linear interaction of waves in a magnetoplasma in the presence of periodic inhomogeneities").

37. *Biography of Boris Nemtsov* (TASS), *supra* note 35 (describing Mr. Nemtsov's early political activities); Dikun, *supra* note 13 (describing same).

38. *Id.*

39. *Id.*

40. Dikun, *supra* note 13 (noting Mr. Nemtsov's popular election following appointment); *Biography of Boris Nemtsov* (TASS), *supra* note 35 (noting Mr. Nemtsov's 1995 election).

41. *Biography of Boris Nemtsov* (TASS), *supra* note 35 (describing the Nizhny Novgorod region reforms under Mr. Nemtsov's direction); Yuri Artemev, *Три Жизни "Немцовок"* (*The Three Lives of the "Nemtsovki"*), BONISTIKA, <http://www.bonistikaweb.ru/nemcovka.htm> (last visited Jan. 11, 2016) (discussing reforms in Nizhny Novgorod during Mr. Nemtsov's stewardship).

42. Artemev, *supra* note 41 (discussing the "Nemtsovki," the regional currency issued under Mr. Nemtsov's direction); Serge Schmemmann, *The Brilliant Boris Nemtsov: A Reformer Who Never Backed Down*, N.Y. TIMES (Mar. 2, 2015), <http://www.nytimes.com/2015/03/03/opinion/the-brilliant-boris-nemtsov-a-reformer-who-never-backed-down.html> (noting the regional currency issued during the period).

43. Dikun, *supra* note 13 (noting unique economic growth in Nizhny Novgorod during Mr. Nemtsov's term); Schmemmann, *supra* note 42 (noting same).

support from Russia's Choice and Yabloko, at that time the country's chief liberal political parties.⁴⁴ Through the mid-1990s, political observers speculate that President Yeltsin will name Mr. Nemtsov as his successor, with Western press calling him a "top young reformer."⁴⁵ In March 1995, Mr. Nemtsov is awarded the Medal of Service to the Fatherland, Russia's highest civilian decoration.⁴⁶

In 1997, Mr. Nemtsov is named First Deputy Prime Minister of the Russian Federation.⁴⁷ Some press report that in a meeting with United States President Bill Clinton, President Yeltsin refers to Mr. Nemtsov as his chosen successor.⁴⁸ Summer 1997 opinion polls show that half of Russians would support Mr. Nemtsov in the 2000 presidential election.⁴⁹

Mr. Nemtsov and other free-market reformers fall out of public favor, though, when the Russian stock market crashes in 1998 and Russia defaults on its sovereign debt.⁵⁰ The subsequent economic crisis expands into a major general political crisis.⁵¹ In December 1998 Mr. Yeltsin dissolves the government, and Mr. Nemtsov is

44. ACADEMIC.RU, *supra* note 34 (describing Mr. Nemtsov's election to the Federation Council); *Biography of Boris Nemtsov* (TASS), *supra* note 35 (noting Mr. Nemtsov's support from mainstream liberal parties).

45. Geoffrey York, *Yeltsin Recruits Top Young Reformer Nemtsov*, GLOBE AND MAIL (Mar. 1997), <http://www.theglobeandmail.com/news/world/from-the-archives-yeltsin-recruits-top-young-reformer-nemtsov/article23235987/> (referring to Mr. Nemtsov as a "top young reformer"); Steele, *supra* note 13 (stating that Mr. Nemtsov had been "earmarked by President Boris Yeltsin as his successor").

46. ПРЕЗИДЕНТ РОССИИ, УКАЗ ПРЕЗИДЕНТА РФ N 260 "О НАГРАЖДЕНИИ МЕДАЛЬЮ ОРДЕНА "ЗА ЗАСЛУГИ ПЕРЕД ОТЕЧЕСТВОМ" II СТЕПЕНИ" (ОТ 10 МАРТА 1995 Г.) (PRESIDENT OF RUSSIA, DECREE OF THE PRESIDENT OF THE RF NO. 260, AWARDING THE MEDAL "FOR SERVICE TO THE FATHERLAND," II DEGREE (MAR. 10, 1995)), <http://kremlin.ru/acts/bank/7627>.

47. ACADEMIC.RU, *supra* note 34 (noting Mr. Nemtsov's appointment to the post); York, *supra* note 45 (noting Mr. Nemtsov's position as First Deputy Prime Minister).

48. Gregory L. White, *Boris Nemtsov's Career Traces Arc of Russia's Dimmed Hopes for Democracy*, WALL ST. J. (Feb. 28, 2015), <http://www.wsj.com/articles/boris-nemtsovs-career-traces-arc-of-russias-dimmed-hopes-for-democracy-1425168024> (noting claims that President Yeltsin had named Mr. Nemtsov as his successor to foreign heads of state); Steele, *supra* note 13 (stating that Mr. Nemtsov had been "earmarked by President Boris Yeltsin as his successor").

49. Kolar, *supra* note 4 (noting Summer 1997 popular support for Mr. Nemtsov); *Nemtsov, Boris*, LENTA.RU ARCHIVE, <http://lenta.ru/lib/14160327/full/> (last visited Jan. 11, 2016) (describing Mr. Nemtsov's apparent trajectory towards the Presidency of Russia).

50. Steele, *supra* note 13 (describing the political implications of the Russian default); *Biography of Boris Nemtsov* (TASS), *supra* note 35 (describing same).

51. *Id.*

forced to resign as Deputy Prime Minister.⁵² A year later, President Yeltsin unexpectedly resigns in a televised address on December 31, 1999.⁵³ In his speech, a kind of apology for the chaos that characterized Russia's transition from Soviet rule, Mr. Yeltsin tells the Russian people, simply, "I seek your forgiveness, that many of our dreams did not come true."⁵⁴ He notifies them in the address that in accordance with the Constitution, the presidency is to be handed provisionally to Prime Minister Vladimir V. Putin.⁵⁵

In January 2000, Mr. Nemtsov co-authors an op-ed about interim President Putin in *The New York Times* entitled *Russia's Best Bet*.⁵⁶ "Russia could do considerably worse than have a leader with an unwavering commitment to the national interest," Mr. Nemtsov and Eurasia Group head Ian Bremmer write.⁵⁷ Following this period, though, Mr. Nemtsov becomes increasingly critical of President Putin's policies.⁵⁸ In January 2004, he co-authors an article warning the Russian masses of an incipient Putinist dictatorship.⁵⁹

In November 2007, Mr. Nemtsov is one of several dozen protesters arrested while chanting "Russia without Putin!" near St. Petersburg's Winter Palace.⁶⁰ The protest is a week ahead of

52. *Id.*

53. *Обращение Президента Б.Н. Ельцина к гражданам России 31 декабря 1999 года* (*Address of President B.N. Yeltsin to the Citizens of Russia, December 31, 1999*), DELOVAYA PRESSA (Jan. 10, 2000), http://www.businesspress.ru/newspaper/article_mId_33_aId_4812.html (full text of President Yeltsin's resignation speech); Илья Карпук, *Речь Ельцина 31.12.1999* (*Speech of Yeltsin 31.12.1999*), YOUTUBE (Apr. 25, 2007), <https://www.youtube.com/watch?v=yvSpiFvPUP4> (full video of President Yeltsin's resignation speech).

54. *Id.*; *Текст новогоднего обращения Бориса Ельцина* (*Text of New Year's Address by Boris Yeltsin*), BBC RUSSIAN BUREAU (Dec. 31, 1999), <http://www.bbc.com/russian/address.htm> (including Mr. Yeltsin's apology for dreams forsaken).

55. *Id.*

56. Boris Nemtsov and Ian Bremmer, *Russia's Best Bet*, N.Y. TIMES (Jan. 5, 2000), <http://www.nytimes.com/2000/01/05/opinion/russia-s-best-bet.html> ("Russia could do considerably worse than have a leader with an unwavering commitment to the national interest.").

57. *Id.*

58. White, *supra* note 48 (outlining Mr. Nemtsov's relations with the Russian leadership over time); Vladimir Kara-Murza and Boris Nemtsov, *Об угрозе путинизма* (*On the Threat of Putinism*), NEZAVISIMAJA GAZETA (Jan. 22, 2004), http://www.ng.ru/politics/2004-01-22/3_letter.html (asserting the danger of a return to authoritarianism under President Putin).

59. Kara-Murza and Nemtsov, *supra* note 58 (open letter "to those who cannot put a price on freedom and democracy").

60. *Police Arrest Scores at Opposition Rally in Russia*, N.Y. TIMES (Nov. 25, 2007), <http://www.nytimes.com/2007/11/25/world/europe/25iht-russia.4.8470583.html> (noting Mr.

parliamentary elections.⁶¹ More than a dozen parliamentary candidates are seen in attendance at the rally.⁶² “So many police proves they are afraid of us,” Mr. Nemtsov tells the press following his release.⁶³

On May 7, 2008, Dmitry Anatolevich Medvedev replaces Vladimir Putin as President of Russia.⁶⁴ Mr. Medvedev's first move as executive is to appoint Mr. Putin prime minister.⁶⁵ While the Medvedev presidency is seen as more liberal than that of Mr. Putin, the latter is understood as the more powerful of the two, and the term “tandemocracy” becomes a fashionable characterization of the Russian style of governance during the period.⁶⁶ Political and sociological histories of Russia generally assert that Mr. Putin maintains effective control of the country during the Medvedev presidency.⁶⁷

In March 2009, Mr. Nemtsov announces that he will run for mayor of Sochi, his birth city, in elections the following month.⁶⁸ He

Nemtsov's participation in mass rallies); Boris Nemtsov (b_nemtsov), LIVEJOURNAL (Nov. 24, 2007), <http://b-nemtsov.livejournal.com/12082.html?thread=1063218> (describing his arrest).

61. *Id.*

62. *Id.*

63. *Police Arrest Scores at Opposition Rally in Russia*, *supra* note 60.

64. *Medvedev becomes Russia's leader*, BBC NEWS (May 7, 2008), <http://news.bbc.co.uk/2/hi/europe/7386940.stm> (reporting on Mr. Medvedev's election to the Russian Presidency); Michael Stott and Oleg Shchedrov, *Russia's Medvedev takes power and pledges freedom*, REUTERS (May 7, 2008), <http://www.reuters.com/article/us-russia-inauguration-idUSL0649335020080507> (reporting same).

65. *Id.*

66. Ilan Berman, *Inscrutable Russian 'Tandemocracy'*, WASH. TIMES (Oct. 15, 2010), <http://www.washingtontimes.com/news/2010/oct/15/inscrutable-russian-tandemocracy/> (describing the general features of the “tandemocracy”); *see also* ANNA ARUTUNYAN, *THE PUTIN MYSTIQUE: INSIDE RUSSIA'S POWER CULT* (2014), at Introduction (explaining that under the “tandemocracy,” Russia was “de jure” ruled by Dmitry Medvedev but “de facto” ruled by “Prime Minister Vladimir Putin”); *see generally* Henry E. Hale and Timothy J. Colton, *Russians and the Putin-Medvedev "Tandemocracy": A Survey-Based Portrait of the 2007-08 Election Season*, NATIONAL COUNCIL FOR EURASIAN AND EAST EUROPEAN RESEARCH (Sept. 8, 2009) (employing the “tandemocracy” model as the status quo descriptor of late-2000s Russian politics).

67. *Id.*

68. *Немцов зарегистрирован кандидатом в мэры Сочи (Nemtsov Registers as Mayoral Candidate in Sochi)*, LENTA.RU (Mar. 28, 2009), <http://lenta.ru/news/2009/03/28/nemtsov/> (reporting Mr. Nemtsov's entry to the Sochi mayoral race); Adrian Blomfield, *Alexander Lebedev joins race to be Russian mayor*, TELEGRAPH (Mar. 18, 2009), <http://www.telegraph.co.uk/news/worldnews/europe/russia/5011403/Alexander-Lebedev-joins-race-to-be-Russian-mayor.html> (noting Mr. Nemtsov's candidacy for Mayor of Sochi).

is attacked with ammonium chloride outside his office by pro-Kremlin activists shortly thereafter, and asserts to the press his belief that the attack is in retaliation to his criticism of plans to hold the Winter 2014 Olympic Games in Sochi.⁶⁹ Mr. Nemtsov loses the mayoral election.⁷⁰

In March 2010, a group of prominent members of the Russian intelligentsia publish an open letter calling for Prime Minister Putin's removal from the Russian government.⁷¹ They urge the Russian people "from Kaliningrad to Vladivostok" to demonstrate against Mr. Putin.⁷² Mr. Nemtsov is a signatory.⁷³

In June 2010, Mr. Nemtsov and Vladimir Stanislavovich Milov, who had served as Deputy Minister of Energy during President Putin's first term, publish one million copies of a report entitled *Putin: Results. 10 Years*.⁷⁴ The fourth report in the *Putin: Results* series begun in 2008, it advertises the Putin Must Go campaign on its inside back cover.⁷⁵ Police seize hundreds of thousands of copies of the report, alleging "extremist" content.⁷⁶ The day after publication, the report's website falls victim to cyber attack.⁷⁷ Some of the report's

69. Joshua Keating, *Interview: Boris Nemtsov*, FOREIGN POL'Y (Mar. 1, 2010), <http://foreignpolicy.com/2010/03/01/interview-boris-nemtsov/> (noting the chemical attack on Mr. Nemtsov); Simon Shuster, *Why Russia's Probe Into the Nemtsov Murder Does Not Stack Up*, TIME (Mar. 10, 2015), <http://time.com/3738734/nemtsov-murder-investigation/> (noting the 2009 attack on Mr. Nemtsov).

70. *Борис Немцов оспаривает результаты выборов мэра Сочи в суде (Boris Nemtsov Disputes Sochi Mayoral Election Results in Court)*, LENTA.RU (Apr. 27, 2009), <http://lenta.ru/news/2009/04/27/sud/> (describing Mr. Nemtsov's loss in the Sochi mayoral election); *На выборах мэра Сочи лидирует кандидат от "Единой России" (United Russia Candidate Leads in Sochi Mayoral Elections)*, LENTA.RU (Apr. 27, 2009), <http://lenta.ru/news/2009/04/26/results/> (reporting on the election of the ruling United Russia Party candidate as Mayor of Sochi).

71. *Путин должен уйти! (Putin Must Go!)*, EZHEDNEVNIY ZHURNAL (Mar. 11, 2010), <http://www.ej.ru/?a=note&id=9935#> (the open letter announcing the initiation of the Putin Must Go! movement).

72. *Id.*

73. *Id.*

74. Milov & Nemtsov, *supra* note 15.

75. *Id.*

76. *Police seize 100,000 anti-Vladimir Putin books*, TELEGRAPH (June 16, 2010), <http://www.telegraph.co.uk/news/worldnews/europe/russia/7833181/Police-seize-100000-anti-Vladimir-Putin-books.html> (describing police seizure of Mr. Nemtsov's reports).

77. *Сайты Немцова и Милова подверглись атаке после публикации нового доклада (Sites of Nemtsov and Milov Under Attack Following Publication of New Report)*, GRANI.RU (June 15, 2010), <http://grani.ru/Internet/m.178982.html> (noting cyberattacks on the websites of Mr. Nemtsov and Mr. Milov).

chapters include “Corruption is Eroding Russia,” “A Dying Country,” “A Country of Screaming Inequality,” “Pension Collapse,” “The Multibillion-Dollar Scam” (regarding the Sochi Winter Olympic Games), and others of similar tone.⁷⁸

In December 2010, during a live televised address, Prime Minister Putin accuses a group including Mr. Nemtsov of stealing “many billions” from public coffers during the 1990s.⁷⁹ Mr. Putin asserts that the political activism of Mr. Nemtsov and others who oppose the sitting Russian government is simply a bid to return to power in order to “line their pockets.”⁸⁰ On New Year’s Eve 2010, Mr. Nemtsov is arrested at an anti-government rally in Moscow.⁸¹ He is sentenced to fifteen days in prison, spending Russia’s most important civil holiday behind bars.⁸² Following his release, Mr. Nemtsov’s January 2011 defamation action against Prime Minister Putin is dismissed: the ruling holds that names like “Boris Nemtsov” simply refer metonymically to “a certain class of political actor” and that, therefore, the televised allegations are not actionable.⁸³

In March 2011, Messrs. Nemtsov and Milov release the report *Putin: Corruption*, the fifth in the *Putin: Results* series.⁸⁴ The report documents the riches of the Russian political class, including 26 palaces and five yachts used by President Medvedev and Prime Minister Putin.⁸⁵ Chapters include “Putin and His Billionaire

78. *Id.*

79. *Putin Urges*, *supra* note 26 (alleging without context that Mr. Nemtsov stole from the Russian people during his tenure as an appointed and elected official).

80. *Id.*

81. Michael Schwartz, *Arrests in Russia Signal Divisions Over Dissent*, N.Y. TIMES (Jan. 3, 2011), <http://www.nytimes.com/2011/01/04/world/europe/04russia.html> (reporting Mr. Nemtsov’s arrest at a mass rally); *Opposition leaders detained during Moscow New Year’s Eve rally*, RADIO FRANCE INT’L (Dec. 31, 2010), <http://www.english.rfi.fr/europe/20101231-opposition-leaders-detained-during-moscow-new-year-s-eve-rally> (reporting Mr. Nemtsov’s New Year’s Eve arrest).

82. Schwartz, *supra* note 81 (noting the sentence levied against Mr. Nemtsov); *Opposition leaders detained*, *supra* note 81 (reporting same).

83. *Борис Немцов стал именем нарицательным (Boris Nemtsov Becomes a Household Name)*, KOMMERSANT (Feb. 24, 2011), <http://www.kommersant.ru/doc/1590640> (reporting Judge Adamova’s ruling regarding Mr. Putin’s allegations against Mr. Nemtsov).

84. PUTIN: CORRUPTION, *supra* note 15.

85. *Id.*

Friends,” “Watches,” “Apartments and Cars,” and others in the same vein.⁸⁶

In 2011 and 2012, Mr. Nemtsov becomes increasingly active in street protests.⁸⁷ He also begins making appearances to United States and European Union legislatures, urging rule of law measures regarding Russia including sanctions and travel bans on individual members of the Putin government.⁸⁸ As his political criticisms grow louder through 2013, Mr. Nemtsov is threatened with various criminal charges.⁸⁹

On March 18, 2014, Russia annexes Crimea, an historically significant peninsula on the Black Sea, from Ukraine, which is in the midst of a civil war.⁹⁰ Mr. Nemtsov is one of the most prominent

86 . НЕЗАВИСИМЫЙ ЭКСПЕРТНЫЙ ДОКЛАД: ПУТИН. КОРРУПЦИЯ (INDEPENDENT EXPERT REPORT: PUTIN. CORRUPTION) 2 (V. Milov, B. Nemtsov, V. Ryzhova, & O. Shornoj eds., 2012).

87. *Чем запомнился Борис Немцов? (For What is Boris Nemtsov Remembered?)*, ARGUMENTY I FAKTY (Feb. 28, 2015), http://www.aif.ru/dontknows/file/chem_zapomnilsya_boris_nemtsov (noting Mr. Nemtsov's participation in street politics); Boris Nemtsov, *Резолюция 15 сентября (Resolution of September 15)*, ЕКНО МОСКВЫ (Sept. 13, 2012), http://echo.msk.ru/blog/nemtsov_boris/929726-Ekho/ (blog post discussing participation in mass anti-Putin rallies).

88. *Вслед за “списком Магнитского” в Европе появятся списки Ходорковского и Немцова (Following the “Magnitsky List” in Europe, Come the Khodorkovsky and Nemtsov Lists)*, PRAVO.RU (Feb. 17, 2011), <http://pravo.ru/news/view/48584/> (reporting Mr. Nemtsov's visit to European Parliament in promotion of sanctions against members of the Russian political class); *Каспаров с Немцовым передали американским конгрессменам дополнения в “список Магницкого”:* туда включили Чурова, Бастрыкина и ряд судей (*Kasparov and Nemtsov Give American Congressmen Additions to the “Magnitsky List,” Including Churov, Bastyrkin, and Various Judges*), ALTAPRESS.RU (July 6, 2012), <http://altapress.ru/story/89165> (reporting Mr. Nemtsov's lobbying of United States politicians to sanction sitting Russian politicians).

89. *Борис Немцов вновь стал фигурантом уголовного дела (Boris Nemtsov Once Again Figures in Criminal Case)*, RBK (Aug. 25, 2012), <http://www.rbc.ru/politics/25/08/2012/666323.shtml> (describing battery charges against Mr. Nemtsov); *Против Бориса Немцова могут возбудить дело по «экстремистской» статье (Against Boris Nemtsov, Possible Initiation of Charges under the “Extremism” Article)*, GAZETA.RU (Sept. 16, 2013), http://www.gazeta.ru/politics/news/2013/09/16/n_3187537.shtml (reporting incitement charges against Mr. Nemtsov and his political party).

90. Steven Lee Meyers & Ellen Barry, *Putin Reclaims Crimea for Russia and Bitterly Denounces the West*, N.Y. TIMES (Mar. 18, 2014), <http://www.nytimes.com/2014/03/19/world/europe/ukraine.html> (reporting Russia's reincorporation of Crimea); Matt Smith & Alla Eshchenko, *Ukraine cries ‘robbery’ as Russia annexes Crimea*, CNN (Mar. 18, 2014), <http://www.cnn.com/2014/03/18/world/europe/ukraine-crisis/> (reporting same).

voices of outrage in Russia regarding the annexation.⁹¹ In February 2015, Mr. Nemtsov tells Russian daily Sobesednik of his fear that “Putin will kill me.”⁹²

Leading up to this time, unsubstantiated claims against Mr. Nemtsov amplify in Russian media, in particular allegations that he is a traitor to Russia; the Committee takes note.⁹³ On February 27, 2015, Mr. Nemtsov tweets to tens of thousands of followers the proposed route of an “anti-crisis, anti-war” march in Moscow.⁹⁴ Hours later he is shot six times, more or less on the Kremlin doorstep, dying at the scene.⁹⁵

II: RIGHT TO REPUTATION IN THE RUSSIAN AND INTERNATIONAL LEGAL FRAMEWORK

This Part offers background on the Russian and international statutory and case law that frame later discussions of liability for media attacks on Mr. Nemtsov’s honor and reputation. To provide context, it begins with general questions regarding defamation as a tort and as an historical legal concept. It continues by specifically discussing the right to reputation provision of the Russian Constitution and the sections on defamation in the Russian Criminal and Civil Codes. Finally, this Part looks at the right to reputation as a concept in the ECHR and the ICCPR. That last section of the Part also reviews the origins and procedures of the ICCPR’s individual complaint mechanism.

91. *Резолюция Марша Мира 21 сентября (Resolution of the Peace March of September 21)*, ЕКХО МОСКВЫ (Sept. 21, 2014), <http://echo.msk.ru/blog/Ekhomsk/1400978-Ekho/> (placing Mr. Nemtsov’s among the loudest anti-annexation voices in Russian society).

92. Milov & Nemtsov, *supra* note 15.

93. Special Procedures Report, *supra* note 21, at 11 (“Mr. Nemtsov was previously arrested in connection with his role in peaceful protests and had been accused by State media and public officials of being an ‘enemy of Russia.’”).

94. Nemtsov, *supra* note 19 (Twitter post giving the route of the planned march).

95. Steele, *supra* note 13 (reporting the known forensic details of Mr. Nemtsov’s murder); *The Murder of Boris Nemtsov*, *supra* note 15 (reporting same); Bolshoi Moskvoretsky Bridge Street, *supra* note 17.

I. Defamation Generally

In the context of international human rights treaties, the right to reputation tends to be a subset of the right to privacy.⁹⁶ Outside the treaty context, and not incongruously, it is also discussed as a feature of the tort of defamation.⁹⁷ This section explores the latter while saving close examination of the provisions of the given treaties for discussion later on. It also weighs arguments against liability for defamation due to freedom of expression concerns. As a general point, this Note adopts the commonly held definition of defamation as a public communication that negatively affects an individual's reputation.⁹⁸ In Russian law specifically, *klevetā* is the umbrella tort concept that translates equally as “defamation,” “libel,” and “slander,” while a civil defamation claim would be based on protections to “dignity, honor, and business reputation” or “intangible goods” generally, which statutorily include integrity and good name.⁹⁹

Legal academic discussions of defamation often highlight concerns relating to the freedom of expression guaranteed in many

96. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (hereinafter UDHR) art. 12 (“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”); ICCPR, *supra* note 7, at art. 17 (“1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.”); ECHR, *supra* note 7, at art. 8 (“1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”); Inter-American Commission on Human Rights, American Convention on Human Rights (Nov. 22 1969) [hereinafter American Convention] art. 11 (“1. Everyone has the right to have his honor respected and his dignity recognized. 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation. 3. Everyone has the right to the protection of the law against such interference or attacks.”).

97. See also Jerome H. Skolnick, *The Sociological Tort of Defamation*, 74 CALIF. L. REV. 677 (1986) (placing reputation at the center of the tort concept of defamation); see generally Bonnie Docherty, *Defamation Law: Positive Jurisprudence*, 13 HARV. HUM. RTS. J. 263 (2000) (asserting that the purpose of defamation law is to “protect reputation”).

98. See Docherty, *supra* note 97, at 265 (“Defamation is a public communication that tends to injure the reputation of another”); TONY WEIR, TORT LAW 162 (2002).

99. See GKRF, *infra* note 119.

jurisdictions, including Russia.¹⁰⁰ These concerns emphasize concepts like “open discussion” and the “marketplace of ideas,” relying on the cliché of a “free press.”¹⁰¹ Given Russia’s media ownership landscape, where government-linked and -friendly entities have effective control over the flow of information, these concerns are a distraction.¹⁰² Discussions focused on alleged risks to freedom of expression posed by defamation law also assert that freedom of the press — which is taken to mean ownership of the press by non-governmental entities — is necessary for individuals to monitor government actions and actors.¹⁰³

Defamation is a “social” tort, while reputation is accepted as “the esteem in which a person is held by others.”¹⁰⁴ Reputation is sometimes discussed as either a form of property, or a form of honor.¹⁰⁵ Within the property conception, damages are seen as payment due to injury to a form of capital linked to an individual’s “personal exertion.”¹⁰⁶ A market view of society is central to this conception of reputation.¹⁰⁷ In a 1986 symposium piece on defamation in the *California Law Review*, Robert C. Post asserts, “No person has the right to a reputation other than that created by the evaluative process of the market, and, conversely, every person enjoys an equal right to enter the market to attempt to achieve what reputation he can.”¹⁰⁸ Elements of this conception of reputation and

100. See Docherty, *supra* note 97, at 264 (asserting that defamation liability is inherently a restriction on freedom of expression); LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 785-86 (2d ed. 1988) (asserting same).

101. See generally Docherty, *supra* note 97 (weighing concerns related to the protection of freedom of expression); Tribe, *supra* note 100.

102. RIA Novosti, *supra* note 28 (showing plurality of Kremlin and Kremlin-friendly holdings in media); *Who Owns the Media in Russia: Leading Holdings*, *supra* note 28 (showing same).

103. See, e.g., Docherty, *supra* note 97 (referring to the press as a “watchdog”); Skolnick, *supra* note 97, at 679 (discussing various academic positions on the press’ duty to oversee the conduct of public officials).

104. See, e.g., Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691 (1986) (asserting that the concept of reputation is inseparable from social relations); Skolnick, *supra* note 97 (stressing the need to examine the “social purpose” of defamation law). *Reputation*, BLACK’S LAW DICTIONARY (9th ed. 2010).

105. See Post, *supra* note 104.

106. J. HAWES, LECTURES ADDRESSED TO THE YOUNG MEN OF HARTFORD AND NEW HAVEN 95 (Hartford 1828); Post, *supra* note 104, at 695 (developing the property conception).

107. Post, *supra* note 104, at 696-97 (discussing the “concept of reputation as property”).

108. *Id.*

society are pertinent to Mr. Nemtsov's case, as are elements of the "honor" conception.

In the "honor" notion of reputation, the value of one's good name transcends its potential value in the marketplace.¹⁰⁹ A more ancient conception, the "honor" understanding of reputation comports more closely with Mr. Nemtsov's case because it considers an individual's specific place in society and the benefits of the social role he plays.¹¹⁰ That is, while his place in society may be a result of his own efforts, his reputation is a reflection of the regard in which society holds that social role.¹¹¹ Loss of honor, as in Mr. Nemtsov's case, "is a fall from grace in the most comprehensive sense – loss of face in the community, but also a loss of self and separation from the basic norms that govern human life."¹¹² In this conception, damages for defamation are seen as a method of vindication, or of restoring honor.¹¹³ Note that both the ICCPR and Russian Constitution and Civil Code provisions on the right to reputation refer to "honor," while the Civil Code provision refers additionally to "dignity."¹¹⁴

2. Right to Reputation in Russian Federal Statutory Law

The civil-political and human rights provisions of the Russian Constitution often track those of the international human rights conventions.¹¹⁵ This holds true as it concerns the Russian

109. *Id.*

110. *Proverbs* 22:1 ("A good name is more desirable than great riches; to be esteemed is better than silver or gold."); MAX WEBER, *ESSAYS IN SOCIOLOGY* 186-88 (1998).

111. Post, *supra* note 104, at 700 (claiming that an individual, in return for his social status, personally receives from others the "regard and estimation that society accords to that role").

112. PETER L. BERGER, *THE HOMELESS MIND: MODERNIZATION AND CONSCIOUSNESS* 90 (1973).

113. Post, *supra* note 104, at 702 (describing a conception of defamation law as concerned primarily with the preservation of social status).

114. Compare ICCPR, *supra* note 7, at art. 17 ("unlawful attacks on his honour and reputation") with KRF, *supra* note 11, at art. 23 ("protection of honor and good name") and GKRF, *infra* note 119, at art. 150(1) ("personal dignity" and "honor and good name").

115. Compare KRF, *supra* note 11, at art. 23 ("1. Everyone has the right to the inviolability of private life, personal and family secrets, and the protection of his honor and good name. 2. Everyone has the right to privacy of his correspondence, telephone conversations, mail, telegraph, and other messages. Limitations to this right are permitted only by court order.") with ICCPR, *supra* note 7, at art. 17 ("1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of

Constitution's protections against attacks on an individual's reputation when compared with the relevant ICCPR provision.¹¹⁶ In this connection, the Russian Constitution asserts stronger protections to reputation than even the ECHR.¹¹⁷ The Russian Criminal Code (the "Criminal Code") includes a fairly detailed provision on defamation, with increased liability where the target of slanderous accusations is alleged to have committed a serious crime, a salient point for Mr. Nemtsov's case, as explained later.¹¹⁸ The Russian Civil Code (the "Civil Code"), meanwhile, protects reputation in two subdivisions.¹¹⁹

the law against such interference or attacks.") and ECHR, *supra* note 7, at art. 8 ("1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.").

116. Compare KRF, *supra* note 11, at art. 23 ("1. Everyone has the right to the inviolability of private life, personal and family secrets, and the protection of his honor and good name. 2. Everyone has the right to privacy of his correspondence, telephone conversations, mail, telegraph, and other messages. Limitations to this right are permitted only by court order.") with ICCPR, *supra* note 7, at art. 17 ("1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.")

117. Compare KRF, *supra* note 11, at art. 23 ("1. Everyone has the right to the inviolability of private life, personal and family secrets, and the protection of his honor and good name. 2. Everyone has the right to privacy of his correspondence, telephone conversations, mail, telegraph, and other messages. Limitations to this right are permitted only by court order.") with ECHR, *supra* note 7, at art. 8 ("1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.").

118. Федеральный закон N 63-ФЗ, Уголовный кодекс Российской Федерации [Federal Law No. 63-FZ, The Criminal Code of the Russian Federation] (as amended July 6, 2016) (Russ.) [hereinafter UKRF] art. 128.1 ("Defamation connected with an accusation of the commission of a serious or especially serious crime is punishable by a fine of up to five million rubles, or the salary or other income of a period of up to three years, or by compulsory labor for a term of up to four hundred and eighty hours.").

119. Федеральный закон N 51-ФЗ, Гражданский кодекс Российской Федерации [Federal Law No. 51-FZ, The Civil Code of the Russian Federation] (as amended July 3, 2016) (Russ.) [hereinafter GKRF] art. 150.1 ("Life and health, personal dignity, personal integrity, honor and good name, goodwill" and "other intangible goods belonging to a citizen from birth, or by law, are inalienable and non-transferable in any other way."); *id.* at art. 150.2 ("In cases and in a manner prescribed by law, intangible goods belonging to the deceased, may be protected by other persons."); *id.* at art. 152.1 ("A citizen is within his rights to demand the

In one, the Civil Code protects Russian nationals' "dignity" and "honor," and gives them the right to the refutation of defamatory allegations in the medium used to disseminate the claims in the first place.¹²⁰ In the other, it protects the individual's "intangible goods," which include honor and good name.¹²¹

When it comes to use of mass media to defamatory ends, the Russian Supreme Court's conceptual definition of false information — or, as directly translated from the Russian legal literature, "information not corresponding to reality" — is clear generally, but prohibitively difficult to render in English.¹²² The Supreme Court holds, essentially, that statements alleging facts and events that did not happen "in reality," during the time period in which they are alleged to have happened, qualify as false.¹²³ Of course, the false allegations must have some negative effect on the dignity, honor, or business reputation of the target in order to be actionable.¹²⁴

a. Honor: Definitions and Implementation in the Russian Constitution

The current Russian Constitution, effective as of 1993, is the jurisdiction's supreme law.¹²⁵ It is split into two sections, the first made up of nine chapters and the second made up of one.¹²⁶ The provisions of the first chapter discuss the basis of the federal

refutation of a discredit to his honor, dignity or business reputation, if such disseminated statements are not proven true. Rebuttal should be done by the same means used to circulate information about the citizen, or other similar means.").

120. *Id.* at art. 152.

121. *Id.* at art. 150.

122. See the Facebook discussion between the author and, among others, the director of Human Rights Watch Russia and one of Russia's most prominent litigators at international human rights tribunals, regarding how to translate the provision to English, with the latter stating that any attempt to do so would be "impossible." Thomas Callahan, FACEBOOK (Nov. 6, 2015), <https://www.facebook.com/RovingBlade/posts/10101219752672770>. The original Russian is, "Не соответствующими действительности сведениями являются утверждения о фактах или событиях, которые не имели места в реальности во время, к которому относятся оспариваемые сведения." (Quoting the Plenary Directive, *supra* note 3.)

123. Plenary Directive, *supra* note 3, at 4 (stating that "[u]ntrue information constitutes statements of facts or events that did not occur in reality" at the time they are alleged to have occurred).

124. GKRF, *supra* note 119, at art. 152.

125. KRF, *supra* note 11, at art. 15 ("1. The Constitution of the Russian Federation shall have supreme juridical force, direct action and shall be used on the whole territory of the Russian Federation. Laws and other legal acts adopted in the Russian Federation shall not contradict the Constitution of the Russian Federation.").

126. See generally *id.*

constitutional system, including the hierarchy of jurisdictions within and across regions; the separation of the executive from the legislature and judiciary; and the establishment of a secular government.¹²⁷ The second chapter is entitled Human and Civil Rights and Freedoms, and in addition to protections to reputation it also includes the right to privacy, the freedom of expression, protections on minority languages and cultures, a ban on torture, and other human rights provisions.¹²⁸ The third chapter explains Russia's federal structure – the methods of legislation, the role of the Central Bank, the status of the autonomous regions, and so on.¹²⁹ Subsequent chapters lay out various administrative features of the Russian government, the rights and duties of the Russian Federation as a sovereign jurisdiction, as well as various other questions of governance.¹³⁰

Article 23 of the Russian Constitution, the sixth of forty-seven articles in the Human and Civil Rights and Freedoms chapter, protects the right to privacy.¹³¹ Article 23.1, the section relevant to the discussion here, states, in full: “Everyone shall have the right to the inviolability of his private life, personal and family privacy, and protection of his honor and reputation.”¹³² The Russian Plenary Supreme Court's 2005 directive on practical application of civil defamation law (the “Plenary Directive”), discussed in greater detail later on, refers first and foremost to Article 23 of the Constitution.¹³³

127. *See id.* at arts. 1-16 (“Chapter 1. The Fundamentals of the Constitutional System[.]”).

128. *See id.* at arts. 17-64 (“Chapter 2. Rights and Freedoms of Man and Citizen[.]”).

129. *See id.* at arts. 65-79 (“Chapter 3. The Federal Structure[.]”).

130. *See id.* at arts. 80-137 (“Chapter 4. The President of the Russian Federation (Art. 80-93); Chapter 5. The Federal Assembly (Art. 94-109); Chapter 6. The Government of the Russian Federation (Art. 110-117); Chapter 7. Judicial Power (Art. 118-129); Chapter 8. Local Self-government (Art. 130-133); Chapter 9. Constitutional Amendments and Review of the Constitution (Art. 134-137)”).

131. KRF, *supra* note 11, at art. 23 (“1. Everyone has the right to the inviolability of private life, personal and family secrets, and the protection of his honor and good name. 2. Everyone has the right to privacy of his correspondence, telephone conversations, mail, telegraph, and other messages. Limitations to this right are permitted only by court order.”).

132. *Id.* The final clause of the provision literally protects “доброе имя” (*dobroe imya*), which translates directly to “good name” but, as in English, indirectly to “reputation.” The other provision of Article 23 protects privacy of correspondence subject to limitation by a court order.

133. Plenary Directive, *supra* note 3, ¶ 1 (opening the Plenary Directive with, “Pursuant to Article 23 of the Russian Constitution”).

Russia also has various Constitutional Laws, with one of particular concern for the purposes of this Note: the Federal Constitutional Law on the Supreme Court of the Russian Federation (the “Law on the Supreme Court”).¹³⁴ Article 5 of this statute outlines the makeup and authority of the Plenary Supreme Court of the Russian Federation (the “Plenary Supreme Court”), on whose directive on civil defamation this Note relies in multiple instances.¹³⁵ The Plenary Supreme Court, *inter alia*, issues decrees on judicial application of statutory law.¹³⁶ It is made up of the heads of the judicial boards of the Supreme Court — the Chairman, First Deputy Chairman, and Deputy Chairman of the Supreme Court of the Russian Federation.¹³⁷ Others who may participate in plenary proceedings include, but are not limited to, the Prosecutor General, the Minister of Justice, the President of the Constitutional Court, and additional judges of the Constitutional Court or other Russian courts.¹³⁸ The Plenary Supreme Court has the authority to appoint various judicial offices across jurisdictions within Russia, as well as to review executive petitions to initiate criminal proceedings.¹³⁹ The most

134. Федеральный конституционный закон от 05.02.2014 N 3-ФКЗ (ред. от 04.11.2014) “О Верховном Суде Российской Федерации” (Federal Constitutional Law of 02/05/2014 No. 3-FKZ (as amended 11/04/2014) “On the Supreme Court of the Russian Federation”) [hereinafter Law on the Supreme Court] (Russ.).

135. *Id.* at art. 5.

136. *See, e.g.*, Plenary Directive, *supra* note 3.

137. Law on the Supreme Court, *supra* note 134, at art. 5.1 (“The Plenum of the Supreme Court of the Russian Federation shall consist of the Chairman of the Supreme Court of the Russian Federation, the First Deputy Chairman of the Supreme Court of the Russian Federation, the Deputy Chairman of the Supreme Court of the Russian Federation — the chairmen of the judicial boards of the Supreme Court of the Russian Federation, referred to in paragraph 2 of Article 3 of the Federal Constitutional Law ... and judges of the Supreme Court of the Russian Federation.”).

138. *Id.* at art 5.3.2 (“The Plenum of the Supreme Court of the Russian Federation addresses issues related to implementation, in accordance with Article 104 of the Constitution of the Russian Federation granted to the Supreme Court of the Russian Federation, of the legality of legislative initiatives on issues within its jurisdiction.”).

139. *Id.* at art. 5.3.4 (“The Plenum of the Supreme Court of the Russian Federation selects, by referral from the Chairman of the Supreme Court of the Russian Federation, a Secretary of the Plenum of the Supreme Court from the judges of the Supreme Court of the Russian Federation for a period of three years. The same judge may be elected Secretary of the Supreme Court of the Russian Federation multiple times.”); *id.* at art. 5.3.5 (“[A]pproves the composition of the Judicial Board on Administrative Cases of the Supreme Court of the Russian Federation, the Judicial Board on Civil Cases of the Supreme Court, the Judicial Collegium for Criminal Cases of the Supreme Court, the Judicial Board on Economic Disputes of the Supreme Court, the Judicial Board for military personnel of the Supreme Court

pertinent subdivision of Article 5 of the Law on the Supreme Court for this Note, though, is Article 5.3.1-2, which authorizes the Plenary Supreme Court to “provide the courts with explanations on judicial practice in order to ensure uniform application of the legislation of the Russian Federation,” and to “resolve issues related to implementation” of the law.¹⁴⁰ The decree On Court Practice in Cases of Protection of the Honor and Dignity of Citizens, as well as Goodwill of Citizens and Legal Persons, issued in 2005, does exactly this.¹⁴¹

b. Defamation: Attacks on Reputation in the Russian Criminal Code

Russian federal law is generally reported thematically in collected codes, for example the Criminal Code, the Labor Code, the Administrative Code, et cetera. They are all updated often to accommodate new legal concepts or to expand or narrow existing provisions.¹⁴² The primary current provision of Russian federal criminal law treating defamation, Article 128.1 of the Criminal Code,

Federation (hereinafter the Judicial Board of the Supreme Court of the Russian Federation), and the transfer of judges from one judicial board of the Supreme Court of the Russian Federation to another judicial board of the Supreme Court of the Russian Federation.”); *id.* at art. 5.3.9 (“[A]pproves, by referral of the Chairman of the appropriate court, the personal composition of the Supreme Court of the republic, territorial, regional court, federal court, court of an autonomous region, court of an autonomous district, military court, tribunal, District Appellate Court, Arbitration Court of the Russian Federation, or court of intellectual property rights.”); *id.* at art. 5.3.8 (“[A]pproves, in connection with referrals from the President of the Russian Federation, the composition of the judicial collegium of judges of the Supreme Court of the Russian Federation, adopted in accordance with the Criminal Procedural Code of the Russian Federation concluded in the actions of the Prosecutor General of the Russian Federation and (or) the Chairman of the Investigative Committee of the Russian Federation, the elements of a crime for a decision to initiate criminal proceedings against given individuals, or to make a decision about bringing them as defendants in a criminal case, if the criminal case was instituted against others.”).

140. *Id.* at art. 5.3.1-2 (“The Plenum of the Supreme Court of the Russian Federation 1) examines the materials of analysis and summary of judicial practice and gives courts explanations on judicial practice in order to ensure uniform application of the legislation of the Russian Federation; 2) resolves issues related to implementation, in accordance with Article 104 of the Constitution of the Russian Federation, granting the Supreme Court of the Russian Federation the right of legislative initiative on issues within its jurisdiction.”).

141. Plenary Directive, *supra* note 3.

142. See, for example, ConsultantPlus entry for UKRF, *supra* note 118, at ch. 17, which includes defamation, showing amendments in 1999, 2003, 2004, 2008, 2009, 2011, 2012, and 2013, http://www.consultant.ru/popular/ukrf/10_25.html#p1791.

came into force in June 2012.¹⁴³ A brief article consisting of five sections that vary liability by circumstance, it defines defamation as “the spread of false information discrediting the honor and dignity of another person or undermining his reputation.”¹⁴⁴ The language is analogous to that of the Russian Civil Code’s reputation provision, discussed below. Importantly for Mr. Nemtsov’s case, Article 128.1 does not address, and therefore does not bar, posthumous defamation claims.¹⁴⁵ The Supreme Court has confirmed this understanding of the law, stating expressly that there is no statute of limitations on such claims.¹⁴⁶

Russia’s criminal laws often feature varying levels of liability depending on the context of the offense. Under Article 128.1.2, defamation carries liability of up to RUB1,000,000, one year’s salary or other income, or forced labor of up to 240 hours when carried out by use of the media or other public means of expression.¹⁴⁷ Article 128.1.5 increases criminal penalties to RUB5,000,000, three years’ salary or defamer’s other income, or up to 480 hours of forced labor if the defamation contains accusations that the target committed an “especially serious crime.”¹⁴⁸ What constitutes such a crime is not defined in the law.¹⁴⁹ The likely especially serious crime of treason, though, which is the subject of Article 275 of the Criminal Code, includes “other assistance” to “a foreign state, an international or

143. Путин подписал закон "О клевете" (*Putin Signs Law "On Defamation"*), INTERFAX (July 30, 2012, 2:20 PM), <http://www.interfax.ru/russia/258078> (reporting on new defamation law of July 2012); UKRF, *supra* note 118, at art. 128.1 (Defamation), CONSULTANTPLUS http://www.consultant.ru/document/cons_doc_LAW_10699/8a73d26dba7976d6c43cc94aa1515368fef256f0/ (showing entry into force of July 28, 2012).

144. The English words “defamation,” “slander,” and “libel” all translate to “клевета” (*kleveta*) in Russian. *Kleveta* is the title of Article 128.1. In order to avoid confusion given the nuances between these English words, I have chosen to use the more general “defamation” for the purposes of this Note.

145. UKRF, *supra* note 118, at art. 128 (not stating exhaustion of a cause of action concurrent with the death of the target of defamation).

146. Plenary Directive, *supra* note 3 (allowing representatives of a target of defamation to bring a case after his death).

147. UKRF, *supra* note 118, at art. 128.1.2. In August 2016, RUB1,000,000 equaled US \$15,080.

148. *Id.* at art. 128.1.5 (“Defamation in combination with an accusation of the commission of a serious or especially serious crime is punishable by a fine of up to five million rubles or the salary or other income of a period of up to three years, or by compulsory labor for a term of up to four-hundred and eighty hours.”)

149. *Id.*

foreign organization or its representatives in activities directed against the security of the Russian Federation.”¹⁵⁰ The Russian media in question accused Mr. Nemtsov of at least participating in a conspiracy to stoke unrest in Russia at the bidding of non-Russian interests, actions that would tend to fit this description.¹⁵¹ Treason is the first provision in the section of the Criminal Code entitled Crimes Against the Foundations of Constitutional Order and State Security, and is punishable by a mandatory minimum twelve-year prison term.¹⁵²

The Russian Criminal Procedural Code sets out three different kinds of criminal prosecutions: public, private-public, and private.¹⁵³ Given the individual injury following defamation, Article 128 proceedings fall under the final category, which means that private individuals have the right to petition for criminal charges against other individuals they allege to have engaged in criminal defamation against them.¹⁵⁴ Litigants in a Russian criminal defamation action also have the option to resolve the complaint in “reconciliation.”¹⁵⁵ The relevant procedural statute even designates a room to be used for this purpose.¹⁵⁶

In its 2013 report to the Committee on its ICCPR compliance, Russia notes several articles of the Criminal Code that, it asserts, are

150. *Id.* at art. 275. “High treason” includes “providing financial, material, technical, advisory or other assistance to a foreign state, an international or foreign organization or their representatives in activities directed against the security of the Russian Federation” and is punishable by a minimum 12 and maximum 20 years in prison, plus a fine of up to RUB500,000 or the equivalent of three years' salary or other income. *Id.*

151. Nechepurenko, *supra* note 5 (providing a general idea of the claims levied against Mr. Nemtsov in Russian media).

152. UKRF, *supra* note 118, at art. 275 (“High Treason”).

153. Федеральный Закон N 174-ФЗ, Уголовно-процессуальный кодекс Российской Федерации [Federal Law No. 174-FZ, Criminal Procedural Code of the Russian Federation] (as amended July 6, 2016) (Russ.) [hereinafter UPKRF] art. 20.1 (“Depending on the nature and severity of the crime, a prosecution, including prosecution in court, shall be carried out as public, private-public, and private.”).

154. *Id.* at art. 20.2 (“Criminal cases involving crimes under Articles 115 part one, 116 part one, and 128.1 part one of the Criminal Code of the Russian Federation are considered criminal cases of private prosecution, initiated only at the application of the victim or his legal representative ... subject to termination in connection with the reconciliation of the victim and the accused. Reconciliation is allowed before the court in the deliberation room of the court.”).

155. *Id.*

156. *Id.*

analogous to Article 17 of the Covenant.¹⁵⁷ The report refers first to Articles 138, 138.1, and 139 of the Criminal Code: the provisions on violation of privacy of correspondence (by various electronic and other means), the illegal sale of surveillance technology that could be used for such violations, and violation of the inviolability of the home, respectively.¹⁵⁸ Oddly, these provisions are contained in Chapter 19 of the Criminal Code, which treats Crimes Against the Constitutional Rights and Freedoms of the Person and Citizen.¹⁵⁹ However, civil law sections are addressed in a subsequent paragraph of the report (which is discussed in greater detail below).¹⁶⁰

The Criminal Code is not the only body of Russian federal statutory law protecting the right to reputation. To that effect, the following discussion explores protections to “dignity, honor, and business reputation” as well as “intangible goods” including dignity and honor in the Civil Code. The Supreme Court’s position regarding the separate sources of liability is that neither the failure to bring a criminal proceeding under Article 128, the closure of such a criminal action, nor a verdict in any direction will bar a Russian claimant from filing a civil defamation complaint on the same cause of action.¹⁶¹

c. Dignity: Intangible Goods and the Right to Rebuttal in the Russian Civil Code

The Russian Civil Code addresses reputation in two separate provisions.¹⁶² The first, Civil Code Article 150, is entitled Intangible Goods.¹⁶³ It is followed by Article 152, which is entitled Right to Protection of Honor, Dignity, and Goodwill.¹⁶⁴ The latter provides

157. U.N. Hum. Rts. Comm., Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Seventh Periodic Reports of States Parties: Russian Federation, U.N. Doc. CCPR/RUS/7 (Jan. 29, 2013) [hereinafter Russian Periodic Report].

158. *Id.*

159. UKRF, *supra* note 118, at ch. 19 (“Crimes Against the Constitutional Rights and Freedoms of Person and Citizen[.]”).

160. Russian Periodic Report, *supra* note 157, ¶ 104.

161. Plenary Directive, *supra* note 3, ¶ 24 (“[R]efusal to initiate criminal proceedings under Article 129 of the Criminal Code of the Russian Federation, the termination of a criminal case, as well as the imposition of a sentence does not exclude the possibility of bringing an action to protect the honor and dignity or business reputation in civil proceedings.”).

162. GKRF, *supra* note 119, at arts. 150, 152.

163. *Id.* at art. 150 (“Intangible Goods”).

164. *Id.* at art. 152 (“Protection of Honor, Dignity, and Goodwill”).

significantly stronger civil protections.¹⁶⁵ Where Russia's Criminal Code provision creates liability only after defamation has been established, the Civil Code creates liability unless the alleged defamer proves the truth of the allegations.¹⁶⁶ The Civil Code provisions both clarify the rights of Russian nationals against defamation, as well as the non-criminal obligations of those making claims that are alleged to be damaging to another's reputation.¹⁶⁷

Article 150 mirrors provisions of both the UDHR and the ICCPR by protecting a given individual's honor or reputation.¹⁶⁸ For example, it states as inalienable and otherwise nontransferable the following rights: life, health, personal dignity and integrity, honor and good name, goodwill, privacy, the home, personal and family secrets, freedom of movement, freedom to choose place of residence, and name.¹⁶⁹ However, unlike the specific civil liabilities named in Article

165. *Compare id.* at art. 150 (“1. Life and health, personal dignity, personal integrity, honor and good name, goodwill” and “other intangible goods belonging to a citizen from birth, or by law, are inalienable and non-transferable in any other way. 2. In cases and in a manner prescribed by law, intangible goods belonging to the deceased, may be protected by other persons.”) *with id.* at art. 152 (“1. A citizen shall have the right to demand, in court, the refutation of defamation to his honor, dignity or business reputation, if such statements are not proven to be true. Rebuttal should be done by the same means used to circulate the information about the citizen, or by other similar means. At the request of interested persons, the protection of honor, dignity and business reputation of a citizen is permitted after his death. 2. Information defaming the honor, dignity or business reputation of a citizen in popular media must be refuted in the same mass media. The citizen ... is entitled to ... publish his response in the same mass media.”); “9. A citizen who has been targeted with information defaming his honor, dignity or business reputation, along with the refutation of that information or the publication of his response, is entitled to claim damages and compensation for moral damages caused by the proliferation of the information.”).

166. *Id.* at art. 152 (“The citizen is within his rights to demand, at court, the refutation of statements discrediting his honor, dignity, or business reputation if the disseminator of such statements does not prove that they are true.”).

167. *See generally id.* at art. 150, 152.

168. *Compare id.* at art. 150 (“Life and health, personal dignity, personal integrity, honor and good name, goodwill” and “other intangible goods belonging to a citizen from birth, or by law, are inalienable and non-transferable in any other way.”) *with* UDHR, *supra* note 96, at art. 12 (“No one shall be subjected to ... to attacks upon his honour and reputation.”) *and* ICCPR, *supra* note 7, at art. 17 (“No one shall be subjected to ... unlawful attacks on his honour and reputation.”).

169. GKRF, *supra* note 119, at art. 150.1 (“Life and health, personal dignity, personal integrity, honor and good name, goodwill, privacy, home, personal and family secrets, freedom of movement, freedom of choice of place of residence, name, authorship, and other intangible goods, which belong to a citizen from birth or by law, are inalienable and non-transferable in any other way.”).

152, Article 150 only provides for injunctions against continued violations.¹⁷⁰

According to a plain reading of Article 152, the burden of proof falls on the complainant in a Russian civil defamation action.¹⁷¹ “A citizen shall have the right to demand refutation” of claims discrediting his honor, dignity or business reputation if such disseminated statements are proven false, states Article 152.1.¹⁷² Once falsity is established, a rebuttal “should be done by the same means through which the information was circulated” about the complainant.¹⁷³ This applies to mass media, as in Mr. Nemtsov’s case, with one additional protection measure for the target of defamation.¹⁷⁴ While the refutation of the slanderous allegations must be published or disseminated in the same mass media that was used to make them, the target of defamation is also given the right to publish *his own response* to the claims in that very medium.¹⁷⁵

In its 2013 report to the Committee on ICCPR compliance, Russia addresses civil reputation and honor violations in the context of the Plenary Directive.¹⁷⁶ There, Russia asserts that cases addressing unauthorized dissemination of damaging but truthful information about an individual’s private life may lead a court to award money damages pursuant to Article 151 of the Civil Code.¹⁷⁷ Meanwhile, an individual could claim both the refutation of the slanderous claims, but also could be entitled to money damages under Article 152 of the Civil Code.¹⁷⁸ All of this, Russia asserts, is its legislative method of

170. *See id.* at art. 150.2 (“Intangible goods are protected in accordance with this Code and other laws in the instances and in the manner provided, as well as in those cases and to the extent to which the use of methods of protecting civil rights (Article 12) follows from the nature of the impaired intangible goods or personal non-property rights and the nature of the consequences of this violation.”).

171. *Id.* at art. 152.1 (“A citizen shall have the right to demand, in court, the refutation of defamation to his honor, dignity or business reputation, if such statements are not proven to be true.”).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at art. 152.2 (“Information defaming the honor, dignity or business reputation of a citizen in popular media, must be refuted in the same mass media. The citizen ... is entitled to ... publish his response in the same mass media.”).

176. Russian Periodic Report, *supra* note 157, ¶ 104.

177. *Id.*

178. *Id.*

incorporating the protections of Article 17 of the ICCPR into its domestic law.¹⁷⁹

One of the most important procedural provisions in all of Russian law as it concerns Mr. Nemtsov's case is as follows: actions in pursuance of the protection of dignity, honor, and business reputation are brought "at the demand of interested persons," which is not limited to the target of the defamatory claims.¹⁸⁰ This is because, under Article 152.2 of the Civil Code, the protection of a Russian citizen's dignity and honor continues "after his death."¹⁸¹ That is, unlike in some other jurisdictions, subject matter jurisdiction over civil defamation claims is not extinguished with the death of the target of defamation.¹⁸² The Supreme Court clarified this point in the Plenary Directive, stating, "for example, relatives and heirs" constitute "interested persons" in the context of Article 152.2.¹⁸³ Article 150 mirrors this concept by declaring that "other persons" may pursue protection of intangible goods "belonging to the deceased."¹⁸⁴

d. The Right to Information in the Mass Media Law

Litigants on behalf of Mr. Nemtsov should be aware of one provision in Russia's federal Law on Mass Media, in the case that the Russian Federation asserts it as an affirmative defense.¹⁸⁵ Article 38 of the Law on Mass Media, in particular, protects the Russian public's right of access to information.¹⁸⁶ While two latter subdivisions of the law address government transparency generally, the first subdivision gives Russian citizens the right to "promptly receive...reliable

179. *Id.* ¶ 102. Note that even in this explanation to the Committee, Russia asserts observance of European Court norms in its application of its own domestic laws.

180. GKRF, *supra* note 119, at art. 152.2 ("At the request of interested persons, the protection of honor, dignity and business reputation of a citizen is permitted after his death.").

181. *Id.*

182. *Id.*

183. Plenary Directive, *supra* note 3, ¶ 13 ("At the request of interested parties (for example relatives, heirs) the protection of a citizen's honor and dignity is permitted after his death (paragraph 1 of Art. 152 of the Civil Code of the Russian Federation).")

184. GKRF, *supra* note 119, at art. 150.2 ("In cases and in a manner prescribed by law, intangible goods belonging to the deceased may be protected by other persons.").

185. Закон РФ от 27.12.1991 N 2124-1 (ред. от 15.07.2016) "О средствах массовой информации" [Law of the Russian Federation from 12/27/1991 No. 2124-1 (as amended July 15, 2016) "On Mediums of Mass Information" (Russ.) [hereinafter Mass Media Law].

186. *Id.* at art. 38 ("The Right to Receive Information").

information” from the media on the activities of not only government agencies but also “public officials,” a term that could in some senses be used to characterize Mr. Nemtsov at the time of the media campaign in question given his leadership role in a registered political party.¹⁸⁷

3. *Right to Reputation in the International Human Rights Context*

The Supreme Court of the Russian Federation has held, including in the Plenary Directive, that “recognized” principles and norms of international law, including treaties to which the Russian Federation is party, constitute foundations of the Russian legal system.¹⁸⁸ As it so happens, privacy, reputation, and honor are all variously protected in the regional and global human rights treaties, including those that Russia has ratified.¹⁸⁹ This section looks at defamation in the context of the UDHR, which has no legal effect but which was a prototype for many of the international agreements on human rights that set legal standards on issues ranging from reputation to sexual violence in conflict, for example; the ICCPR; and the ECHR. The objective is to illustrate generally the relevant international understanding of reputation by highlighting the similarities in language between the treaties.

After a discussion of the UDHR primarily for historical-contextual purposes, the section discusses human rights treaties covering reputation in descending order of relevance to the goal of the paper. That is, the ICCPR, which creates the preferable tribunal where Mr. Nemtsov’s family should file suit against the Russian Federation, comes first. The European Convention on Human Rights, which Russia has ratified, but which features less clear protections given the absence of an explicit reputation provision, comes next.

187. *Id.* (“Citizens have the right to promptly receive, through mass media, reliable information about the activities of state agencies, local governments, organizations, public associations and their officials.”).

188. Plenary Directive, *supra* note 3, at 1 (naming both the ICCPR and the ECHR as foundations of Russian law).

189. *See supra* note 96 and accompanying text.

a. The Universal Declaration of Human Rights

Representatives from the Soviet Union participated in the two-year drafting process eventually leading to the Universal Declaration of Human Rights, which the United Nations General Assembly adopted in 1948.¹⁹⁰ The UDHR is a thirty-provision outline of universal rights that has subsequently been elaborated through various United Nations treaties.¹⁹¹ But though its representatives participated in drafting the UDHR, the Soviet Union was one of eight States (six of them nominally socialist) to abstain from voting for its adoption at the General Assembly.¹⁹² All the same, the Russian Federation is now party to multiple legally binding treaties that more specifically and strictly protect rights outlined in the UDHR.¹⁹³

Article 12 of the UDHR reads, “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”¹⁹⁴ Regardless of, or perhaps given, the sheer breadth of rights protected, the UDHR is “morally, but not legally binding” on States given its status as a declaration of the United Nations General Assembly.¹⁹⁵ The rights it calls on States to protect

190. See generally MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2002); UDHR, *supra* note 96.

191. See generally UDHR, *supra* note 96.

192. Peter Danchin, *Drafting History*, COLUM. U. CTR. FOR TEACHING AND LEARNING, http://ccnmtl.columbia.edu/projects/mmt/udhr/udhr_general/drafting_history_10.html (noting the Soviet Union's role in the drafting of the UDHR); Glen Johnson, *Development of the Universal Declaration of Human Rights*, RAZVITIE LICHNOSTI, <http://tl-online.ru/articles/4-03/224.html> (noting same).

193. Russia has ratified the Genocide Convention, CERD, the ICESCR and ICCPR, the Apartheid Convention, CEDAW, the CAT, the Convention on the Rights of the Child, the Convention on the Rights of People with Disabilities, the Slavery Convention, and the Trafficking Convention, among many others. Treaty Participation search, UNITED NATIONS TREATY COLLECTION, <https://treaties.un.org/pages/TreatyParticipantSearch.aspx?tab=UN> (select “Russian Federation” in “Participant” menu).

194. Compare UDHR, *supra* note 96, at art. 12, with ICCPR, *supra* note 7, at art. 17.

195. BRUNO SIMMA AND PHILIP ALSTON, *THE SOURCES OF HUMAN RIGHTS LAW: CUSTOM, JUS COGENS, AND GENERAL PRINCIPLES* 82-108 (1992) (describing the UDHR as non-binding); Hilary Charlesworth, *Universal Declaration of Human Rights (1948)*, MAX PLANCK ENCYC. PUB. INT’L L. (Feb. 2008), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e887?rskey=ZnPaBZ&result=1&prd=EPIL> (noting the UDHR's non-binding authority).

are now protected more specifically in other legally binding treaties, though, for example the ICCPR, the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, and others.¹⁹⁶

b. The International Covenant on Civil and Political Rights and its Individual Complaint Component

The International Covenant on Civil and Political Rights was passed at the UN General Assembly in December 1966.¹⁹⁷ It creates obligations on States Parties to protect the various civil and political rights of individuals subject to the State Party's jurisdiction.¹⁹⁸ The ICCPR took legal effect in March 1976 pursuant to Article 49, which gives the treaty authority following ratification by thirty-five States.¹⁹⁹ An early party to the Covenant, the Soviet Union — the Russian Federation's legal predecessor — signed in 1968 and ratified in 1973.²⁰⁰ Among other requirements, States Parties to the Covenant must report on their compliance whenever the Committee requests such a report, as in the Russian Federation's report mentioned previously in this Note.²⁰¹

Article 28 of the ICCPR creates the United Nations Human Rights Committee.²⁰² Under Article 28, the Committee has the authority to clarify provisions of the Covenant by request, to conduct mandatory regular reviews of State Party compliance with the Covenant, and — more importantly to the purposes of this Note —

196. UDHR, *supra* note 96, at art. 5 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).

197. ICCPR, *supra* note 7 (“[E]ntry into force 23 March 1976[.]”).

198. *Id.* at pmb1.

199. *Id.* at art. 49 (“The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.”); *infra* note 208.

200. *Status as of Jan. 14, 2016 (International Covenant on Civil and Political Rights)*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en [hereinafter ICCPR Status] (showing the Union of Soviet Socialist Republics' ratification in 1973).

201. ICCPR, *supra* note 7, at art. 40(1)(b) (“The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights ... whenever the Committee so requests” after the first year of authority.).

202. *Id.* at art. 28(1) (“There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee).”).

take contentious jurisdiction over individuals' claims that a State Party has violated human rights protected under the Covenant.²⁰³ The First Optional Protocol to the ICCPR allows the Committee to review Communications, as complaints under its jurisdiction are called, regarding State violations as long as an individual files the Communication.²⁰⁴ That is, neither other States nor non-governmental organizations ("NGOs") may litigate allegations of human rights violations against a State at the Committee.²⁰⁵

Decisions at the Committee, which are called Committee Views and may take years to be reached, are legally binding.²⁰⁶ Jurisdiction over complaints is contingent on ratification of the First Optional Protocol, which Russia has ratified and which is discussed in greater detail in a later section of this Note.²⁰⁷ The Committee has reviewed a very small number of Article 17 (right to privacy) complaints against the Russian Federation, but has never found one concerning reputation to be admissible.²⁰⁸

Like most of the major multiple-issue human rights treaties, the ICCPR protects the right to reputation; Committee Views on the matter tend to refer to "honor and reputation" together.²⁰⁹ In fact, the ICCPR's dual-provision Article 17 not only protects the right to reputation, but requires States Parties also to give legal protection to

203. *Id.*

204. First Optional Protocol, *supra* note 6, at art. 1 ("A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.").

205. *Id.*

206. J. TH. MOLLER & A. DA ZAYAS, UNITED NATIONS HUMAN RIGHTS COMMITTEE CASE LAW, 1977-2008: A HANDBOOK 48 (2009) ("[T]he views constitute international case law and, as such, may be considered as part of what is known as 'hard law.'").

207. *Status as of Mar. 15, 2016 (Optional Protocol to the International Covenant on Civil and Political Rights)*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en [hereinafter *Optional Protocol Status*] (showing the Russian Federation's accession to the Optional Protocol on Oct. 1, 1991).

208. For example, since the 114th Session (March 2012), the Committee has found two Article 17 communications against the Russian Federation to be admissible. *Human Rights Committee Jurisprudence*, OFFICE OF THE HIGH COMM'R FOR HUM. RTS., <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/Jurisprudence.aspx>.

209. See *e.g.*, *Gilbert Martinez and Others v. Algeria*, CCPR/C/109/D/1922/2009 ¶ 3.1 (Dec. 2, 2013) (discussing "honor and reputation").

targets of defamation.²¹⁰ Also, it is worth mentioning in relation to Mr. Nemtsov's case, the Committee holds that States Parties have a positive obligation to protect individuals against violations of rights protected by the ICCPR not only when committed by State agents (for example state-run media), but by other individuals or private entities (for example, so-called independent media).²¹¹

As in some other treaties, the ICCPR treats reputation within the article on privacy. The first subdivision of Article 17 includes two distinct protections in a single sentence: "arbitrary and unlawful interference" with privacy, home, family, and correspondence is barred alongside "unlawful attacks" on honor and reputation.²¹² The second subdivision creates an important additional obligation on ratifying States: "Everyone," it reads, has the right to "protection of the law against such interference or attacks."²¹³ The Soviet Union did not address Article 17 in its handful of reservations to the ICCPR; the Russian Federation has subsequently made no declaration or understanding regarding the provision.²¹⁴

The Committee has made clear in a General Comment on Article 17 that States Parties to the ICCPR have an obligation to protect individuals from attacks on their reputation regardless of whether such attacks "emanate" from the State or from "natural or legal persons."²¹⁵ Further, the Committee notes that the inclusion of bans

210. ICCPR, *supra* note 7, at art. 17 ("1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.").

211. U.N. Hum. Rts. Comm., Gen. Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004) [hereinafter General Comment 31] ("[T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.").

212. ICCPR, *supra* note 7, at art. 17(1) ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.").

213. *Id.*

214. See *supra* note 200 (showing States Parties' reservations, declarations, and understandings to the ICCPR).

215. U.N. Int'l Hum. Rights Instruments, *Comp. of Gen. Comments and Gen. Recs. Adopted by the Hum. Rights Treaty Bodies Vol. 1*, 191 ¶ 1, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. 1) (May 27, 2008) [hereinafter General Comment 16] ("Article 17 provides for the right of every person to be protected against arbitrary or unlawful interference with his privacy, family,

on both “unlawful” and “arbitrary” interference with privacy (or, more specifically, reputation) is intentional.²¹⁶ That is, derogations on the right to privacy may be permitted where required or allowed by law — for example, in light of reasonable national security concerns.²¹⁷ In the case of Mr. Nemtsov, the example would be attacks on reputation by the press in light of concerns of a “fifth column” bent on destabilizing the country, where restrictions on such press would be barred by other sections of Russian law. However, the Committee also holds that some “arbitrary” interferences may be impermissible despite being otherwise lawful.²¹⁸ States Parties must ensure that “interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant,” and no matter what, should be reasonable given the circumstances.²¹⁹

The Russian Federation had an obligation under Article 17 of the ICCPR to protect Mr. Nemtsov against the very public designation by state media and others as an “internal enemy” and “national traitor” at the head of a conspiracy to destabilize Russia.²²⁰ There can be no question that a State Party must not carry out attacks on an individual’s reputation — an important consideration to be sure, but not the central issue of this Note. The obligation to protect individuals once such attacks have already taken place — especially where the attacks are of such force as to culminate in that individual’s assassination — is very clearly implicated in the case of Mr. Nemtsov. Where there has been an attack on reputation, the Committee holds that those responsible must be held as such.²²¹

home or correspondence as well as against unlawful attacks on his honour and reputation. In the view of the Committee this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.”).

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. See Kramer, *supra* note 4; see also Nechepurenko, *supra* note 5; General Comment 16, *supra* note 215 (explaining defamation liability at the Committee).

221. General Comment 16, *supra* note 215, at 193 ¶ 11 (“Provision must also be made for everyone effectively to be able to protect himself against any unlawful attacks that do occur and to have an effective remedy against those responsible.”).

The First Optional Protocol to the International Covenant on Civil and Political Rights (“Protocol”) is the complaint and recourse mechanism for individuals facing State violations of rights protected under the Covenant.²²² The General Assembly adopted the Protocol in December 1966; it took legal effect in March 1976.²²³ Ratifying States to the Protocol accept the Committee’s authority “to receive and consider communications from individuals subject to its jurisdiction” who allege the State in question violated one or multiple provisions of the ICCPR.²²⁴ An individual filing a Communication is referred to as its “author.”²²⁵ Once such a Communication has been received and weighed, the Protocol requires States Parties to “submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken” in response to the violation.²²⁶ Article 12 of the Protocol gives States Parties the explicit right to denounce the Committee’s jurisdiction.²²⁷ No State, however, has ratified the Protocol and subsequently denounced the Committee’s jurisdiction.²²⁸

Russia acceded to the Protocol in the Soviet twilight, on October 1, 1991.²²⁹ Moscow’s single declaration to the treaty establishes a domestic exhaustion requirement and a requirement that only matters not under consideration at other tribunals be considered at the

222. First Optional Protocol, *supra* note 6.

223. *Id.*

224. *Id.* at art. 1 (“A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.”).

225. *See* Hum. Rts. Comm. Communication No. 1450/2006, *infra* note 305, at 1.1; Hum. Rts. Comm. Communication No. 1619/2007, *infra* note 305, at 1.1; *and* Hum. Rts. Comm. Communication No. 1482/2006, *infra* note 305, at 1.1.

226. First Optional Protocol, *supra* note 6, at art. 4.2 (“Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.”).

227. *Id.* at art. 12.1 (“Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect three months after the date of receipt of the notification by the Secretary-General.”).

228. Optional Protocol Status, *supra* note 207 (showing States Parties and no denunciations).

229. *Id.*

Committee.²³⁰ These requirements are already contained in Articles 5(2)(a) and 5(2)(b) of the Protocol.²³¹ Hypothetically, the declaration may have been an attempt to bypass the second clause of Article 5(2)(b), which waives the domestic exhaustion requirement “where the application of the remedies is unreasonably prolonged;” the Soviet justice system was notoriously slow. Russia became subject to the Protocol’s jurisdiction simultaneously with the dissolution of the Soviet Union in December 1991.²³²

The Committee first determines whether a Communication is admissible.²³³ Then, notwithstanding the domestic exhaustion and exclusivity requirements, it raises the allegation with the State Party.²³⁴ The State Party, in turn, has six months to submit in writing any explanation or “statements clarifying” what it has done to remedy the alleged violation.²³⁵

230. *Id.* (“The Union of Soviet Socialist Republics, pursuant to article 1 of the Optional Protocol, recognizes the competence of the Human Rights Committee to receive and consider communications from individuals subject to the jurisdiction of the Union of Soviet Socialist Republics, in respect of situations or events occurring after the date on which the Protocol entered into force for the USSR. The Soviet Union also proceeds from the understanding that the Committee shall not consider any communications unless it has been ascertained that the same matter is not being examined under another procedure of international investigation or settlement and that the individual in question has exhausted all available domestic remedies.”).

231. First Optional Protocol, *supra* note 6, at art. 5 (“2. The Committee shall not consider any communication from an individual unless it has ascertained that: (a) The same matter is not being examined under another procedure of international investigation or settlement; (b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.”).

232. *Historical Information*, UNITED NATIONS TREATY COLLECTION, <https://treaties.un.org/Pages/HistoricalInfo.aspx> (“By a communication dated 24 December 1991, the President of the Russian Federation notified the Secretary-General that membership of the Union of Soviet Socialist Republics (USSR) in the United Nations is being continued by the Russian Federation. The Government of the Russian Federation subsequently informed the Secretary-General that as at 24 December 1991, the Russian Federation maintains full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and multilateral treaties deposited with the Secretary-General and requested that the name ‘Russian Federation’ be used in the United Nations in place of the name ‘Union of Soviet Socialist Republics.’”).

233. First Optional Protocol, *supra* note 6, at art. 4 (“Subject to the provisions of article 3, the Committee shall bring any communications submitted to it under the present Protocol to the attention of the State Party to the present Protocol alleged to be violating any provision of the Covenant.”).

234. *Id.*

235. *Id.*

Neither organizations nor groups of individuals may submit Communications to the Committee, though both prospects were discussed in the drafting stage of the Protocol.²³⁶ Further, anonymous submissions are barred.²³⁷ And though the preferred complainant is the individual whose rights were allegedly violated, the Committee accepts Communications from close relatives or other close associates of the alleged victim.²³⁸ Further, legal and human rights organizations commonly file supporting briefs with the Committee in conjunction with individual Communications.²³⁹ Pursuant to Article 5(1) of the Protocol, the Committee will consider “all written information made available to it” by the filing individual or the State Party

236. See U.N. Secretary-General, *Annotations to the Draft International Covenant on Human Rights*, 10 U.N. GAOR Annex at 81, U.N. Doc. A/2929 (1955) (“Opinion was deeply divided concerning the right to initiate proceedings before the committee. Some held that only States should be allowed to appeal to the committee. Others proposed various ways of enlarging the right to initiate proceedings. In resolution 421 (V), section F, the General Assembly requested the Commission on Human Rights to consider provisions ‘to be inserted in the draft covenant or in separate protocols, for the receipt and examination of petitions from individuals and organizations with respect to alleged violations of the covenant’. Again, by resolution 737 B(VIII), the Assembly transmitted to the Commission a proposal requesting it to draft ‘provisions recognizing the right of petition of every natural person, every duly constituted group of individuals and every recognized non-governmental organization’, for inclusion in the covenant in accordance with the decision of the General Assembly in its resolution 421 (V), section F, mentioned above. All the proposals, which would extend the right to initiate proceedings, were either rejected or withdrawn.”); Report of the Ninth Session of the Hum. Rts. Comm., 16 U.N. ESCOR Supp. (No. 8), 16-17, U.N. Doc. E/2447 (1953) (“[C]ertain non-governmental organizations could bring to the notice of the United Nations matters falling within the purview of the Economic and Social Council and this recognition should be taken into account in considering the admissibility of communications from non-governmental organizations. To limit the right of complaint ... would hamper the work which those organizations were doing, and would make the United Nations appear isolated in the eyes of many ordinary people. They strongly supported the proposals which empowered the Committee to act on its own motion and to receive communications from non-governmental organizations and individuals.”).

237. First Optional Protocol, *supra* note 6, at art. 3 (“The Committee shall consider inadmissible any communication under the present Protocol which is anonymous, or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the Covenant.”).

238. Pestaño, *infra* note 305. The parents of the alleged victim of rights violations by the Philippines authored the Communication.

239. Ida Lintel & Cedric Ryngaert, *The Interface between Non-Governmental Organisations and the Human Rights Committee*, 15 INT’L COMMUNITY L. REV. 359, 361 (2013) (discussing generally the individual-focused nature of the ICCPR, with the common practice of support in litigation by civil society organizations).

respondent.²⁴⁰ That is, either party may file supporting information prepared by third parties in hopes of persuading the Committee.²⁴¹

Prominent Russian civil rights litigators have asserted concerns that the Committee Views are of a “very uncertain legal status.”²⁴² Indeed, whether or not Committee Views constitute binding law is a point of contention in the international legal literature. At the same time the Committee asserts — and legal academics generally agree — that Committee Views are hard, binding law.²⁴³

c. The European Convention on Human Rights

The European Convention on Human Rights (formally the Convention for the Protection of Human Rights and Fundamental Freedoms, which is how the Supreme Court refers to it) is the Council of Europe’s interstate human rights mechanism.²⁴⁴ All members of the Council of Europe are States Parties to the Convention, and new Council members are expected to ratify at their earliest opportunity.²⁴⁵ To be clear, the Convention is not a European Union (“EU”) instrument: while having jurisdiction over many EU Member States, it also binds non-EU Council of Europe members like Montenegro, Norway, Turkey, and, for that matter, Russia.²⁴⁶ Russia joined the Council of Europe in February 1996.²⁴⁷

240. First Optional Protocol, *supra* note 6, at art. 5(1) (“The Committee shall consider communications received under the present Protocol in the light of all written information made available to it by the individual and by the State Party concerned.”).

241. *Id.*

242. See correspondence on file with the author.

243. Moller & Da Zayas, *supra* note 206.

244. ECHR, *supra* note 7 (“The Governments signatory hereto, being members of the Council of Europe [...], Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms ..., Have agreed as follows[.]”).

245. *Conference Report Honouring of Commitments Entered into by Member States When Joining the Council of Europe*, PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE, art. 9 (Apr. 14, 1994), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16442&lang=en> (“The Assembly recalls in this connection that accession to the Council of Europe must go together with becoming a party to the European Convention on Human Rights. It therefore considers that the ratification procedure should normally be completed within one year after accession to the Statute and signature of the Convention.”).

246. *Chart of signatures and ratifications of Treaty 005 (Convention for the Protection of Human Rights and Fundamental Freedoms)*, COUNCIL OF EUROPE (Jan. 25, 2016), <http://www.coe.int/en/web/conventions/search-on-treaties/>

Russian nationals sue often on human rights questions at the European Court of Human Rights, the tribunal attached to the Convention.²⁴⁸ However, the Convention does not explicitly protect reputation.²⁴⁹ Article 8, the provision on the right to privacy, states only that, “[e]veryone has the right to respect for his private and family life, his home and his correspondence.”²⁵⁰ Governments are barred generally from interfering with the “exercise of this right” during normal conditions under the Convention.²⁵¹ However, the Convention allows derogation of the right to privacy and its auxiliary rights in response to various public safety or security concerns.²⁵² The European Court sometimes reads protections against interference with honor or reputation into Article 8, as discussed in a later section.

It is with these considerations in mind that representatives of Mr. Nemtsov should litigate a defamation case on his behalf. Given the very strong protections to reputation in Russian statutory law, they would have a strong case within the Russian court system. If exhausting the Russian court system fails to provide a favorable result, the ICCPR and ECHR also provide protections. The following Part outlines the very clear positions of Russia’s Supreme Court on the application of defamation law in both the criminal and civil contexts, while also looking at sample Committee and European Court decisions with a view to understanding the possible outcomes of a claim on Mr. Nemtsov’s behalf at those tribunals.

/conventions/treaty/005/signatures?p_auth=ZlxTjJin (“Treaty open for signature by the member States of the Council of Europe and for accession by the European Union[.]”).

247. *Id.* (showing Russian membership beginning in 1996).

248. *Decisions Concerning the Russian Federation*, EUROPEAN CT. HUM. RTS. HUDOC, [http://hudoc.echr.coe.int/eng#{"languageisocode":\["ENG"\],"respondent":\["RUS"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\]}](http://hudoc.echr.coe.int/eng#{); (showing six decisions against Russia in the first two weeks of 2016 alone).

249. ECHR, *supra* note 7, at art. 8 (“Right to respect for private and family life: 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”).

250. *Id.*

251. *Id.*

252. *Id.*

III. REPUTATION IN RUSSIAN COURTS AND AT THE INTERNATIONAL HUMAN RIGHTS TRIBUNALS

This Part explores the right to reputation at the Supreme Court of the Russian Federation and at the two relevant international human rights tribunals. This includes, first, deeper discussion of the Supreme Court's Plenary Directive on jurisprudential application of the right to dignity, honor, and business reputation, to which the Note has referred in brief on multiple previous occasions. The Plenary Directive provides the baseline understanding of defamation law in the Russian court system.²⁵³

Then, in order to illustrate in order of persuasive authority relative to the objective of the Note overall, this Part first looks at the totality of United Nations Human Rights Committee Views — three decisions — treating Article 17 claims against the Russian Federation; none was found admissible. It also examines the facts of three example successful Article 17 claims founded on reputation and honor at the Committee. It then looks at four example cases regarding defamation at the European Court, to which Russia is a party, and at which Russian nationals often litigate. Recall, though, that Article 8 of the European Convention only vaguely protects individuals from “interference by a public authority” with “private and family life,” not reputation.²⁵⁴ For that reason, successful cases on point with that of Mr. Nemtsov are difficult to come by.²⁵⁵

1. Defamation in the Russian Courts

The Russian Plenary Supreme Court's 2005 Resolution on Judicial Practice in Cases on the Protection of Honor and Dignity of Citizens and Goodwill of Citizens and Legal Entities (previously and hereafter referred to as the “Plenary Directive”) should be seen as the baseline understanding of defamation in Russian law.²⁵⁶ In Russia,

253. Plenary Directive, *supra* note 3.

254. ECHR, *supra* note 7, at art. 8 (“Right to respect for private and family life[.]”).

255. *Decisions Concerning Article 8*, EUROPEAN CT. HUM. RTS. HUDOC, [http://hudoc.echr.coe.int/eng#{"fulltext":\["reputation"\],"languageisocode":\["ENG"\],"article":\["8"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\]}](http://hudoc.echr.coe.int/eng#{) (limiting search to include “reputation,” with results showing a total of 159 such cases against all ratifying parties, including inadmissibility judgments).

256. *See generally* Plenary Directive, *supra* note 3; Todd Foglesong, *The Dynamics of Judicial (In)dependence in Russia in Judicial Independence in THE AGE OF DEMOCRACY:*

which is officially a civil law country but has been characterized as a hybrid civil-common law jurisdiction, one court's decisions are not universally de jure binding on other courts. Lower courts do de facto tend to follow higher courts' decisions, though. The Supreme Court is the country's court of last resort in civil and criminal actions, and compliance with Plenary directives is expected.²⁵⁷

The Plenary Directive begins by noting the right of all Russians to honor and good name found in Article 23 of the Constitution.²⁵⁸ It continues by noting that norms of international law, including international agreements to which Russia is a party, are among the foundations of the Russian legal system.²⁵⁹ Among these considerations is also the fact that the freedom to impart and receive information is constitutionally protected in Russia; this question comes up again and again in the Plenary Directive.²⁶⁰ Meanwhile, it looks explicitly to the European Convention as a source of clarification on questions of dignity and honor.²⁶¹ In fact, Russian courts' application of defamation provisions "shall be construed in accordance with the legal position of the European Court of Human Rights."²⁶² This was also Russia's stated position during its 2013 ICCPR compliance review at the Committee.²⁶³

One of the most relevant sections of the Plenary Directive for the purposes of this Note is the subdivision on the dissemination of untrue information.²⁶⁴ One initial procedural point in this section is that heirs and representatives of a deceased target of defamation may initiate proceedings under Article 152 of the Civil Code.²⁶⁵ Another is

CRITICAL PERSPECTIVES FROM AROUND THE WORLD 65 (Peter H. Russell & David M. O'Brien eds., 2001) (explaining the place of Supreme Court plenary directives generally).

257. KRF, *supra* note 11, at art. 126 ("The Supreme Court of the Russian Federation constitutes the highest federal organ on civil, criminal, administrative and other cases falling under the jurisdiction of the courts of general jurisdiction.").

258. Plenary Directive, *supra* note 3, ¶ 1 (opening the Plenary Directive with, "Pursuant to Article 23 of the Constitution of the Russian Federation").

259. *Id.* ¶ 2 (naming, specifically, the ICCPR and ECHR as "foundations" of Russian law).

260. *Id.* ¶ 2 (discussing the freedom of information); *id.* ¶ 9 (discussing statutory restrictions to information in Russia).

261. *Id.* ¶ 3 (naming the ECHR as a persuasive source for defamation questions).

262. *Id.*

263. Russian Periodic Report, *supra* note 157, ¶ 102.

264. Plenary Directive, *supra* note 3, ¶ 13 (beginning of the section on untrue information).

265. *Id.*

that anonymous defamatory allegations are not actionable, that is, the target of defamation must be able to identify a party levying the allegations.²⁶⁶

Later sections identify various other procedural questions in defamation actions that directly concern the use of mass media for defamatory purposes, as in Mr. Nemtsov's case.²⁶⁷ For example, a section on defendants in such actions states that both the authors of untrue defamatory statements as well as the "persons" who disseminated the statements may be held liable.²⁶⁸ If the dissemination was through the media, the editors of the medium may also be held liable.²⁶⁹ If no author's name is attached to the claim (television news media was central to the character assassination campaign against Mr. Nemtsov), the founder of the media company may be liable.²⁷⁰ Meanwhile, respondent is to cover the costs of publishing refutations of defamatory allegations.²⁷¹ There is no statute of limitations on such claims against the editorial boards of media shown to have engaged in defamation.²⁷²

Criminal and civil damages are simultaneously available to a defamation claimant based on the same cause of action.²⁷³ Meanwhile, judgment in favor of a criminal defamation defendant does not preclude the plaintiff from pursuing civil damages on the same cause of action.²⁷⁴ In order for a civil claim to be actionable, at least one of two elements must be met: that the respondent distributed the defamatory information about the plaintiff, and that the

266. *Id.*

267. *Id.* ¶¶ 19-21 (discussing defamation in the media).

268. *Id.* ¶ 19 (assigning liability for legal persons who make defamatory claims, as well as those who disseminate such claims).

269. *Id.* ¶ 20 (assigning personal liability for editorial staff of media found to have disseminated defamatory claims).

270. *Id.* ¶ 21 (assigning personal liability for executives of media found to have disseminated defamatory claims).

271. *Id.* ¶ 46 (assigning costs to respondent in a successful defamation action). Media is also addressed in various other sections not important for this Note, for example that the publishers or distributors of advertisements containing defamatory allegations are equally liable under Article 152.

272. *Id.* ¶ 13 (extending liability to authors and editorial staff of media engaged in defamation).

273. *Id.* ¶ 23 (allowing both civil and criminal liability for defamation on the same cause of action).

274. *Id.* ¶ 24 (allowing for civil liability in tort following a failed criminal action on the same defamation cause of action).

defamatory allegations were untrue.²⁷⁵ If claimant is unable to prove either, the court should decline jurisdiction over the claim.²⁷⁶ In addition to refutation of defamatory claims in a civil action, the claimant is also entitled to compensatory damages.²⁷⁷ In the refutation, the respondent medium must identify which allegations about the claimant were false.²⁷⁸ Factors for consideration in determining the amount of pecuniary damages include the nature and content of the publication, as well as the extent of dissemination.²⁷⁹ Damages should be commensurate with the injury suffered, with a view to avoiding unreasonable burdens on the freedom of expression.²⁸⁰ Meanwhile, due to a provision of the Russian Constitution barring forced expression, a court may not compel a defendant to apologize personally to a claimant.²⁸¹

The Plenary Directive defines defamation in multiple ways, none of which are mutually exclusive with the others.²⁸² One is that defamation requires false information, which in turn consists of assertions of purported fact that “did not occur in reality” at the time they are alleged to have occurred.²⁸³ One definition relevant to Mr. Nemtsov’s case is defamation as allegations that a “citizen has committed a dishonest act,” or has engaged in “unethical behavior in ... political life.”²⁸⁴ The respondent in a civil defamation action must prove the truthfulness of the defamatory allegations, while the claimant must prove that the respondent, and not someone else, made the allegations.²⁸⁵

275. *Id.* ¶ 30 (laying out the elements of a civil defamation cause of action).

276. *Id.* ¶ 25.

277. *Id.* ¶ 31 (assigning damages liability to defamation respondent in a successful case).

278. *Id.* ¶ 37 (requiring media engaged in defamation to publicly identify and refute defamatory claims following an adverse action).

279. *Id.* ¶ 33 (outlining the range of liabilities depending on severity of the claim).

280. *Id.*

281. *Id.* ¶ 40 (noting that even in a successful defamation action, respondent may not be compelled to apologize to claimant given Article 29's prohibition on forced expression). However, a court may oversee a settlement between the parties where it would not be contrary to public policy.

282. *Id.* ¶¶ 28-29 (defining defamation).

283. *Id.* ¶ 28 (invoking the statutory definition of defamation noted on multiple occasions in this Note).

284. *Id.* ¶ 29 (generally noting defamation liability for allegations that an individual engaged in dishonest or criminal conduct).

285. *Id.* ¶ 33 (assigning burdens of proof on both claimant and respondent in a civil defamation action).

2. *Privacy, Honor, and Reputation at the Human Rights Committee*

As this Note went to publication, the Committee had considered 143 Communications against State Parties that in some way incorporate a claim on Article 17, the ICCPR provision protecting reputation.²⁸⁶ However, few of these Communications were both held admissible and resulted in Committee Views favorable to the complainant on the merits on the Article 17 cause of action.²⁸⁷ Further, not only has no Article 17 claim against the Russian Federation ever been found admissible, but only one Russian claimant has ever submitted a reputation- or honor-based Communication to the Committee.²⁸⁸ In order to anticipate the results of Mr. Nemtsov's Article 17 case at the Committee, this Part examines all three Article 17 claims against the Russian Federation along with three successful Article 17 claims against other States Party to the ICCPR and the First Optional Protocol.

a. The Unsuccessful Article 17 Claims against the Russian Federation

The Committee has accepted jurisdiction over Russian nationals' cases including Article 17 claims on three occasions.²⁸⁹ However, it did not find Russia to be in violation of Article 17 in any of them.²⁹⁰ Further, only one of the cases concerns reputation.²⁹¹

In *Khakdar v. Russia*, the author, Kesmatulla Khakdar, was born in Afghanistan, but having lived in Russia for two decades, he disputed his deportation to Afghanistan as an unlawful interference

286. Cases Concerning Article 17, U.N. HUM. RTS. OFF. HIGH COMMISSIONER, <http://juris.ohchr.org/search/Documents> (in "Body", select "CCPR"; and in "Article", select "CCPR-17," "CCPR-17-1", and "CCPR-17-2") (last visited Apr. 13, 2016).

287. *Id.* (in the drop-down menu "Type of Decision", select "Adoption of Views" in order to filter out holdings on admissibility).

288. *Id.* (in the drop-down menu "State or Entity", select "Russian Federation"); *id.* (in the field "Keyword", add "reputation").

289. Hum. Rts. Comm. Communication No. 2126/2011 (*Kesmatulla Khakdar v. Russia*), U.N. Doc. CCPR/C/112/D/2126/2011 (Nov. 26, 2014); Hum. Rts. Comm. Communication No. 1764/2008 (*Zeydulla Vagab Ogly Alekperov v. Russia*), U.N. Doc. CCPR/C/109/D/1764/2008 (Dec. 2, 2013); Hum. Rts. Comm. Communication No. 1983/2010 (*Y.B. v. Russia*), U.N. Doc. CCPR/C/110/D/1983/2010 (Apr. 23, 2014).

290. *Id.* Hum. Rts. Comm. Communication No. 2126/2011, *supra* note 289; Hum. Rts. Comm. Communication No. 1764/2008, *supra* note 289; Hum. Rts. Comm. Communication No. 1983/2010, *supra* note 289.

291. Hum. Rts. Comm. Communication No. 1983/2010, *supra* note 289.

with his private life in violation of Article 17 of the ICCPR.²⁹² He was found to have failed to exhaust domestic remedies in relation to the claim, and so the Committee found it inadmissible.²⁹³ Neither reputation nor honor featured in the Communication.²⁹⁴

In *Alekperov v. Russia*, the author Zeydulla Vagab Ogly Alekperov was a prison inmate appealing multiple administrative details of his sentencing.²⁹⁵ His Article 17 claim was over an alleged interference with his ability to file a Communication, regarding the very case at hand, with the Committee.²⁹⁶ The Committee found that the author had not substantiated the claim, and found it inadmissible.²⁹⁷ Again, reputation did not factor into the Article 17 claim.²⁹⁸

In *Y.B. v. Russia*, the author was the defendant in a criminal case that lasted approximately two years.²⁹⁹ More than a year after the

292. Hum. Rts. Comm. Communication No. 2126/2011, *supra* note 289, ¶ 3.3 (“The author further submits that, if he were returned to Afghanistan, his family life would be destroyed and annihilated, since his daughter and spouse would not be able to go with him, as the situation of general violence there amounts to a violation of article 7 of the Covenant. Moreover, they would be specifically targeted as non-Muslim women who do not speak the language and do not know the local customs, including religious customs. The author therefore submits that if he were deported to Afghanistan his rights under article 17 of the Covenant would be violated.”).

293. *Id.* ¶ 10.4 (“The Committee notes the State party’s submission that the author had failed to exhaust the available domestic remedies in that he had failed to request a residence permit on the basis of his marriage to a Russian Federation citizen. The Committee notes that the author has not provided an explanation as to why applying for a residence permit on the ground of being married to a Russian Federation citizen and having a child, who is also a Russian Federation citizen, would not have constituted an effective remedy for the protection of his rights under article 17 of the Covenant. The Committee therefore declares the author’s claim under article 17 to be inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.”).

294. *See generally id.*

295. Hum. Rts. Comm. Communication No. 1764/2008, *supra* note 289.

296. *Id.* ¶ 2.11 (“The author’s sister requested the Committee: (1) not to discontinue his communication; (2) to inform the Permanent Mission of the Russian Federation in Geneva about the interference with his correspondence with the Committee, and (3) to request the Permanent Mission of the Russian Federation to provide explanations.”).

297. *Id.* ¶ 8.5 (“the Committee considers that this part of the communication is insufficiently substantiated for purposes of admissibility, and declares it inadmissible under article 2 of the Optional Protocol.”).

298. *See generally id.*

299. Hum. Rts. Comm. Communication No. 1983/2010, *supra* note 289, ¶¶ 2.1-2.2 (“2.1 On 26 June 2006, the Prosecutor’s office in Velikie Luki, the town where the author resided, initiated criminal proceedings against him under article 319 of the Criminal Code (publicly offending a State agent). 2.2 On 27 May 2008, the justice of the peace of the 33rd district of

case was closed without going to trial, the local court's website posted a press release stating that there was an ongoing criminal investigation against the author.³⁰⁰ Y.B. sued the town court, claiming damage to his reputation.³⁰¹ The court stated a lack of jurisdiction, and the appellate level upheld that decision.³⁰² In a related Article 17 claim in the same Communication, Y.B.'s medical information was made known to a number of people involved with his investigation.³⁰³ In all Y.B. claimed that Russia had violated seven different Articles of the ICCPR in handling his case, but the Committee found each claim to be unsubstantiated and, therefore, inadmissible.³⁰⁴

b. Successful Honor and Reputation Claims against other States Parties

The Committee has, in six cases, considered and ruled favorably on the merits regarding unlawful or arbitrary attacks on honor or

Velikie Luki issued a decision to terminate the court case against the author based on the absence of *corpus delicti* of the crime.”).

300. *Id.* ¶ 2.4 (“On 1 July 2009, an article was published on the website of the town court of Velikie Luki in the public information section, which included information to the effect that there was an ongoing criminal case against the author and that he was being investigated. The author was mentioned by name and information damaging to his reputation was accessible to all.”).

301. *Id.* ¶ 2.5 (“[T]he author filed an application with the town court of Velikie Luki seeking compensation for the moral damages inflicted to him by the public being wrongly informed that he was under investigation for criminal activity.”).

302. *Id.* ¶ 2.6 (“On 23 October 2009, the town court of Velikie Luki issued a ruling returning the author's claim for lack of jurisdiction. The author then appealed this ruling to the Pskov regional court, which, on 1 December 2009, issued a cassation decision confirming that the Velikie Luki town court had no jurisdiction and ruling that the claim should be filed with the Moscow city court. The author attempted to apply for a supervisory review of that decision, but his request was denied by the Pskov regional court on 18 January 2010.”).

303. *Id.* ¶ 6.4 (“The author further submitted that during the pretrial investigation in 2006 a number of his medical records had been taken from medical establishments by investigating officers without a court order, in violation of his right to privacy under article 17, paragraph 1, of the Covenant. In that manner, confidential information regarding the state of the author's health had become known to a large number of persons.”).

304. *Id.* ¶ 9.5 (“The Committee observes that the author's allegations of violations of his rights under [articles including 17] ... are not substantiated in relation to the subject matter of his initial communication, namely that the refusal of the Velikie Luki town court to hear his case for moral damages caused by the publication of erroneous information on the court's website, constituted a denial of justice. Therefore, the allegations in the above submissions are inadmissible under article 2 of the Optional Protocol. The finding above is without prejudice to the author's ability to submit a separate communication with regard to any alleged violations of his rights under the Covenant that may have occurred.”).

reputation.³⁰⁵ Three of the Communications that resulted in favorable judgments for the claimants — that is, where the Committee found State violations of Article 17 of the ICCPR — are considered here. This subsection begins by examining a Communication with some similarities to the case of Mr. Nemtsov. In that case, the government of Turkmenistan asserted falsely on national television and in print that the author, an opposition-affiliated journalist with connections to the United States, had been involved in an assassination plot against the President of Turkmenistan; the Committee found that Turkmenistan had violated Article 17.³⁰⁶

The subsection then continues with two additional Committee Views treating cases that very clearly featured unlawful or arbitrary interference with an individual's honor or reputation. In one, the Philippines was found to have violated Article 17 after officially declaring that the murder of a potential whistleblower was a suicide.³⁰⁷ In the other, Germany was found to have violated Article 17 after one of its courts arbitrarily ordered a pro se litigant in a complex inheritance dispute to undergo psychiatric testing.³⁰⁸

There are three important distinguishing factors to note when considering these latter two cases alongside the case of Mr. Nemtsov. The first is that neither claim concerns the use of national media to defame the individual claimant.³⁰⁹ The second factor is that in no case is the claimant alleged to have engaged in a conspiracy, or in conduct generally, of such enormity as to threaten the nation, as in the case of Mr. Nemtsov.³¹⁰ The third point is that the State acts that implicated

305. Hum. Rts. Comm. Communication No. 1958/2010 (A.M.H. El Hojouj Jum'a et al. v. Libya), U.N. Doc. CCPR/C/111/D/1958/2010 (July 21, 2014); Hum. Rts. Comm. Communication No. 1922/2009 (Martinez, et al. v. Algeria), U.N. Doc. CCPR/C/109/D/1922/2009 (Oct. 28, 2013); Hum. Rts. Comm. Communication No. 1619/2007 (Pestaño v. The Philippines), U.N. Doc. CCPR/C/98/D/1619/2007 (Mar. 23, 2010); Hum. Rts. Comm. Communication No. 1450/2006 (Komarovski v. Turkmenistan), U.N. Doc. CCPR/C/93/D/1450/2006 (July 24, 2008); Hum. Rts. Comm. Communication No. 1482/2006 (M.G. v. Germany), U.N. Doc. CCPR/C/93/D/1482/2006 (July 23, 2008); and Hum. Rts. Comm. Communication No. 852/1999 (Borisenko v. Hungary), U.N. Doc. CCPR/C/76/D/852/1999 (Oct. 14, 2002).

306. See Hum. Rts. Comm. Communication No. 1450/2006, *supra* note 305.

307. Hum. Rts. Comm. Communication No. 1619/2007, *supra* note 305.

308. Hum. Rts. Comm. Communication No. 1482/2006, *supra* note 305.

309. See generally Hum. Rts. Comm. Communication No. 1619/2007, *supra* note 305; Hum. Rts. Comm. Communication No. 1482/2006, *supra* note 305.

310. See generally Hum. Rts. Comm. Communication No. 1619/2007, *supra* note 305; Hum. Rts. Comm. Communication No. 1482/2006, *supra* note 305.

the following individuals' honor or reputation did so indirectly by way of social stigma attached to a claim or representation about the target, not directly with allegations concerning the individual's credibility.³¹¹ All the same, the Committee found that States Parties arbitrarily or unlawfully interfered with the privacy, honor, and reputation of these claimants. The intention of this part of the subsection is to show, with all due respect to the authors of the Communications under discussion, that the Committee has found violations of Article 17 where interferences with an individual's honor and reputation are of significantly lower gravity than the Russian media's attacks on the honor and reputation of Mr. Nemtsov.³¹²

The case of *Komarovski v. Turkmenistan* is similar to Mr. Nemtsov's case in that State media made explicit defamatory allegations against the claimant.³¹³ Leonid Komarovski, its author, is an ethnically Russian United States citizen.³¹⁴ While in the Turkmen capital Ashgabat on business, Mr. Komarovski was arrested on charges that he was connected to an assassination attempt on President for Life of Turkmenistan, Saparmurad Niyazov ("Türkmenbaşy").³¹⁵

Türkmenbaşy's motorcade was alleged to have been fired upon two days after Mr. Komarovski's arrival in Ashgabat.³¹⁶ After the apparent assassination attempt, Türkmenbaşy announced on national

311. Even though in Hum. Rts. Comm. Communication No. 1482/2006, *supra* note 305, the point of the psychiatric exam seems to have been to undermine the individual's credibility. See Hum. Rts. Comm. Communication No. 1482/2006, *supra* note 305, ¶ 2.6 ("[T]he Ellwangen Regional Court ... had ordered her medical examination without objective reasons and without a prior oral hearing.").

312. See generally Hum. Rts. Comm. Communication No. 1619/2007, *supra* note 305; Hum. Rts. Comm. Communication No. 1482/2006 *supra* note 305.

313. Hum. Rts. Comm. Communication No. 1450/2006, *supra* note 305, ¶ 3.8 ("The author further claims to be a victim of a violation of article 17, paragraph 1 of the Covenant in that, at the end of 2003, the State party's government published a book, allegedly written by him, containing the official version of the events of 25 November 2002. On several occasions the author has publicly stated that he did not write the book, is unfamiliar with its contents and does not have copyright in it, despite the copyright symbol appearing next to his name. He never signed any contract with the State party's authorities allowing them to use his name on any publication or to publish or sell anything under his name. The existence of this book constitutes an unlawful attack on his honour and reputation.").

314. *Id.* ¶ 1.1

315. *Id.* ¶ 2.5-2.6 (describing the general details of Mr. Komarovski's detention).

316. *Id.* ¶ 2.4 (describing the purported assassination attempt on Türkmenbaşy).

television that leaders of the Turkmen Popular Democratic Movement (“NDDT”), an opposition party, were responsible.³¹⁷ Mr. Komarovski was arrested shortly thereafter while in the home of an associate who had some connection to the NDDT leadership that is not made clear in the Committee View.³¹⁸ Mr. Komarovski was held incommunicado for one week before United States officials were notified of his arrest.³¹⁹ Turkmen law enforcement held him for roughly another five months thereafter, beating and drugging him in detention.³²⁰ After being injected against his consent with an unknown narcotic, Mr. Komarovski was filmed admitting to participation in an attempted coup d’état against the Türkmenbaşy government; the video was broadcast on national television.³²¹ He asserted no recollection of the confession.³²² Mr. Komarovski was eventually released following “the intervention of the United States Embassy.”³²³ In addition to the national broadcast of Mr. Komarovski’s “confession,” Turkmen authorities published a book that they alleged to have been authored by Mr. Komarovski, detailing his participation in the attempt on the life of Türkmenbaşy.³²⁴ Mr. Komarovski asserted no involvement in the writing or publication of the book.³²⁵

In addition to several claims related to his arbitrary detention, Mr. Komarovski asserted that Turkmenistan had unlawfully interfered with his reputation under Article 17 by way of the publication of the

317. *Id.* ¶ 2.4 (noting the accusations against Mr. Komarovski on national television).

318. *Id.* ¶ 2.5

319. *Id.* ¶ 2.8 (“During the entire detention period, the author was not allowed to contact his family in writing or over the phone, or receive their visit. He was held incommunicado for the first seven days of detention, before the US embassy [*sic*] in Ashgabat was notified of his detention.”).

320. *Id.* ¶¶ 2.8-2.11 (noting author’s detention from December 2002 to April 2003).

321. *Id.* ¶ 2.9 (“[A]fter his release, he was shown a video of himself admitting to be a drug addict and to have participated in the plot against the President. He does not remember having made this statement, which was broadcast on 18 December 2002 on Turkmen Public Television.”).

322. *Id.*

323. *Id.* ¶ 2.11 (“On 15 April 2003, following the intervention of the United States Embassy, the author was released by Presidential Pardon. At the end of 2003, the Turkmen authorities published a book, allegedly written by the author, in which he admits his participation in the attempted assassination of the President. The author denies having written this book.”).

324. *Id.*

325. *Id.*

book.³²⁶ In the most succinct paragraph of the Views, the Committee holds that the false portrayal of Mr. Komarovski in a book confirming the “official version” of the assassination attempt constituted an unlawful interference with his honor and reputation, in violation of Article 17 of the ICCPR.³²⁷ Regardless of the additional claims, the Committee found a violation of Article 17 based on that single State act of defamation against the claimant.³²⁸

In *Pestaño v. The Philippines*, the authors’ son was one of several sailors in the Philippine Navy who died under mysterious circumstances in 1995 after refusing to participate in a massive drug-smuggling operation.³²⁹ The Philippine Navy stated officially that the authors’ son had committed suicide, but buried him in the national military cemetery with full honors despite a Navy policy barring such treatment for suicides.³³⁰ The authors’ son’s life insurance paid out his coverage in full, apparently not believing that the cause of death was suicide.³³¹

Following the disappearances of two associates of the authors’ son, members of the Philippine Senate ordered an inquiry into the case.³³² Subsequently, a vice-admiral of the Philippine Navy intervened in the case on two occasions.³³³ First, he requested that the

326. *Id.* ¶ 3.8 (“The author further claims to be a victim of a violation of article 17, paragraph 1 of the Covenant in that, at the end of 2003, the State party’s government published a book, allegedly written by him, containing the official version of the events of 25 November 2002.”).

327. *Id.* ¶ 7.7 (“Finally, the publication of a book confirming the official version of the events of 25 November 2002 which falsely portrays the author as the writer of the book, constitutes, in the absence of relevant information from the State party, an unlawful interference with the author’s privacy and an unlawful attack against his honour and reputation, in violation of article 17, paragraph 1, of the Covenant.”).

328. *Id.*

329. *See* Hum. Rts. Comm. Communication No. 1619/2007, *supra* note 305, ¶¶ 2.2-2.5 (relaying the chronology of the authors’ son’s death and burial).

330. *Id.* ¶ 2.5 (“On 30 September 1995, the authors’ son was buried in the National Cemetery for military personnel and given full military honours, despite a Navy policy stating that suicide victims should not benefit from such treatment.”).

331. *Id.* ¶ 2.7 (“In the course of the same month, after conducting its own inquiry, and despite the official Navy and police conclusions, the victim’s insurance company paid the full amount of his coverage to his beneficiaries for his death.”).

332. *Id.* ¶ 2.10 (“On 15 November 1995, two Senators filed a Senate Resolution, directing the appropriate Senate Committees to conduct an inquiry into the circumstances surrounding the death of the authors’ son.”).

333. *Id.* ¶ 2.11 (“In December 1995, the State party’s Navy Flag Officer in Command, a Vice-Admiral, invited the authors to dinner, and requested that they refrain from pursuing their

authors “refrain from pursuing” their son’s case.³³⁴ On the second occasion, the official threatened to cancel a contract between the authors and the Philippine Navy worth PHP100,000,000 if they pursued the case.³³⁵ After refusing to abandon the case, all four of the Philippine Navy ships being repaired by the authors’ company mysteriously sank, the company’s offices were ransacked, and the authors’ nephew, an employee of the company, was killed.³³⁶

Three years later, the Senate investigation concluded that the Pestaños’ son was killed other than by suicide.³³⁷ However, it was not until seven years later still, in 2005, that the case was reopened, only to see the lead investigator replaced and the case left uninvestigated.³³⁸ At the Committee, the Pestaños asserted that the elaborate cover-up of their son’s death, including the allegations that he had committed suicide, was an unlawful attack on his honor and reputation under Article 17.³³⁹ The Committee found that on the

son’s case against the Navy. Two weeks later, the Navy Flag Officer in Command sought to see the authors again, and presented the author, Mr. Pestaño, with his company’s contract with the Navy, worth a hundred-million pesos, together with an affidavit of waiver and desistance to pursue his suit against the Navy.”).

334. *Id.*

335. *Id.* At that time, PHP100 million was worth US\$3,888,870. Bankers Association of the Philippines, *Exchange Rates > Philippine Peso per US Dollar 1995*, http://www.bsp.gov.ph/dbank_reports/ExchangeRates_1_rpt.asp?frequency=Annual&range_from=1995&range_to=1995&conversion=Average.

336. Hum. Rts. Comm. Communication No. 1619/2007, *supra* note 305, ¶ 2.11 (describing the mysterious events following the Pestaños’ refusal to abandon the investigation of their son’s death).

337. *Id.* ¶ 2.15 (“On 25 January 1998, after eight Committee hearings, a visual inspection of the stateroom of the authors’ son in the ship, and relying, inter alia, on expert evidence⁵ and witness testimonies, two Senate Committees issued a Joint report on the Pestaño case, which contained the following findings: (i) The authors’ son did not kill himself on the BRP Bacolod City on 27 September 1995; (ii) he was shot in one place in the vessel different from the one where his body was found; (iii) after his death, his body was moved and laid on the bed where it was found; (iv) he must have been shot on board the BRP Bacolod City before the vessel reached the Navy Headquarters on 27 September 1995; (v) there was a deliberate attempt to make it appear that the authors’ son killed himself inside his stateroom; and (vi) such an attempt was so deliberate and elaborate that one person could not have accomplished it by himself.”).

338. *Id.* ¶ 2.17 (“[T]he case was left uninvestigated in the Office of the Ombudsman for military affairs.”).

339. *Id.* ¶ 3.2 (“[The authors] recall the Senate Committee’s findings of 1998, which they believe conclusively established that their son did not commit suicide, but was murdered. They add that there was a deliberate and elaborate conspiracy to cover-up his death, including through fabrication destruction or tampering of evidence, as well as misrepresentation and

merits, the Philippines' attempt to make it appear that the authors' son had committed suicide, when in fact he had clearly been murdered, was an unlawful attack on his honor.³⁴⁰

In *M.G. v. Germany*, the author, Ms. M.G., had been ordered to undergo a psychological examination to determine whether she was fit to litigate on her own behalf in an inheritance dispute.³⁴¹ She demonstrated that existing physical ailments had been exacerbated by the stress of handling what appeared to be a complex and contentious case *pro se*.³⁴² Ms. M.G. filed a complaint against the court that ordered the exam; it was rejected without explanation.³⁴³ Ms. M.G. submitted to the Committee that the decision to subject her to a medical examination without objective reasons and without a hearing was an unlawful interference with her privacy under Article 17.³⁴⁴ The Committee went further in its Views, holding that the social stigma and potential reputational consequences of psychological illness made the interference with Ms. M.G.'s privacy disproportionate to the end sought, and therefore an arbitrary interference with her honor and reputation under Article 17.³⁴⁵

The Committee tends to use soft language when determining recourse for individuals in whose favor it has ruled. For example, in *Komarovski v. Turkmenistan*, the Committee ordered Turkmenistan to provide Mr. Komarovski with an "effective remedy," as well as to prosecute individuals behind the violations of his rights, pay him "reparations," and also make a public retraction of the claims related to the book.³⁴⁶ The Committee will generally not order the payment of money damages, in contrast to the European Court — which is discussed in the following section.

distortion of facts, all of which constituted an obstruction of justice, and an unlawful attack against the authors' son honour.").

340. *Id.* ¶ 6.6 ("The Committee notes that the authors' claim under article 17 paragraph 1, to the effect that the State party's attempt to make it appear that the victim committed suicide, is to be construed as an unlawful attack against his honour.").

341. Hum. Rts. Comm. Communication No. 1482/2006, *supra* note 305, ¶¶ 2.1-2.2.

342. *Id.* ¶ 2.5 (giving background on Ms. M.G.'s case).

343. *Id.* ¶ 2.4.

344. *Id.* ¶ 2.5.

345. *Id.* ¶¶ 10.1-10.2.

346. Hum. Rts. Comm. Communication No. 1450/2006, *supra* note 305, ¶ 9.

3. *Interference with Private Life at the European Court*

This Section considers four successful reputation-related claims at the European Court. In comparison with the scarcity of Article 17 Committee Views, the European Court of Human Rights has ruled on over one thousand Article 8 (privacy) claims against States Parties to the Convention.³⁴⁷ Russia is the fourth-most-sued State on privacy claims at the European Court.³⁴⁸ A search of “reputation” within European Court judgments that includes Article 8 violations returns 104 results.³⁴⁹ To find an invasion of privacy, the European Court looks to whether the invasion was both lawful and “necessary in a democratic society.”³⁵⁰ However, as these cases show, the European Court does not directly address reputation — it includes damage to reputation as a possible corollary of improper invasions of privacy.³⁵¹ For that reason, none of the following cases can be read on point with the case of Mr. Nemtsov in the way of, for example, Komarovski v. Turkmenistan at the Committee.

The pair of cases *Kolesnichenko v. Russia* and *Yuditskaya and Others v. Russia* saw privacy complaints follow law enforcement mistreatment of lawyers in Perm, a small city 1,400 kilometers (870 miles) east of Moscow.³⁵² In *Kolesnichenko v. Russia*, the applicant, Aleksey Kolesnichenko, was accused of forging documents for a criminal defendant he was representing, resulting in the issuance of warrants to search his apartment and that of his parents.³⁵³ In *Yuditskaya and Others v. Russia*, the applicant’s law firm was raided when one of its lawyers, on a frolic of his own, was caught forging a contract in order to cover up a bribery scheme to which he was otherwise not party.³⁵⁴

347. Decisions Concerning Article 8, *supra* note 255.

348. *Id.* (showing 135 reported cases against Italy, 101 against Poland, 96 against Turkey, and 88 against Russia).

349. *Id.* (in “VIOLATION,” select “8;” enter keyword “reputation”).

350. ECHR, *supra* note 7, at art. 8 (“There shall be no interference by a public authority with the exercise of” the right to privacy and family life “except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”)

351. *Id.*

352. See generally *Yuditskaya and Others v. Russia*, App. No. 5678/06 Eur. Ct. H.R. (2015); see also *Kolesnichenko v. Russia*, App. No. 19856/04 Eur. Ct. H.R. (2009).

353. *Kolesnichenko*, *supra* note 352, ¶¶ 8-10.

354. *Yuditskaya*, *supra* note 352, ¶¶ 8-10.

The European Court did not directly consider reputation in either case, and neither applicant submitted that interference with or damage to reputation was the basis of the alleged Article 8 violation.³⁵⁵ Mr. Kolesnichenko's claim was exclusively related to the inviolability of the home, while Yuditskaya et al similarly alleged an Article 8 violation due to unreasonable search and seizure.³⁵⁶ As in the other European Court cases examined below, the Court brought up the question of reputation *sua sponte*, and, anyway, in passing.³⁵⁷ In both cases, the Court found that investigators had acted with unrestricted, and therefore unreasonable, discretion in the searches in question.³⁵⁸ Among other reasons, while at least considering damage to reputation as a corollary, the Court found the searches to be unreasonable and therefore to have been violative of Article 8.³⁵⁹

One case considers the reputational consequences of direct State action. In *Sõro v. Estonia*, applicant Mihhail Sõro was an Estonian national who had been employed by the Soviet security and intelligence services ("KGB") as a driver during the period of Soviet occupation of the Baltic States including Estonia.³⁶⁰ In 2004, thirteen years after the dissolution of the Soviet Union, and ten years after the withdrawal of Russian military personnel from Estonia, Mr. Sõro's employment with the KGB during the years 1980-91 was made public pursuant to an Estonian statute.³⁶¹

While Estonia asserted the necessity of rooting out agents of the country's former occupiers, Mr. Sõro responded that he was only a driver, was not involved in any intelligence-gathering activities, and was forced out of his job as a result of Estonia's official publication of his status as a KGB employee – despite the fact that he had always disclosed it when applying for work.³⁶² In 2007, the Tallinn Court of Appeals, the Estonian appellate court deciding against Mr. Sõro, held that, essentially, he was to be assumed guilty of collaboration with an occupier because establishing his innocence would be too difficult

355. Yuditskaya, *supra* note 352; Kolesnichenko, *supra* note 352.

356. Yuditskaya, *supra* note 352, ¶ 3; Kolesnichenko, *supra* note 352, ¶ 3.

357. Yuditskaya, *supra* note 352, ¶ 28; Kolesnichenko, *supra* note 352, ¶ 31.

358. Yuditskaya, *supra* note 352, ¶ 29; Kolesnichenko, *supra* note 352, ¶ 33.

359. Yuditskaya, *supra* note 352, ¶ 2; Kolesnichenko, *supra* note 352, at Judgment, ¶ 2.

360. *Sõro v. Estonia*, App. No. 22588/08 Eur. Ct. H.R. (2015) ¶ 3.

361. *Id.* ¶ 19.

362. *Id.* ¶ 30.

given the passage of time since his employment with the KGB.³⁶³ The Tallinn Court stated in this same ruling, though, that official publication of Mr. Sõro's status as former a KGB employee was inherently defamatory.³⁶⁴ The European Court, reading the Tallinn Court's judgment, found the Estonian statute requiring public disclosure of KGB affiliation to have a "punitive character on top of its alleged preventive purpose."³⁶⁵

Mr. Sõro asserted that while he had never faced problems with employment despite disclosing his past as a KGB driver, he was treated as "an occupier, a traitor, a snitch among his colleagues and acquaintances" following Estonia's official publication of that status.³⁶⁶ In ruling on the merits, the European Court found that the public disclosure included facts about Mr. Sõro's past that had the capacity to negatively impact his reputation.³⁶⁷ The Court also found that the interference was lawful in theory, but was applied arbitrarily.³⁶⁸ In that connection, it found a violation of Article 8.³⁶⁹

In *Khmel v. Russia*, the applicant was a regional legislator who threw a protracted temper tantrum in a police station following his midday arrest on drunk driving charges.³⁷⁰ After being released following his refusal to take a sobriety test, and once his status as regional Duma deputy had been established, Aleksandr Khmel not only verbally abused police officers at the precinct, but also threw his shoes at them and proceeded to unload desk drawers onto the floor.³⁷¹ Despite his release, Mr. Khmel refused to leave the station, "wreaking havoc," in the words of the Court.³⁷² As this was happening, the police chief informed local television media of the incident, and cameramen came to the station to catch it on film.³⁷³ It was shown the following day during a news broadcast to viewers in Murmansk, Mr. Khmel's constituent region.³⁷⁴ In his complaint, Mr. Khmel asserted

363. *Id.* ¶ 32.

364. *Id.* at n.38.

365. *Id.*

366. *Id.* ¶ 53.

367. *See id.* ¶ 56.

368. *See id.* ¶ 57, 61.

369. *See id.* ¶ 63-64.

370. *See Khmel v. Russia*, App. No. 20383/04 Eur. Ct. H.R. (2013), ¶ 5.

371. *See id.* ¶¶ 6-8.

372. *Id.* ¶¶ 46.

373. *See id.* ¶¶ 8-9.

374. *See id.* ¶¶ 6, 11.

that in addition to being filmed against his consent, the sole purpose of the broadcast was to tarnish his reputation.³⁷⁵

The European Court addressed various aspects of the incident, but in connection to the Article 8 section of the complaint, focused on the filming and broadcast of Mr. Khmel without his consent.³⁷⁶ First and foremost, the Court noted that the concept of private life extends to “aspects relating to personal identity, such as a person’s name or image.”³⁷⁷ In its discussion of the interference with Mr. Khmel’s privacy, the European Court held that such interference must be “in accordance with the law,” that being the domestic law of the State Party defendant, and also be “necessary in a democratic society.”³⁷⁸ The Court found that since the first requirement was not met, it was unnecessary to explore the second.³⁷⁹ One law the European Court examined, and with which the interference would need to be in accordance, was Article 38 of the Russian Law on Mass Media, discussed previously in this Note.³⁸⁰

Despite Mr. Khmel’s “disorderly and violent” behavior in custody, the European Court still found that the filming and broadcast of the video against his consent, and which had the potential to damage his reputation, violated Article 8.³⁸¹ That is, even where the media’s dissemination of damaging information about a public official was true, the Court found a violation of Article 8 where the dissemination was unlawful.³⁸² In this way, at least, *Khmel v. Russia* should be persuasive to the Court should it be faced with a defamation claim by representatives of Mr. Nemtsov.

In three of the Article 8 cases discussed here, the European Court awarded claimants four-figure euro sums including pecuniary and non-pecuniary damages as well as costs.³⁸³ In *Yuditskaya v. Russia*, the applicants did not submit a claim for just satisfaction, and

375. *See id.* ¶ 39.

376. *See id.* ¶ 36.

377. *Id.* ¶ 40.

378. *Id.* ¶ 45.

379. *See id.* ¶ 51.

380. *See id.* ¶ 16. *See also supra* Section II(2)(d) (discussing Article 38 of the Russian Law on Mass Media).

381. *See Khmel, supra* note 370, ¶¶ 46, 52.

382. *See id.* ¶ 49.

383. *See id.* at Judgment, ¶ 4; *Sõro, supra* note 360, at Judgment, ¶ 3; *Kolesnichenko, supra* note 352, at Judgment, ¶ 3.

so the Court awarded them nothing while declaring a violation of Article 8 of the ECHR.³⁸⁴ In no case did the European Court call on the State Party defendant to take action other than to pay out the damages.³⁸⁵

This Part has explored international human rights litigation on reputation and reputation-related questions. At the Committee, this includes *Komarovski v. Russia*, which featured a cause of action on point with the case of Mr. Nemtsov — that is, where national media was used in a character assassination campaign.³⁸⁶ It also included cases where the effects of State acts had reputational implications on the claimants that were arguably of far lesser gravity than those of the claims made by Russian media that Mr. Nemtsov was at the head of a campaign to destabilize his country.³⁸⁷ In all of these cases, the Committee found violations of Article 17 — a good sign for Mr. Nemtsov’s case.³⁸⁸ Further, in all of these cases, the Committee ordered the State Party defendant to report on its remedial actions going forward.³⁸⁹

At the European Court, however, cases on point with that of Mr. Nemtsov were harder to find. The cases under examination in this Part focused on State actions that, as the European Court found it, had knock-on effects that included detriment to reputation. While mentioning these effects in passing, the rulings that a State Party had violated Article 8 of the ECHR tended to rest on privacy violations of a different color. And when finding violations, the European Court ordered small damages amounts — even in comparison with the

384. See *Yuditskaya*, *supra* note 352, at ¶ 34.

385. See *id.* at Judgment, ¶¶ 1-2; *Khmel*, *supra* note 370, at Judgment, ¶¶ 1-5; *Söro*, *supra* note 360, at Judgment ¶¶ 1-4; *Kolesnichenko*, *supra* note 352, at Judgment ¶¶ 1-4.

386. See Hum. Rts. Comm. Communication No. 1450/2006, *supra* note 305. See also *supra* notes 313-28 and accompanying text.

387. See generally Hum. Rts. Comm. Communication No. 1482/2006, *supra* note 305; Hum. Rts. Comm. Communication No. 1619/2007, *supra* note 305. See also *supra* notes 329-45 and accompanying text.

388. See generally Hum. Rts. Comm. Communication No. 1450/2006, *supra* note 305; M.G., *supra* note 305; Hum. Rts. Comm. Communication No. 1619/2007, *supra* note 305.

389. See generally Hum. Rts. Comm. Communication No. 1450/2006, *supra* note 305; Hum. Rts. Comm. Communication No. 1482/2006, *supra* note 305; Hum. Rts. Comm. Communication No. 1619/2007, *supra* note 305.

damages available for defamation under Russian law — while seeking no further action from the State Party.³⁹⁰

IV: THE DEFAMATION CASE FOR BORIS NEMTSOV

Media hostility towards Boris E. Nemtsov, in the form of a character assassination campaign, grew in proportion to his criticism of President Vladimir V. Putin during the two years leading up to his murder on February 27, 2015.³⁹¹ Mr. Nemtsov was alleged to be a leader of the so-called “fifth column,” a conspiracy of political agitators on the take from non-Russian powers.³⁹² Essentially, these media very clearly accused Mr. Nemtsov of treason while providing no substantiation for the claims.³⁹³ On one occasion, Mr. Putin accused Mr. Nemtsov of large-scale theft of public funds.³⁹⁴ Further, the Russian government apparently took no action to force the media engaged in attacks on Mr. Nemtsov’s credibility to prove the allegations asserted against him or to cease making them.

Russian statutory law provides robust protections to reputation, dignity, and honor in its Constitution, Civil Code, and Criminal Code.³⁹⁵ In addition to statutory law, the Russian Supreme Court has issued a Plenary Directive on courts’ application of the criminal and civil statutes concerning attacks to reputation.³⁹⁶ Two important features of this Directive are a stated bar on statutes of limitations on such claims, and, relatedly, express permission of posthumous claims.³⁹⁷

390. *See, e.g.*, Khmel, *supra* note 370, at Judgment, ¶ 4. *See also supra* notes 347-85 and accompanying text.

391. *See* Nechepurenko, *supra* note 5 (describing the toxic media atmosphere in Russia regarding opposition politics); Lipman, *supra* note 5 (describing same).

392. *See* Lipman, *supra* note 5.

393. *See id.*

394. *See* Путин призвал не допустить во власть тех, кто “поураганил” в 90-е годы, *supra* note 26 (quoting Mr. Putin’s allegation that Mr. Nemtsov “churned” the Russian people during his tenure as a public servant).

395. *See supra* Part II.

396. *See* Plenary Directive, *supra* note 3 (directing Russian courts on interpretive questions related to criminal and civil defamation matters).

397. *See id.*

Mr. Nemtsov unsuccessfully sued Mr. Putin personally on a defamation claim while he was still alive.³⁹⁸ However, given the provisions of Russian law outlining media liability for attacks on personal dignity and honor, Mr. Nemtsov's representatives have a good case against media outlets that participated in the character assassination campaign under discussion here.³⁹⁹ It is not outside the realm of possibility that the Russian courts could provide Mr. Nemtsov's representatives with satisfactory recourse. Such recourse could potentially include not only money damages, but also refutations of unsubstantiated claims against Mr. Nemtsov in the media used to make those allegations in the first place, at cost to the defendant.⁴⁰⁰

Should Mr. Nemtsov's representatives exhaust the Russian court system without a ruling in his favor, they have potential recourse at two international tribunals: the European Court of Human Rights, and the United Nations Human Rights Committee.⁴⁰¹ The Russian Supreme Court expressly includes consideration of European Court norms in its application of defamation law, and the Russian Federation has reported to the Committee on its incorporation of ICCPR understandings of respect for personal dignity, among other things, into its federal laws.⁴⁰² But the tribunals are not created equal when it comes to defamation claims.

There are two important considerations regarding differences between the potential and probable outcomes at each tribunal. The first is that the Committee more expressly recognizes reputation as a separately delineated individual right, given its inclusion in the language of Article 17 of the ICCPR.⁴⁰³ The Committee has found in favor of claimants asserting victimhood of character assassination campaigns in the media of States in Russia's geopolitical neighborhood.⁴⁰⁴ Meanwhile, cases at the European Court concerning

398. See Немцов, Рыжков и Милов подали иск против Путина за клевету (*Nemtsov, Ryzhkov, and Milov File Defamation Suit against Putin*), FONTANKA (Dec. 23, 2010), <http://www.fontanka.ru/2010/12/23/119/>.

399. See *supra* notes 126-27 and accompanying text.

400. See *id.*

401. See ICCPR Status, *supra* note 200; First Optional Protocol Status, *supra* note 207; ECHR Status, *supra* note 239.

402. See Russian Periodic Report, *supra* note 157.

403. See ICCPR, *supra* note 7, at art. 17.

404. See, e.g., Hum. Rts. Comm. Communication No. 1450/2006, *supra* note 305.

reputation as such are few, as damage to reputation is usually seen in that court as an offshoot of violations of privacy; Article 8 of the ECHR does not name reputation as a protected right.⁴⁰⁵ The second consideration is that while the European Court awards money damages, the amounts are small and the Committee tends to order States to follow up and provide other recourse to applicants asserting violations of the ICCPR.⁴⁰⁶ In the case of Mr. Nemtsov, this could include enforcement of Russia's very strong anti-defamation statutes to Mr. Nemtsov's benefit.

If past Article 8 (privacy) actions including damage to reputation at the European Court are a guide, the Court is likely to award Mr. Nemtsov's representatives money damages.⁴⁰⁷ Though the example cases explored in this Note do not consider reputation as the foundational right of the claim, Mr. Nemtsov's case is so obvious that the Court would be very likely to read a violation of privacy into the reputational effects of the Russian media campaign on Mr. Nemtsov's private life. One way, for example, would be to cite the multiple observer claims that the very media atmosphere in question was a proximate cause of Mr. Nemtsov's assassination.⁴⁰⁸ Where State ownership of complicit media could be established, the European Court would need to find that the interference with Mr. Nemtsov's privacy was unlawful — which, as shown *supra*, it would be under Russian law — and unnecessary in a democratic society. Establishing neither of these would be difficult.

Meanwhile, at the Committee, Mr. Nemtsov's representatives would not need to show State action directing the media campaign in question, or even State ownership of the media.⁴⁰⁹ This is because Article 17 of the ICCPR creates an obligation on States Parties to protect their nationals against interference with their reputation.⁴¹⁰ The Committee would be likely to order the Russian Federation to

405. See ECHR, *supra* note 7, at art. 8.

406. Compare *supra* Part III.2 with *supra* Part III.3.

407. See *supra* notes 383-85 and accompanying text.

408. See Nechepurenko, *supra* note 5; Lipman, *supra* note 5.

409. See ICCPR, *supra* note 7, at art. 17.

410. See *id.*

“remedy” the situation concerning Mr. Nemtsov’s reputation; Russian federal law features various reasonable methods of doing so.⁴¹¹

CONCLUSION

Without taking any position on unsubstantiated allegations of Kremlin involvement in the February 2015 assassination of Russian opposition elder statesman Boris E. Nemtsov, it is the project of this Note to demonstrate the strength of a defamation case on Mr. Nemtsov’s behalf in Russian and international courts. The case is strong, in fact, regardless of his murder, and is based on the character assassination campaign directed against Mr. Nemtsov in response to his exposure of malversation and sharp criticism of Russian foreign policy.⁴¹² The federal laws of the Russian Federation provide extensive civil and criminal remedies for defamation, with expanded liability when the media is used to slanderous ends. If the Russian courts do not rule in Mr. Nemtsov’s favor, the case may and should continue internationally given Russia’s ratification of two international treaties creating human rights tribunals.

Given the differences in damage procedures, though, the United Nations Human Rights Committee is the preferable tribunal. However, Mr. Nemtsov’s representatives would have a very strong case regardless of which international court they choose to litigate with a view to restoring his honor. Given the protections to dignity and honor in Russian law, and the domestic exhaustion requirements in the international courts, they should start their suit in Russia. Also, given the Russian Supreme Court’s bar on statutes of limitations and permission of posthumous defamation claims, they would be able to take as much time as possible to gather information beyond the scope of this Note to make their case in the domestic court system. No matter what, the right to reputation is protected by law both in Russia and internationally, and, therefore, the case for Boris Nemtsov is clear.

411. See Hum. Rts. Comm. Communication No. 1450/2006, *supra* note 305; Hum. Rts. Comm. Communication No. 1482/2006, *supra* note 305; Hum. Rts. Comm. Communication No. 1619/2007, *supra* note 305. See also *supra* Part II.

412. See Nechepurenko, *supra* note 5; Lipman, *supra* note 5.

