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## Russian Compliance with Articles Five and Six of the European Convention of Human Rights as a Barometer of Legal Reform and Human Rights in Russia

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# RUSSIAN COMPLIANCE WITH ARTICLES FIVE AND SIX OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS AS A BAROMETER OF LEGAL REFORM AND HUMAN RIGHTS IN RUSSIA

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Jeffrey Kahn\*

*This Note examines two of Russia's obligations under the European Convention on Human Rights (ECHR): the Article 5 right to liberty and security, and the Article 6 right to a fair trial to gauge Russian compliance with European human rights norms. These articles lie at the heart of systematic legal reform in the Russian Federation. This Note defends the thesis that the agonizingly slow progress of judicial reform and the advancement of human rights in Russia is a function of the inevitable lag of conceptual norms behind institutional reform. Part I explores the weak place of the rule of law as an institutional force in Soviet and post-Soviet Russian history and emphasizes the power of conceptual legacies as well as the path dependency of prior institutional choices. Part II presents the current legal architecture of the Russian Federation as it relates to the ECHR, discussing first the position of international treaties in Russia's hierarchy of laws and, second, domestic Russian criminal law and criminal procedural law. Part III focuses on the conceptual and legal distance that separates Russian domestic law from the human rights obligations that Russia has undertaken in international treaties with the Council of Europe. Part IV analyzes the steadily growing docket of complaints lodged against Russia for alleged violations of the ECHR. Finally, Part V advocates a variety of educational reforms at every level of Russian society by both foreign and domestic actors. The Note concludes on a note of alarm, predicting the weakening of institutional legal structures absent conceptual and attitudinal changes.*

The Russian Federation signed the European Convention for the Protection of Human Rights and Fundamental Freedoms

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All transliterations of Cyrillic into Roman type and translation of Russian citations into English are the author's own.

Considerable primary research was made possible by the author's annual participation at the "Council of Europe Summer School: Bringing a Case to the European Court of Human Rights," held in Moscow in July 2000 and July 2001. These five-day workshops (more are planned for 2002 and 2003) are attended by classes of more than twenty-five leading Russian human rights lawyers practicing throughout the Russian Federation. They are sponsored by the Council of Europe and conducted by the AIRE Centre (which stands for Advice on Individual Rights in Europe), a London-based human rights center that specializes in the ECHR. The views expressed in this Note are the author's own and do not necessarily reflect those of the AIRE Centre, the Council of Europe, or the participants of the Summer School.

(ECHR) on February 28, 1996.<sup>1</sup> Upon its ratification, on May 5, 1998, Russia became a full member of the Council of Europe.<sup>2</sup> As a high-contracting party, Russia accepted the obligation “[to] secure to everyone within [its] jurisdiction the rights and freedoms” described in the ECHR.<sup>3</sup> Russia recognized the authority of the European Court of Human Rights to ensure observance of this obligation,<sup>4</sup> and the right of individuals to petition the Court alleging violations of the ECHR by the Russian state, a right extraordinary in international human rights law.<sup>5</sup>

Accession to the ECHR has been hailed as a sign of great progress for Russia’s human rights record and for its development as a rule of law state.<sup>6</sup> Nevertheless, virtually all respected international observers have seriously criticized Russia’s weak legal institutions

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1. See Council of Europe Treaty Office, Convention for the Protection of Human Rights and Fundamental Freedoms: Chart of Signatures and Ratifications, available at <http://conventions.coe.int/Treaty/EN/cadreprincipal.htm> (last visited April 9, 2002) [hereinafter Chart of Signatures and Ratifications]. The Convention was opened for signature in Rome on November 4, 1950, and entered into force following ratification by ten signatories on September 3, 1953. As of March 4, 2002, accession has been made by forty-one states. *Id.*

2. The Russian Federation signed the Convention in Strasbourg on February 28, 1996. The Russian Duma, the lower chamber of the Federal Assembly, voted in favor of ratification on February 20, 1998. The Federation Council, the upper chamber, voted in favor on March 13, 1998. President Boris Yel’tsin signed the federal law ratifying the treaty on March 30, 1998. See O ratifikatsii Konventsii o zashchite prav cheloveka i osnovnykh svobod i Protokolov k nei, No. 54-FZ, [On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols to it, Federal Law 54-FZ,] *Sobr. Zakonod. RF*, [Collected Legislation of the Russian Federation], 1998, No. 14, Art. No. 1514, at 2939–40. Russian ratification was made with reservations, which are discussed *infra* Part II.B. and accompanying text.

3. European Convention for the Protection of Human Rights and Fundamental Freedoms, Europ. T.S. No. 5, available at <http://conventions.coe.int/Treaty/en/Treaties/Htm/005.htm> [hereinafter ECHR].

4. ECHR, *supra* note 3, at art. 19.

5. ECHR, *supra* note 3, at Protocol No. 11. This amendment to the ECHR “created, for the first time in the history of international law, a right for individual human beings to make states accountable before an international court for alleged breaches of their international obligations.” L.J. CLEMENTS ET AL., *EUROPEAN HUMAN RIGHTS: TAKING A CASE UNDER THE CONVENTION* 13 (Sweet & Maxwell 2d ed. 1999) (1994). The rights and duties of individuals in contradistinction to, and even against, states is not unheard of in public international law. Nevertheless, “[f]or the most part, however, the individual remains an object, not a subject, of international law . . . .” D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 142 n.2 (Sweet & Maxwell 5th ed. 1998) (1973).

6. See, e.g., Marjorie Farquharson, *End Note: Kalashnikov Versus the Russian Federation*, 5 RFE/RL NEWSLINE, Dec. 12, 2001, at <http://www.rferl.org/newsline/search/> (“In the not too distant future, decisions taken in a quiet Rhineland courtroom could supply much-needed voltage to the meandering process of legal reform in the Russian Federation, as they have already done in other parts of Europe.”); see also Bill Bowring, *Russia’s Accession to the Council of Europe and Human Rights: Four Years On*, 4 EUR. HUM. RTS. L. REV. 362, 363 (2000) (“[T]here are perhaps even more convincing grounds for concluding that Russia is undergoing genuine and profound transformation as a direct result of accession, especially in the application of the rule of law.”).

and poor human rights record.<sup>7</sup> Russian membership in the Council of Europe and compliance with the strictures of the ECHR has been far from easy; criticisms of Russia's human rights record, the generally poor condition of state institutions, and the weak state of the rule of law repeatedly have been made by rapporteurs to the Council.<sup>8</sup> Anxiety over continuing large-scale violence in Chechnya is another massive stumbling block to acceptance of Russia as a co-equal by other member-states.<sup>9</sup> On April 6, 2000, the excesses of the Second Chechen War resulted in suspension of Russia's voting rights in the Council's Parliamentary Assembly, a sensational walk-out from that body by the Russian delegation, and vituperative diplomatic exchanges on both sides.<sup>10</sup> International observers were,

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7. Freedom House World Rankings, available for Russia for every year since 1991, are widely respected as authoritative and methodologically rigorous. Countries are ranked on a seven-point scale—one being the highest and seven being the lowest level of democratic progress—in two categories: political rights and civil liberties. Russia's Freedom House ranking for 1999–2000 in those categories was four and five, respectively. At no point in the last ten years has Russia earned lower than a three in either category. Russia's most recent composite ranking (4.25) puts it below Romania, Bulgaria, and Macedonia in terms of democratic measures. See *NATIONS IN TRANSITION, 1999–2000: CIVIL SOCIETY, DEMOCRACY AND MARKETS IN EAST CENTRAL EUROPE AND THE NEWLY INDEPENDENT STATES* 530 (Adrian Karatnycky et al. eds., 2001) [hereinafter *KARATNYCKY ET AL.*]; see also *HUMAN RIGHTS WATCH, HUM. RTS. WATCH WORLD REP. 2000* 286–93 (Dec. 1999); *HUMAN RIGHTS WATCH, HUM. RTS. WATCH WORLD REP. 2001* 313–20 (Dec. 2000) [hereinafter *HUM. RTS. WATCH WORLD REP. 2001*].

8. See Rudolf Bernhardt et al., *Report on the Conformity of the Legal Order of the Russian Federation with Council of Europe Standards*, 15 *HUM. RTS. L.J.* 249, 250–95 (1994).

9. See Sergei Kovalev, *Putin's War*, N.Y. REV. BOOKS, Feb. 10, 2000, at 4–8.

10. For an excellent summary of the Parliamentary Assembly's actions in April, see *Credentials of the Delegation of the Russian Federation*, Opinion of the Committee on Legal Affairs and Human Rights Doc. No. 8956 (Jan. 25, 2001), available at [www.stars.coe.fr/doc/doc01/edoc8956.htm](http://stars.coe.fr/doc/doc01/edoc8956.htm) (June 19, 2001). For unofficial transcripts and summaries of the debates (including very frank comments by Vladimir Zhirinovskiy), see *Provisional Version of the Report of the Debate of 06 April 2000 at 10 A.M.*, available at <http://stars.coe.fr/verbatim/20002/e/0002061000e.htm> (April 7, 2000) and *Provisional Version of the Report of the Debate of 06 April 2000 at 15 P.M.* [sic] available at <http://stars.coe.fr/verbatim/20002/e/0002061500e.htm> (April 7, 2000). Lord Judd, in the presentation in the morning session of April 6, 2001 on his report on the conflict in Chechnya and the credentials of the Russian delegation, expressed his dismay that the European Court of Human Rights had been sidelined:

I find it unbelievable that our governments have not so far found a way of referring some of the allegations and issues to the court. That is feebleness at the beginning of the twenty-first century. What on earth is the point of having these institutions if our governments are not prepared to act? . . . I conclude by saying to my Russian friends that the Council of Europe is about human rights or it is about nothing.

*Provisional Version of the Report of the Debate of 06 April 2000 at 10 A.M.*, available at <http://stars.coe.fr/verbatim/20002/e/0002061000e.htm> (April 7, 2000); see also *HUM. RTS. WATCH WORLD REP. 2001*, *supra* note 7, at 319.

and are, split on “the Russian question”: would Russia’s democratic and legal institutions be strengthened by continued membership in the Council, or would ongoing violation of the ECHR do no more than bring the efficacy of this innovative human rights system into doubt, in the process diminishing the reputation of the Council of Europe as a whole?<sup>11</sup>

This question is as relevant (and unanswered) today as it was when Russia signed the ECHR in 1998. This Note examines two of Russia’s obligations under the ECHR: the Article 5 right to liberty and security, and the Article 6 right to a fair trial.<sup>12</sup> There are a number of reasons to consider these articles as good barometers of the state of Russian compliance with European human rights norms. First, Russian human rights lawyers themselves identify these two articles as foremost in importance to them; representatives from one of the leading human rights centers in Moscow noted that Articles 5 and 6 account for most of their cases.<sup>13</sup> Second, the rights expressed in these articles lie at the root of systemic legal reform in the Russian Federation. These rights address such issues as arrest and detention, the independence and power of judicial bodies, the conduct of trials, and fundamental concepts like the presumption of innocence and the right to a defense. Third, as is clear from even this abbreviated laundry list of issues, the durability of these rights affects the protection in Russian courts of many of the other rights enumerated in the ECHR as well as those found in the Russian Constitution, or, in fact, of any matter that requires the existence of a fair, impartial, and reliable judicial system.

The political elite of the Russian Federation was consigned by history to rebuild a complex federal state in the conceptual, institutional, and physical rubble of two anciens régimes: the Soviet Union and the Russian Empire. Neither of these great powers were

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11. At one extreme of this debate, some respected lawyers who practice before the Court predict the demise of the ECHR process as it has operated for the last fifty years. See Interviews with international and Russian human rights lawyers in London, UK, and Moscow, Russ. (Summer 2001) (cited on condition of anonymity) (on file with author). They predict a heightening of admissibility requirements. The imposition of these difficult procedural hurdles prior to any hearing of a case on its merits would ease the bottleneck of Russian cases that could choke the already slow docket of the Court. *Id.* They also predict that as particularly egregious violations of the ECHR are increasingly exposed in successful complaints against Russia, the complaints of Western European litigants will appear comparatively less serious, resulting in less attention to them by the Court. *Id.*

12. These articles are reproduced in full, *infra* in Appendix A.1.

13. Interviews with participants in the 2000 and 2001 Council of Europe Summer Schools, Moscow, Russ. (Summer 2000 and 2001) (cited on condition of anonymity) (on file with author). Indeed, more than half of all complaints to Strasbourg revolve around Article 5 and Article 6 issues. See CLEMENTS ET AL., *supra* note 5, at 139.

noted for devotion to the rule of law in general or to human rights in particular. This Note defends the thesis that the agonizingly slow progress of judicial reform and the advancement of human rights in Russia is a function of the inevitable lag of conceptual norms behind institutional reform. The injection of modern, Western European human rights norms, therefore, cannot “fix” Russia overnight. To reconcile the discrepancies that exist between Russian and ECHR legal standards will require much more than the stroke of a legislating pen. Part I explores the weak place of the rule of law as an institutional force in Soviet and post-Soviet Russian history and emphasizes the power of conceptual legacies as well as the path dependency of prior institutional choices. Part II presents the current legal and political architecture of the Russian Federation as it relates to the ECHR, discussing first the position of international treaties in Russia’s hierarchy of laws and, second, domestic Russian criminal law and criminal procedural law. Part III focuses on the conceptual and legal distance that separates Russian domestic law from the human rights obligations that Russia has undertaken in international treaties with the Council of Europe. Part IV analyzes the steadily growing docket of complaints lodged against Russia for alleged violations of the ECHR. Finally, Part V advocates a variety of educational reforms at every level of Russian society by both foreign and domestic actors. The Note concludes on a note of alarm, predicting the weakening of institutional legal structures absent conceptual and attitudinal changes.

## I. THE RULE OF LAW IN THE RUSSIAN FEDERATION

The manner of *thinking* about law and legal abstractions—by politicians, judges, lawyers, and even the population in general—is as important as any constitutional commitment to the rule of law itself. Perhaps the most important issue with which to begin analysis of Russia’s compliance with the ECHR is the level of development of Russian conceptions of the rule of law itself.<sup>14</sup> It is impossible to overstate how difficult and slow such a transition in thinking will be in post-Soviet Russia. The agonizingly slow and often brutally harsh experience of economic transition (a transition

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14. See, e.g., ECHR, *supra* note 3, at art. 7, § 2 (judging criminality “according to the general principles of law recognized by civilised nations[,]” i.e., not just by national law definitions of crimes); ECHR, *supra* note 3, at art. 13 (establishing as a positive obligation the existence of an “effective remedy” to the violation of Convention rights and freedoms).

that focused on the essentials of a market economy of goods and services that people need simply to go about their daily lives) should suggest how much more problematic such an intangible conceptual transition must be.<sup>15</sup> To borrow a phrase from Jon Elster, Claus Offe, and Ulrich Preuss, the problem is much more complicated than “rebuilding the ship at sea”—the Russian ship of state has never even had a maiden voyage propelled by the rule of law.<sup>16</sup>

When legal scholars and political scientists compare modern democracies, government under law is generally considered to be a fundamental precondition.<sup>17</sup> Legal scholars with knowledge of both the ECHR and Russia point to a developing appreciation for the rule of law in Russia as a fundamental achievement of Russia’s accession to the Convention.<sup>18</sup> That said, it should be stated at the outset that, by any responsible measurement, the rule of law in Russia is still far from consolidated.<sup>19</sup>

The preposition in the phrase “government *under* law” is the operative word, defining a relationship between citizen and ruler that preceded the development of modern democracies by hundreds of years. Democracy may put the power to choose and be chosen a lawmaker in the hands of the citizen, but it is a *political* power capable of only periodic exercise. Without the *legal* power to use the authority of courts to compel action, disclose information, and demand the rational use of the power of the state, the force of democracy to ensure individual rights is greatly diminished. Law is

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15. See, e.g., Archie Brown, *Introduction in CONTEMPORARY RUSSIAN POLITICS: A READER* 247–51 (Archie Brown ed., 2001).

16. JON ELSTER ET AL., *INSTITUTIONAL DESIGN IN POST-COMMUNIST SOCIETIES: REBUILDING THE SHIP AT SEA* (1998).

17. See, e.g., JUAN J. LINZ & ALFRED STEPAN, *PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE* 3, *passim* (1996). For analysis particular to the ongoing transition from post-totalitarian authoritarianism in post-Soviet Russia, see JEFFREY KAHN, *FEDERALISM, DEMOCRATIZATION, AND THE RULE OF LAW IN RUSSIA* (forthcoming 2002).

18. See Bowring, *supra* note 6, at 363 (“[T]here are perhaps even more convincing grounds for concluding that Russia is undergoing genuine and profound transformation as a direct result of accession, especially in the application of the rule of law.”).

19. Russia scores a 5.25 on the 1999–2000 Freedom House seven-point scale for development of the rule of law (where one indicates the most progress, seven indicates the least progress). This is a composite score based on measures of the constitutional, legislative, and judicial framework (4.25/7), and corruption (6.25/7). By comparison, neighboring Poland scored a 1.88, Lithuania a 2.88, and Tajikistan a 5.88. See KARATNYCKY ET AL., *supra* note 7, at 25, 42, 541–46.

what makes democratic government a “republic of reasons” and not simply, ruthlessly, majoritarian rule.<sup>20</sup>

The English language, unfortunately, does not lend itself to the distinctly different meanings telescoped into the word “law.” Of course, law can be understood in positivist terms as simply the statutes, legislation, and rules enacted by legislatures. But law, or rather “Law,” may also connote first principles for the organization of human relations (in the American and English legal traditions, primarily developed through the common law). The state, as Harold Berman neatly phrased it, is “not only a creator but also a creature of law.”<sup>21</sup> The difference between a state governed by *laws* and one ruled by *Law* is enormous. The former, what Berman called a “law-based state,” is the *Rechtsstaat*: laws, that is, statutes and other legislation are the supreme authority in the state by virtue of the *process* of lawmaking that generates them.<sup>22</sup> It is the state, to paraphrase Max Weber, that exercises monopoly control over the creation of law.<sup>23</sup> A “Rule of Law” state, on the other hand, is a state that is *not* the sole source of law. In common law countries, courts (administered by the state but deliberately located at a distance from the overtly political branches of state power) are the wellspring of principles of equity and other normative standards. In both common law and civil law countries, theories of natural law, the counterweight of civil society, and customary private law have served as sources of *Law* beyond the generative power of a state’s parliament. The laws of the legislature may be declared unlawful or, rather, un-Lawful, because mere procedural accuracy is not enough to legitimate (consecrate) the law. “While, in complying with the notion of the rule of law, the political power that governs the state is subordinated to a law that it has not directly produced, in the case of *Rechtsstaat*, the state subordinates itself to

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20. CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* 20 (1993) (“The minimal condition of deliberative democracy is a requirement of reasons for governmental action . . . a republic of reasons.”).

21. Harold J. Berman, *The Rule of Law and the Law-Based State (Rechtsstaat)*, in *TOWARD THE “RULE OF LAW” IN RUSSIA? POLITICAL AND LEGAL REFORM IN THE TRANSITION PERIOD* 49 (Donald D. Barry ed., 1992).

22. *See id.* at 47. This idea is captured by the aphorism: *Auctoritas, non veritas, facit legem* (Authority, not truth, creates statutes).

23. As Berman rightly points out, the *Rechtsstaat* could theoretically be a fascist or dictatorial state—there is no substantive prescription beyond the positivist procedural requirements of rule by laws. Nazi Germany, the USSR, and Apartheid South Africa were all states rich in laws, however unjust (i.e. un-Lawful) these laws were. *Id.* at 47.



its 'own' law."<sup>24</sup> The self-binding notion of "government under law" does not create the *Rechtsstaat*—not rule by laws—but the rule of Law. Cass Sunstein's characterization of deliberative democracy as "a republic of reasons" only partially captures this meaning. English loses a distinction that is better expressed in Latin (*lex* versus *ius*), French (*loi* versus *droit*) or, for that matter, in Russian (*zakon* versus *pravo*).

Development of rule of law conceptions, norms, and practices has been difficult and slow in post-Soviet Russia.<sup>25</sup> In the words of Bernard Rudden, "[d]uring the last years of its life the Soviet Union turned to law like a dying monarch to his withered God."<sup>26</sup> Although undoubtedly true that the Supreme Soviet and its successor, the Russian Duma, have engaged in a lawmaking campaign "with the fervour of one who sees in legislation the path to paradise[.]"<sup>27</sup> that utopia is nowhere within reach, nor likely to be grasped by the lawyer-politician. What did Mikhail Gorbachev (who, incidentally, is a lawyer by training)<sup>28</sup> mean *exactly* when he famously expressed the need to return to a *pravovoe gosudarstvo*, usually translated as "law-based state?"<sup>29</sup> Did he mean to go beyond the Soviet *Rechtsstaat*, to demand rule by laws made legitimate by something beyond the unanimity of Party-controlled parliamentary assent? Did he mean a "rule of Law" state, a state held accountable to *pravo*, i.e. *ius*? The "Theses" published prior to the Nineteenth Communist Party Conference (which radically restructured electoral procedures, and legislative and judicial institutions in June

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24. Gianmaria Ajani, *The Rise and Fall of the Law-Based State in the Experience of Russian Legal Scholarship: Foreign Patterns and Domestic Style*, in TOWARD THE "RULE OF LAW" IN RUSSIA? POLITICAL AND LEGAL REFORM IN THE TRANSITION PERIOD 5 (Donald D. Barry, ed. 1992).

25. Between the collapse of the Soviet Union on December 25, 1991 and the adoption of a new constitution for the Russian Federation by popular referendum on December 12, 1993, the 1978 Constitution of the Russian Soviet Federated Socialist Republic (RSFSR) was still law, although subject to increasing (and sometimes contradictory) amendment. See KAHN, *supra* note 17, at 1 n. 2. This is despite the aspiration expressed in the 1993 Russian Constitution, which states: "The Russian Federation—Russia shall be a democratic, federal, rule-of-law state with a republican form of government." KONST. RF art. 1, § 1 (1993). Holding Russia up to its own standard (and, no less, the standard that it has accepted by ratifying the ECHR), one may deflect the criticism that expectations for reform have been set too high. But see Michael McFaul, *Getting Russia Right*, FOREIGN POL'Y 58, 58–62 (Winter 1999–2000), for this alternative view.

26. Bernard Rudden, *Civil Law, Civil Society, and the Russian Constitution*, 110 LAW Q. REV. 56, 56 (Jan. 1994).

27. *Id.*

28. See ARCHIE BROWN, THE GORBACHEV FACTOR 29–31 (1996).

29. The mere use of this phrase marked a turning point in Soviet history. Labeled for seven decades a "bourgeois" concept, the term had been proscribed from permitted discussions of Soviet law. See Donald D. Barry, *Introduction in TOWARD THE "RULE OF LAW" IN RUSSIA? POLITICAL AND LEGAL REFORM IN THE TRANSITION PERIOD* xiii (Donald D. Barry ed., 1992).

1988) made reference to the importance of a division of powers in a rule-of-law state and established a constitutional review commission. In October 1988, Gorbachev asserted that this was the key to reforms that could be characterized as "a legal revolution."<sup>30</sup>

It became clear that Gorbachev was talking about something new for the Soviet Union. Increasingly, the relationship between state and law drew closer to conceptions of a rule-of-law state. The future USSR Minister of Justice Yakovlev explained in 1988:

The specific question is: what over what? The state over the law or the law over the state? Despite the fact that the law is born of the state, and has its sources in state institutions, the state nevertheless becomes truly law-based when it places the law above itself.<sup>31</sup>

A transition in *thinking* about law and legal abstractions was as important as the transition to the rule of law itself. It is unsurprising that, operating in the shell of a state built on the administrative use of law as tool and weapon, inexperienced parliamentarians often resorted to instrumentalist Soviet legal habits.<sup>32</sup> According to one scholar and early member of the Russian democratic opposition:

[W]hile arguing for the rule of law or a law-based state, 'democrats' saw law as a means of toppling the regime, as a tool that should have been directed mainly against their Communist opponents, while they themselves did not feel bound by

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30. *Interv'iu M.S. Gorbacheva zhurnal'iu 'Shpigel' (FRG)*, [Interview with M.S. Gorbachev by the magazine *Spiegel (FRG)*,] PRAVDA, Oct. 24, 1988, at 1-2.

31. Berman, *supra* note 21, at 49 (quoting V.F. YAKOVLEV, ROUNDTABLE DISCUSSION ON THE MEANING OF A LAW-BASED STATE (1988)).

32. Perhaps the most famous (and horrifying) expression of this Soviet view is that of the first Commissar of Justice, N.V. Krylenko:

The court is, and still remains, the only thing it can be by its nature as an organ of the government power—a weapon for the safeguarding of the interests of a given ruling class . . . .

A club is a primitive weapon, a rifle is a more efficient one, the most efficient is the court . . . . For us there is no difference between a court of law and summary justice. . . . The court is an organ of State administration and as such does not differ in its nature from any other organs of administration which are designed, as the court is, to carry out one and the same governmental policy . . . .

1 VLADIMIR GSOVSKI, SOVIET CIVIL LAW 241 (1948) (quoting N.V. KRYLENKO, THE JUDICIARY OF THE R.S.F.S.R. 206 (1923)).

what they considered to be outdated and unjust Communist laws.<sup>33</sup>

Soviet legal study for years had been steeped in the basic principles of Marxism-Leninism (e.g., law as an instrument of class domination), dialectical materialism (including the forecast withering away of all law and state administration), and the history of the Communist Party.<sup>34</sup> All the while, Russian lawyers were starved of serious study of comparative law, constitutionalism, and federalism. The Soviet lawyer “whether he be a convinced Marxist-Leninist or not, of whatever disposition, his concepts of law, its origins, role, and purpose, have been affected by this intellectual framework.”<sup>35</sup>

There is no common law tradition in Russia, and thus, crucially, no tradition of protecting individual rights through judicial review.<sup>36</sup> Though the development of Russian law has a long and fascinating history, its course was profoundly different from either the civil law traditions of continental Europe (from which it mainly drew)<sup>37</sup> or the common law traditions of England, Scotland, and

33. See Alexander V. Lukin, “Democratic” Groups in Soviet Russia (1985–1991): A Study in Political Culture 323 (D.Phil. Dissertation, Oxford University, Faculty of Social Studies, Trinity Term 1997) (available at the Bodleian Library, Oxford University).

34. See WILLIAM E. BUTLER, *RUSSIAN LAW* 32, 129–34 (1999).

35. WILLIAM E. BUTLER, *SOVIET LAW* 27 (2d ed. 1988); see also HAROLD J. BERMAN, *JUSTICE IN THE USSR: AN INTERPRETATION OF SOVIET LAW* (1966).

36. See Albert J. Schmidt, *Soviet Civil Law as Legal History: A Chapter or a Footnote*, in *THE REVIVAL OF PRIVATE LAW IN CENTRAL AND EASTERN EUROPE: ESSAYS IN HONOR OF F.J.M. FELDBRUGGE* 45–62 (George Ginsburgs et al. eds., 1996); see also I GSOVSKI, *supra* note 32, at 259. The right to judicial review of administrative action (and inaction) is now (nominally) guaranteed by the Russian Constitution. KONST. RF art. 46, § 2 (1993).

37. Interestingly, the Preamble to the European Convention on Human Rights notes the existence of a “common heritage of political traditions, ideals, freedom and the rule of law” shared by the governments of European countries. ECHR, *supra* note 3, at Preamble. The European Court of Human Rights doctrine of the “margin of appreciation” (expressing the view that the ECHR member-states are sufficiently different to require broad acceptance of diverse practices), however, serves to undercut this striking assertion. The European Court of Human Rights does not always set uniform and rigid standards “across-the-board” for compliance with all Convention rights in all member-states. “A certain leeway or margin of appreciation in deciding whether a violation exists” is part of the Court’s methodology. CLEMENTS ET AL., *supra* note 5, at 217 (discussing the application of the Art. 14 freedom from discrimination in matters ranging from taxation to family life to racial bias). This doctrine has been used by the Court in regard to admissibility decisions involving the Russian Federation. The Court noted in *Pitkevich v. Russia*, App. No. 47936/99, at \*20 (Eur. Ct. H.R. Feb. 8, 2001), available at <http://www.echr.coe.int/eng>, which in part involved the Art. 10 freedom of expression, that “[t]he Contracting States have a certain margin of appreciation in assessing whether such a need [to restrict freedom of expression] exists [because necessary in a democratic society].” The Court ultimately held Pitkevich’s case inadmissible. *Id.* at \*11.

the United States.<sup>38</sup> In the Russian Empire, prior to the Judicial Reform of 1864, judicial opinions were neither published nor circulated.<sup>39</sup> As legal experts from the Parliamentary Assembly of the Council of Europe concluded, in their report on Russian conformity with the fundamental principles required for full membership in the Council of Europe (human rights, the rule of law, and democratic pluralism): “The courts can now be considered structurally independent from the executive, but the concept that it should in the first place be for the judiciary to protect the individuals has not yet become a reality in Russia.”<sup>40</sup> This opinion was relatively unchanged two years later, as noted by the Council’s rapporteur:

[T]he mentality towards the law has not yet changed. In Soviet times, laws could be completely disregarded—party politics and “telephone justice” reigned supreme. While it cannot be said that laws are ignored as a matter of course in present times, they are disregarded if a “better” solution to a particular problem seems to present itself. This assertion is valid for every echelon of the Russian state administration, from the President of the Federation . . . down to local officials. . . .

[I]t is very difficult to enforce the law through the courts. Often, a complaint against administrative abuse cannot even be brought to court, since the prosecutor’s office is the competent state organ. But even when such cases are brought to court, and the court rules against the administration, the

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38. See, e.g., A.H. (Archie) Brown, *The Father of Russian Jurisprudence: The Legal Thought of S.E. Desnitskii*, in *RUSSIAN LAW: HISTORICAL AND POLITICAL PERSPECTIVES* 122, 123 (W.E. Butler ed., 1977) (emphasizing the influence of German, Scottish, and English scholarship on Russian legal education). See generally BUTLER, *supra* note 34, at 14–79.

39. William G. Wagner, *Civil Law, Individual Rights, and Judicial Activism in Late Imperial Russia*, in *REFORMING JUSTICE IN RUSSIA, 1864–1996: POWER, CULTURE, AND THE LIMITS OF LEGAL ORDER* 32 (Peter H. Solomon, Jr. ed., 1997).

40. Rudolf Bernhardt et al., *Report on the Conformity of the Legal Order of the Russian Federation with Council of Europe Standards*, 15 *HUM. RTS. L.J.* 249, 287 (Oct. 31, 1994). In fact, given the oversight of the judiciary by the executive branch Ministry of Justice for another two years, “structural independence from the executive” is unduly optimistic. See *infra* note 41 and accompanying text.

decision is sometimes not implemented due to the low standing courts and their decisions enjoy in public opinion.<sup>41</sup>

The “founding fathers” of Russia’s new constitutional system were consigned to struggle with a Soviet legal legacy with few comparative legal tools to guide them.<sup>42</sup> In the Soviet era, from the legal nihilism of “revolutionary legality” to the rigid formalism of the Stalinist bureaucratic state, one of the few constants in legal thought was the subordination of the judiciary, “hierarchically inferior to parliament and to the executive.”<sup>43</sup> It was only with the adoption of the 1993 Constitution—in the aftermath of a violent confrontation between the executive and legislative branches of government—that judicial independence was, at least nominally, acknowledged.<sup>44</sup> Even then, it was not until passage of the 1996 Constitutional Law on the Judicial System that the traditional dependence of courts of general jurisdiction on the Ministry of Justice, which not only provided “logistical” support but also was charged with “ ‘oversight’ ” of the ordinary courts, officially came to an end.<sup>45</sup>

The second Russian president, Vladimir Putin (who, at least, *attended* law school, albeit on assignment by the KGB), has not alleviated anxiety about the level of appreciation that exists for the rule of law. Early in his presidential campaign, Vladimir Putin introduced a strange phrase into the political lexicon: “the dictatorship of law.”<sup>46</sup> Putin’s speeches and writings on democracy and law were at once encouraging and chilling. His use of democratic concepts often left unclear in what manner he thought them best applied:

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41. *Opinion by the Committee on Legal Affairs and Human Rights on Russia’s Application for Membership of the Council of Europe*, Eur. Consult. Ass., 1996 Sess., Doc. No. 7463 (Jan. 18, 1996), reprinted in 17 HUM. RTS. L. J. 218, 218–19 (1996).

42. For an excellent and detailed examination of early Soviet legal concepts and “discontinuity” with pre-Revolutionary legal thought, see I GSOVSKI, *supra* note 32, at 152–262. For an analysis of the continued intrusion of Soviet and early post-Soviet extra-legal “unwritten rules” on the conduct of state and private business, and their brake on economic and legal reform, see ALENA LEDENEVA, UNWRITTEN RULES: HOW RUSSIA REALLY WORKS 38 (2001). The author catalogues corrupt, illegal, and often violent methods of conducting state regulatory and private economic business, concluding that, to counter these practices “it is simply not enough to transform the formal rules and the ways they are enforced.” *Id.*

43. GENNADY M. DANILENKO & WILLIAM BURNHAM, LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION 58 (1999).

44. See KONST. RF art. 10 (1993) (separation and independence of branches of government); *id.* at art. 120 (independence of the judiciary under law).

45. DANILENKO & BURNHAM, *supra* note 43, at 58–59.

46. Open Letter from Vladimir Putin, to Russian Voters, (Feb. 25, 2000), available at <http://putin2000.ru/07/05.html>.

In a non-law-governed, i.e. weak, state the individual is defenseless and not free. *The stronger the state, the freer the individual* [emphasis in original]. In a democracy, your and my rights are limited only by the same rights enjoyed by other people. It is on recognizing this simple truth that the law is based, the law that is to be followed by all—from an authority figure to a simple citizen.

But democracy is the dictatorship of the law—not of those placed in an official position to defend that law. . . .

I know there are many now that are afraid of order. But order is nothing more than rules. And let those who are currently engaged in substituting concepts for one another, trying to pass off the absence of order for genuine democracy—let them, I say, stop looking for hidden dirty tricks and trying to scare us with the past. “Our land is rich, but there is no order in it”, they used to say in Russia.

Nobody will ever say such things about us in future.<sup>47</sup>

Such statements sent shockwaves through Russia’s weak democratic opposition.<sup>48</sup> Did the Russian president mean the “Rule of Law,” or a more frightening, bureaucratized rule through laws? Was Putin’s oxymoronic linkage of dictatorship and law compatible

47. *Id.*

48. Contrary to the assertion by Peter Rutland that this phrase was a “throw-away remark that Putin made while talking to journalists,” (Peter Rutland, *Putin’s Path to Power*, 16 POST-SOVIET AFF. 345 (2000)) Putin has repeatedly expressed his well-known maxim of government. In a televised address to the nation on the eve of his reform package, Putin linked the phrase to his “strengthening of the vertical of executive power,” saying: “This is what the dictatorship of law means. It would mean we are living in one strong country, one single state called Russia.” *Address* (Russian public television broadcast, May 17, 2000) (BBC Monitoring, trans.) *reprinted in Vladimir Putin: Vlast’ dolzhna byt’ rabotaiushchei!* [*Vladimir Putin: Power should be working!*] ROSS. GAZETA, May 19, 2000, at 3. In another televised speech on July 8, 2000, before both houses of the Federal Assembly, Putin managed to give a fundamental concept of civil law—the importance of maintaining a space outside the domain of public law—an ominous tinge:

That is why we insist on just one dictatorship—the dictatorship of the law, although I know that many people dislike the expression. That is why it is so important to indicate the boundaries of the domain where the state is full and only master, to state precisely where it is final arbiter and to define those spheres where it should not meddle.

*Address* (Russia public television broadcast, July 8, 2000) (BBC Monitoring, trans.). One is left to wonder what size such a non-state sphere could have in Putin’s Russia.

with the tremendous act of self-restraint that is government *under* law? The initial legal reforms of the Putin administration, particularly in relation to the Tax Code, proposed Land Code, and federal reforms, have been welcomed substantive changes. Anxiety has remained, however, with regard to broader conceptions of governmental restraint and the retention of a legal sphere—private law—outside of governmental interference.<sup>49</sup> Transition away from authoritarianism, as well as the development of stable federal relations, hinged on that choice.

Undeniably, the weak development of rule of law conceptions in Russia is perhaps the most fundamental issue with which to begin analysis of Russia's compliance with the ECHR.<sup>50</sup> Although such a broad critique is hardly an actionable claim in *any* court system, these conceptual failings underlie *every* particular concern over specific human rights violations.<sup>51</sup> Very practical problems—of particular salience in contemporary Russia—of sufficient resources and the allocation of funds adequate to ensure prompt and effective justice also return to questions of a positive obligation to ensure the rule of law.<sup>52</sup> Pre-trial detention, arbitrary or capricious administrative procedures, due process, equal protection—these are all issues that, at their core, depend on acceptance of the enormous act of self-restraint that is government *under* law.

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49. As a highly respected authority on Russian politics has observed, Putin's first eighteen months in office have been marked by the "selective application of the law," as a "lever[] of power" against a weakly independent media, federal and regional political opponents, and Russia's powerful financial oligarchs. Archie Brown, *Vladimir Putin and the Reaffirmation of Central State Power*, 17 POST-SOVIET AFF. 48–49 (2001). "But what marks entrepreneurs and governors who have incurred the wrath of the Kremlin is not that they contravened laws. It would be difficult to find a major financier in Russia who had not done anything illegal or a republican president or regional governor who had not infringed a federal law. What distinguished them, rather, from their more fortunate brethren was that they had *failed the loyalty test*." *Id.* at 48 (italics in original). As displayed in the imprisonment of media-tycoon Vladimir Gusinsky (which ended only following Gusinsky's forfeiture of his media holding to the state-controlled gas conglomerate Gazprom), this approach can "hardly suggest commitment to an impartial rule of law." *Id.* at 48–49.

50. See, e.g., ECHR, *supra* note 3, at art. 7, § 2; *id.* at art. 13.

51. The observance of the rule of law is, obviously, a key principle behind Article 5 and Article 6 of the ECHR. See *infra* notes 77–95 and accompanying text.

52. As will be discussed below in regard to Article 6, the European Court has held that member-states may not plead lack of resources as an excuse for the delay or denial of a right to trial (e.g., docket backlogs, and insufficient personnel). See *Guincho v. Portugal*, 7 Eur. H.R. Rep. 223 (1984) (holding foreseeable problems of backlog and delay confronting legal systems must be remedied by member-states to avoid violation of Article 6); see also CLEMENTS ET AL., *supra* note 5, at 160–62.

## II. THE EUROPEAN CONVENTION AND RUSSIAN LAW: AREAS OF POTENTIAL CONFLICT

### *A. International Treaties in the Hierarchy of Russian Law*

The Russian Federation Constitution establishes a monist system, in sharp contrast to the dualist approach to international law employed by the Soviet Union.<sup>53</sup> The following articles of the Russian Federation Constitution are relevant. Article 15, § 4 states:

The generally recognized principles and norms of international law and the international treaties of the Russian Federation shall constitute an integral part of its legal system. If an international treaty of the Russian Federation establishes rules other than those established by the law, the rules of the international treaty shall apply.<sup>54</sup>

Article 17, § 1 states:

The rights and freedoms of the human being and citizen shall be recognized and guaranteed in the Russian Federation in conformity with the generally recognized principles and norms of international law and in accordance with this Constitution.<sup>55</sup>

Article 46, § 3 states:

Everyone shall have the right, in accordance with international treaties of the Russian Federation, to apply to international organs concerned with the protection of human

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53. Generally speaking, a monist system is one permeated by international law without the need for domestic legislative action. A dualist system requires that international treaties and other obligations be given force of law by legislative enactment. For a discussion of the monism/dualism debate in international law, see HARRIS, *supra* note 5, at 68–71. In relation to Russia, see Article 5, § 3 of the Russian Law of Treaties: “The provisions of officially published international treaties of the Russian Federation which do not require the publication of intra-State acts for application shall operate in the Russian Federation directly. Respective legal acts shall be adopted in order to effectuate other provisions of international treaties of the Russian Federation.” For an excellent English translation and commentary on the Law of Treaties, see WILLIAM E. BUTLER, *THE RUSSIAN LAW OF TREATIES* (1997). For commentary, see DANILENKO & BURNHAM, *supra* note 43, at 34 n.62 and 41–47; see also G.M. Danilenko, *The New Russian Constitution and International Law*, 88 AM. J. INT’L L. 451, 458–68 (1994).

54. KONST. RF art. 15, § 4 (1993).

55. *Id.* at art. 17, § 1.



rights and freedoms if all available domestic remedies have been exhausted.<sup>56</sup>

Article 55, §§ 1 and 2 state:

1. The enumeration of fundamental rights and freedoms in the Constitution of the Russian Federation shall not be interpreted to deny or diminish other generally recognized rights and freedoms of the human being and citizen.<sup>57</sup>

2. No laws denying or diminishing the rights and freedoms of the human being and citizen may be issued in the Russian Federation.<sup>58</sup>

These are statements of constitutional law with enormous implications.<sup>59</sup> First, Articles 17 and 55 may be interpreted to mean that international law is superior to the Russian Constitution.<sup>60</sup> Second, Article 15 incorporates *all* international law into Russian domestic law, not only the law created by ratified treaties but also “generally recognized principles and norms” of international law, i.e. customary international law.<sup>61</sup> Third, treaty norms are considered superior to domestic federal, republican, and provincial law; customary international law, however, is not given superiority.<sup>62</sup>

According to Professor Gennady Danilenko, the Russian Federation Constitutional Court first based a decision on international law in 1993.<sup>63</sup> Danilenko notes that the Constitutional Court now “invokes international law in almost all of its decisions concerning human rights.”<sup>64</sup> A 1995 Russian Federation Supreme Court explanation (which is binding on inferior courts) orders the direct use of international law in judgments.<sup>65</sup> Another 1995 Russian Federa-

56. *Id.* at art. 46, § 3.

57. *Id.* at art. 55, § 1.

58. *Id.* at art. 55, § 2.

59. Butler calls this formal recognition and integration of international law into Russian domestic law “one of the most momentous changes of the twentieth century in the development of Russian law.” BUTLER, *supra* note 34, at 592.

60. *Id.* at 593.

61. DANILENKO & BURNHAM, *supra* note 43, at 33.

62. *Id.* In addition, Butler notes that the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights have been held to be “generally-recognised” norms of international law. BUTLER, *supra* note 34, at 592.

63. See The Labor Code Case, Vestn. Konst. Suda RF, No. 1 (1993), excerpted in DANILENKO & BURNHAM, *supra* note 43, at 34.

64. DANILENKO & BURNHAM, *supra* note 43, at 42 (citing remarks made by Danilenko at the Ninety-First Annual Meeting of the American Society of International Law (1997)).

65. *Id.* at 43.

tion Supreme Court explanation ordered inferior courts to make direct use of Article 9 of the International Covenant on Civil and Political Rights.<sup>66</sup> Furthermore, courts may make use of the interpretation given to treaties by international organs. Thus, in connection with Russia's Council of Europe obligations, Danilenko notes that there is "no bar to the domestic use of the interpretation of the [European] Convention [of Human Rights and Fundamental Freedoms] advanced by the European Court of Human Rights. The case-law of the European Court may thus be gradually transformed into Russian domestic jurisprudence."<sup>67</sup>

In addition, Russian legislation has been passed with regard to the domestic use of international law. The 1995 Law on International Treaties requires the immediate and direct application of officially published treaties if no enabling legislation is required.<sup>68</sup> Danilenko notes that this indicates that the Russian Federation treats self-executing and non-self-executing treaties differently, which could have a substantial impact on the use of different treaties by the courts.<sup>69</sup> Treaties that are deemed to require domestic enabling legislation may not be utilized by the courts.<sup>70</sup> Finally, Danilenko notes:

Under the existing Criminal Procedure Code, it is possible to request the review of a conviction following a finding by international organs by referring to a "new circumstance" or a breach of "the law," a formula which may include violations of international law. Similar considerations may be invoked in civil cases.<sup>71</sup>

It would appear that this reference to civil cases refers to Article 7 of the 1994 Civil Code, which states that international treaties "directly apply" to civil relations, except in those circumstances

66. *Id.* at 49–50.

67. *Id.* at 46.

68. *Id.* at 49.

69. *Id.* at 49; *see also id.* at 47–48 (translation of excerpt from Russian Supreme Court: "Ruling of the Plenary Session of the Supreme Court of the Russian Federation 'On Some Questions Concerning the Application of the Constitution of the Russian Federation by Courts.'").

70. *Id.* at 43–45 (noting that although the Russian Federation Constitutional Court initially seemed inclined to make no distinction between these two types of treaties, subsequent legislative activity by the Russian Federation Duma created countervailing influences).

71. *Id.* at 47 n.74.

that require enabling domestic legislation.<sup>72</sup> The ECHR does not present such a circumstance.<sup>73</sup>

### *B. Russian Reservations to the European Convention on Human Rights*

As did virtually all states-signatories to the ECHR,<sup>74</sup> Russia lodged reservations at the time of its accession to the Convention.<sup>75</sup> Russia's two reservations both relate to conformity of its Soviet-era Criminal Procedure Code<sup>76</sup> to the provisions of Article 5 of the Convention.<sup>77</sup> The Russian reservation is in two parts. The first part

72. *Id.* at 49.

73. Butler sees greater disagreement in the Russian legal community regarding the direct use of international law. He cites Article 15(1) of the 1995 Law of Treaties, noting some jurists argue that only ratified treaties are superior to Russian law. Treaties that are not ratified, or not subject to ratification, "fall outside the scope of Article 15(4) of the 1993 Russian Constitution and Article 5(1) of the 1995 Law on treaties." BUTLER, *supra* note 34, at 593-94. A Supreme Court Plenum decree (October 31, 1995) adopts the view that other treaty rules are to be applied only if made binding by federal law. *Id.* at 594. However, with regard to the ECHR in particular, the combination of the treaty's own provisions for incorporation into domestic law, enforcement mechanisms, and empirical treatment by both the Council of Europe and Russian authorities of a growing docket of complaints, suggests there seems to be little dispute about its direct applicability.

74. For a full list of all countries and conditions of accession to the ECHR, see Chart of Signatures and Ratifications, *supra* note 1.

75. Reservations are permitted under ECHR. See ECHR, *supra* note 3, at art. 57. Reservations may not be of a general character, must be in regard to a particular provision of the Convention, and must contain a brief statement of the domestic law concerned. *Id.* It should be noted that Russia *did not* lodge any declarations, authorities, territorial applications, communications, or other objections to the ECHR, as did other member-states. See Chart of Signatures and Ratifications, *supra* note 1.

76. Emerging from the rubble of the previous Soviet regime, the Russian Federation was forced to operate a legal system governed by a mix of already existing Soviet laws and newly minted post-Soviet ones. This peculiar situation was especially true with regard to criminal law and criminal procedure law. In 1960, the then RSFSR enacted a Criminal Code and a Criminal Procedure Code (in substance, virtually identical to codes enacted for the USSR as a whole and other components of the Soviet Union). With numerous amendments, revisions and repairs, these codes continued to operate after the Soviet Union collapsed in 1991. See *Ugolovnyi kodeks RSFSR. Ugolovno-protsessual'nyi kodeks RSFSR. C izmeneniami i dopolneniami po sostoiianiiu na 1 iuliu 1994 g* [*Criminal Code of the RSFSR. Criminal Procedure Code of the RSFSR. With changes and additions through 1 July 1994*], (Izdatel'stvo BEK [Publishing House BEK] (1994). Not until 1996 was consensus reached on a new Russian Federation Criminal Code, which was passed to replace the old Soviet-era code. Because of heated disputes in the drafting of the Criminal Procedure Code, however, not until 2001 has both the substance and process of Russian criminal justice been governed by post-Soviet codes of law. BUTLER, RUSSIAN LAW, *supra* note 34, at 550; DANILENKO & BURNHAM, *supra* note 43, at 455.

77. In addition, at the time of publication, Russia has signed, but not ratified, the following Council of Europe treaties of particular relevance to the advancement of its Article 5 and Article 6 obligations: Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Apr. 16,

concerns application of the Criminal Procedure Code to procedures involving all persons under the jurisdiction of the courts of the Russian Federation. The second part concerns only military detention, in which case application to a Russian court is not always possible.<sup>78</sup>

At the time of its accession, the Russian Federation had yet to adopt a new Criminal Procedure Code. (A new Criminal Code, on the other hand, was adopted in July 1996—effective January 1, 1997.)<sup>79</sup> A new Criminal Procedure Code became law in December 2001;<sup>80</sup> however, most of the Code's provisions will not become effective until July 1, 2002.<sup>81</sup> In addition, as noted below, several of the Code provisions that are crucially important to bringing Russia into compliance with its ECHR obligations may not become effective until January 1, 2004.<sup>82</sup> Therefore, for the time being, Russian criminal justice *still* operates under elements of the Criminal Procedure Code of the now defunct Russian Soviet Federated Socialist Republic (RSFSR).<sup>83</sup> This Code relied on the central role of the procurator<sup>84</sup> in virtually every stage of a criminal case, from arrest

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1997, Europ. T.S. No. 114 and Criminal Law Convention on Corruption, Jan. 27, 1999, Europ. T.S. No. 173.

78. Bowring, *supra* note 6, at 366. Both parts of the reservation are reproduced *infra* in Appendix A.2 of this Note.

79. Ugolovnyi kodeks Rossiiskoi Federatsii, No. 63-FZ, [Criminal Code of the Russian Federation, Federal Law No. 63-FZ,] *Sobr. Zakonod. RF*, [Collected Legislation of the Russian Federation,] 1996, No. 25, Art. No. 2954, at 6007–6132. For an excellent English translation, see CRIMINAL CODE OF THE RUSSIAN FEDERATION (William E. Butler, trans., 3rd ed. 1999).

80. On June 20, 2001, a draft Criminal Procedure Code passed its second reading (of three) in the Duma, by a margin of 290–2. On November 22, 2001, it passed its third and final reading in the Duma. On December 5, 2001, it was approved by the upper chamber of the Russian Parliament, the Federation Council, and on December 18, 2001, it became law. For the legislative history, see <http://www.akdi.ru/gd/proekt/fz01.HTM>.

81. O vvedenii v deistvie, No. 177-FZ, [Federal Law No. 177-FZ], UPK RF [Code of Criminal Procedure] art. 1 (2001), available at <http://www.akdi.ru/gd/proekt/079044GD.SHTM>.

82. Criminal Procedure Code Article 29 § 2, which transfers power over pre-trial detention from the procurator to the judge, was slated to enter into force only on January 1, 2004. *Id.* at art. 10. However, as noted below, a surprising ruling by the Russian Federation Constitutional Court ordered this entry deadline to be accelerated to July 1, 2002. Other provisions, including those on the composition of certain courts (UPK RF Art. 30) and the participation of the accused in certain procedures (UPK RF Art. 246) are to enter into force in 2003. *Id.* at arts. 7–9.

83. This Code was first adopted in 1960, but has since undergone considerable amendment. See CRIMINAL CODE, *supra* note 79, at xxi–xxii.

84. The procuracy, a uniquely Russian institution, combines the office of a criminal prosecutor with that of a general ombudsman supervising the lawful operation of virtually all ministries, agencies, and departments. The institution that ultimately became the procuracy was created in 1722 by Peter the Great, probably on the basis of the famous Czar's junkets to Sweden, among other adventures. See BUTLER, *supra* note 34, at 172–86.

to post-conviction—or even post-acquittal—review.<sup>85</sup> This fact placed the old code into fundamental conflict with established ECHR jurisprudence essential to Russia's eventual compliance with European human rights norms.<sup>86</sup> Rapporteurs of the Council of Europe repeatedly stressed the importance of drafting new codes of criminal procedure (as well as codes of criminal law, civil procedure, and a law on the penitentiary system).<sup>87</sup> Citing the European Court of Human Rights case *Brincat v. Italy*,<sup>88</sup> for example, one scholar noted that the ECHR does not recognize Russian procurators as falling under the category of "other officer authorized by law to exercise judicial power" for the purposes of arrest and detention covered under Article 5, Section 3.<sup>89</sup>

What is to be made of the Russian reservations? On a positive note, the mere fact that such a reservation was lodged prior to accession to the Convention implies awareness in Russian legal and political circles of the dissonance between European and Russian standards in these areas. The system of reservations is an entirely proper method of signaling awareness of such noncompliance with expected obligations under the Convention. The Russian reservation notes in particular that such applications are only "temporary."<sup>90</sup> Finally, as Article 57 of the ECHR specifically prohibits reservations "of a general character," the reach of Russian noncompliance with human rights norms established in the Convention must be particularized and specified in advance. Reservations made with regard to Article 5, § 3, for example, cannot be applied to other Convention articles.

On the other hand, the "temporary" state of affairs described in Russia's reservation has now lasted for over four years. Reservations to multilateral treaties are generally lodged because time is needed to bring domestic law into conformity with treaty obligations. However, as a rule, the *practice* of the offending domestic law is

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85. O prokurature Rossiiskoi Federatsii, [On the Procuracy of the Russian Federation,] *Sobr. Zakonod. RF*, [Collected Legislation of the Russian Federation,] 1995, No. 47, Art. No. 4472, at 8330–53. For commentary, see DANILENKO & BURNHAM, *supra* note 43, at 117–23, 512. These functions will be examined in greater detail below. *See infra* notes 116–87 and accompanying text.

86. Bowring, *supra* note 6, at 367.

87. Report of the Political Affairs Comm. on Russia's Request for Membership of the Council of Europe, Eur. Consult. Ass. 1996 Sess., Doc. 7443 (Jan. 2, 1996) *reprinted in* 17 *HUM. RTS. L. J.* 187, 197 (Oct. 15, 1996).

88. *Brincat v. Italy*, 249 Eur. Ct. H.R. (ser. A) at 12 (1993) (holding that "if it then appears that the 'officer authorised by law to exercise judicial power' may later intervene, in the subsequent proceedings, as a representative of the prosecuting authority, there is a risk that his impartiality may arouse doubts which are to be held objectively justified").

89. Bowring, *supra* note 6, at 367.

90. *See infra* Appendix A.2.

typically suspended while the law is changed.<sup>91</sup> This was made difficult in the case of the Russian Criminal Procedure Code, which could hardly be suspended without implementation of a new law to fill the legal vacuum. To the extent that these reservations stabbed at the core of Article 5 guarantees of rights of liberty and security, Russian exceptionalism in this area undermined many other aspects of Russian human rights. An argument might even be made that, as expressed in the Vienna Convention on the Law of Treaties, such reservations as recorded by Russia are “incompatible with the object and purpose of the treaty.”<sup>92</sup> Further support for this reasoning is found by analogy to General Comment 24 of the U.N. Human Rights Committee.<sup>93</sup>

The new Russian Criminal Procedure Code, as will be noted below, may make continuation of Russia’s reservation to the ECHR unnecessary. However, this is not to say that the Russian Federation *will* withdraw the reservation, or that Russia will therefore be in full compliance with its ECHR obligations. As noted below, a progressive law on habeas corpus, passed almost a decade ago, is still grossly underutilized by judges still operating in the conceptual, social, and often physical remnants of the old Soviet system. And

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91. According to Nuala Mole, General Comment 11 of the U.N. Human Rights Committee is generally seen as the basis for this understanding of reservations to human rights treaties. Interview with Nuala Mole, Director, AIRE Centre, in Moscow, Russ. (July 6, 2000) (on file with author). This Comment reads in part:

In view of the nature of article 20 [of the International Covenant on Civil and Political Rights], States parties are obliged to adopt the necessary legislative measures prohibiting the actions referred to therein. However, the reports have shown that in some States such actions are neither prohibited by law nor are appropriate efforts intended or made to prohibit them.

General Comment 11, U.N. Hum. Rts. Comm., 19th Sess., at 12, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

92. Vienna Convention on the Law of Treaties, May 23, 1969, art. 19(c), 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

93. *General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, General Comment 24, U.N. Hum. Rts. Comm., 52nd Sess., 1382nd mtg. at § 12, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).

Reservations often reveal a tendency of States not to want to change a particular law. And sometimes that tendency is elevated to a general policy. Of particular concern are widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted.

although considered on their own, Russia's twin reservations from Article 5 obligations regarding pre-trial detention and arrest are particularly disheartening, one might consider these reservations to be the tip of the iceberg—as the rest of this Note argues, there are many more instances of Russian noncompliance with European human rights obligations that are *not* subject to any pre-accession reservations or subsequent derogations.

Finally, whether or not the reservation is withdrawn, it may be of limited practical benefit to the Russian government. It is important to make clear that Russia's fairly sweeping reservation was nevertheless of rather limited domestic effect. True, the Reservation, by definition, prevents the European Court of Human Rights from holding Russia in violation of specified provisions of the Convention. As already noted, however, Russian constitutional law places international law (in both its treaty and customary law forms) at the highest levels of Russia's legal hierarchy. There is nothing to prevent a Russian lawyer from presenting violations of the Convention, and the European Human Rights Court's relevant caselaw, in its arguments before a Russian court. Although the vast majority of Russian judges are still likely to find such practice quite unfamiliar, both the Russian Constitutional Court<sup>94</sup> and Supreme Court<sup>95</sup> have deployed the Convention and ECHR caselaw in their own decisions, encouraging lower courts to do the same. In some cases, entire sections of the Criminal Procedure Code have been declared by the Constitutional Court to be in violation of the Russian Constitution. Even with its reservation, therefore, the impact of the Convention on Russian domestic legal practice is potentially considerable.

In a recent case (heard under the still-existing reservation), *Kalashnikov v. Russia*,<sup>96</sup> the Court was faced with an admissibility decision on a complaint of detention on remand in excess of four years. When the Russian Government sought to invoke its reservation to block admissibility, the Court noted the objection, but nevertheless held the reservation was “closely linked to the merits of the applicant's complaint,” setting the case for hearing on the merits.<sup>97</sup> How the reservation will affect the decision on the merits must wait until the hearing and decision, scheduled to begin summer 2002.

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94. See *supra* note 64 and accompanying text.

95. See *supra* note 65 and accompanying text.

96. App. No. 47095/99, (Eur. Ct. H.R. Sept. 18, 2001), <http://www.echr.coe.int/>.

97. *Id.* at \*24.

### III. RUSSIAN CRIMINAL PROCEDURE, CRIMINAL LAW, AND ARTICLES 5 AND 6

According to three leading European human rights practitioners, Luke Clements, Nuala Mole, and Alan Simmons, "more than half of all complaints to Strasbourg invoke Article 5 and/or 6."<sup>98</sup> This general trend has been corroborated by leading Russian human rights lawyers in the particular case of Russia, as well.<sup>99</sup> This section examines several key issues of dissonance between Russian and European human rights and legal norms that are *not* the subject of Russian reservations to the ECHR. These include matters of habeas corpus and pre-trial detention; rights to a speedy trial and an adequate defense; problems of double jeopardy; and the current moratorium on the death penalty—a direct result of Council of Europe requirements.

It should be noted at the outset that criminal law and procedure in the Russian Federation differs from Anglo-American preconceptions of those subjects in two important respects. First, the Russian system is for the most part based on an inquisitorial—rather than adversarial—approach to matters of criminal justice. This system is a function of historical ties to continental European approaches, ties that date back to Peter the Great.<sup>100</sup> Thus, comparisons between the American and Russian models of criminal justice, for example, may be of less value than comparisons with French or German models, with which there is more in common. That said, the more immediate Soviet legacy is a second, highly salient feature that must be kept in mind. Although ideology-driven normative prescriptions have largely been eradicated from the Russian criminal justice system, both Soviet-era personnel and habits continue to affect the system. As William Butler has observed with regard to the Criminal Procedure Code:

The object of the proceedings likewise may differ; they are not merely to expose crimes expeditiously, convict the guilty, and ensure the proper application of the law. The legacy of

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98. See CLEMENTS ET AL., *supra* note 5, at 139.

99. Interviews with attendees at the 2000 ECHR Summer School sponsored by the Council of Europe, in Moscow, Russ. (Summer 2000) (cited on condition of anonymity) (on file with author).

100. See generally NICHOLAS V. RIASANOVSKY, A HISTORY OF RUSSIA 227–28, 230–34 (5th ed. 1993) (explaining how the roots of this system were established when Peter the Great adapted European institutions to the Russian situation).



the Soviet past remains in the Code and speaks of using criminal procedure to strengthen legality, assist crime prevention, and help nurture and educate citizens to obey and respect the law.<sup>101</sup>

### A. Habeas Corpus and Pre-Trial Detention

The Russian Federation detains more people in its penitentiaries than any other country in the world.<sup>102</sup> According to the U.S. State Department, Bureau of Democracy, Human Rights and Labor, citing January 2001 statistics of the Public Center for Penitentiary Reform, 1,060,000 people are detained in penitentiaries or other facilities run by the Ministry of Justice.<sup>103</sup> Of this number, approximately 280,000 people are confined to Special Isolation Facilities in pre-trial detention.<sup>104</sup> Conditions in these grossly overcrowded institutions are, by all accounts, abominable.<sup>105</sup> Nine years after the passage of a federal law that extended review of unlawful detention beyond criminal investigators and procurators to independent judges—the Russian equivalent of habeas corpus review—the law has been grossly underutilized by a judiciary still in the grips of old thinking, Soviet-era personnel, and both chronically underfunded and hopelessly overextended.<sup>106</sup>

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101. BUTLER, *supra* note 34, at 243.

102. According to the report of Oleg Mironov, Plenipotentiary for Human Rights in the Russian Federation, more than 700 people per 100,000 were detained, exceeding Western Europe, on average, by factors of seven to fifteen. At the time of publication, Mironov reported 330,000 people in pre-trial detention. Bowring, *supra* note 6, at 373 (citing the First Annual Report of the activities of the Plenipotentiary for Human Rights in the Russian Federation dated Feb. 10, 1999).

103. BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEPT. OF STATE, COUNTRY REP. ON HUM. RTS. PRACS. 2000: RUSSIA (Feb. 2001), <http://www.state.gov/g/drl/rls/hrrpt/2000/eur/>. It should be noted that, in addition to the Ministry of Justice, the Ministry of Health, the Ministry of Defense, and the Ministry of Education of the Russian Federation all maintain penal institutions. *Id.*

104. *Id.* There are 195 of these facilities in the Russian Federation. In addition, approximately 65,000 people are held in police detention centers. *Id.*

105. The conditions of Russian penitentiaries and detention centers might raise admissible claims of violation of Article 3 of the Convention, the prohibition of torture, inhuman or degrading treatment, or punishment. Recently, Russian Deputy Minister of Justice Yuri Kalinin admitted to ITAR-TASS that conditions of pre-trial detention in Russia were "equal to torture" and must be brought into conformity with Council of Europe standards as quickly as possible. See Paul Goble, *Detention Center Conditions 'Equal to Torture'*, 5 RFE/RL NEWSLINE, Apr. 27, 2001, at <http://www.rferl.org/newsline/search/>.

106. For an excellent analysis of this amendment to the Criminal Procedure Code and its (lack of) effects, see Todd Foglesong, *Habeas Corpus or Who Has the Body? Judicial Review of Arrest and Pretrial Detention in Russia*, 14 WIS. INT'L L.J. 541, 559–68 (1996).

Whether a person is arrested as a result of an investigation, or an investigation follows an arrest for which there is immediately sufficient evidence to label the person a suspect (*podozrevaemyi*), the Russian Constitution, Criminal Procedure Code, and a federal law on detention set strict constraints on the nature and period of detention.<sup>107</sup> Article 22, § 2 of the Constitution states: "Arrest, detention and custodial confinement shall only be permitted pursuant to a judicial order. Absent such an order, no person may be detained for more than 48 hours."<sup>108</sup> This plain language of the Constitution acquires an aspirational tone, however, due to Part Two "Transitional Provisions" of the Constitution, which extends the life and legal supremacy of existing (i.e. Soviet-era) criminal procedures.<sup>109</sup> Russia's Reservation to the ECHR likewise reflects this retention of the old procedures and norms.<sup>110</sup>

The still-functioning Soviet-era Criminal Procedure Code<sup>111</sup> grants the criminal investigator seventy-two hours of interrogation, detention, and investigation before a "suspect" must be either released or reclassified as an "accused" (*obviniaemyi*). Within the first twenty-four hours of this period, written notification must be made to the procurator about the detention.<sup>112</sup> To the credit of the

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107. "O soderzhanii pod strazhei podozrevaemykh i obviniaemykh v sovershenii prestuplenii" (v red. Federal'nogo zakona ot 21.07.98 N 117-FZ), [On detention of suspects and accused in perpetration of a crime, (in the redaction of the Federal law of July 7, 1998, No. 117-FZ)], *Sobr. Zakonod. RF*, [Collected Legislation of the Russian Federation], 1998, No. 29, Art. No. 2759, at 5226-47.

108. KONST. RF, art. 22, § 2 (1993).

109. Section 6 of the "Concluding and Transitional Provisions" in Part II of the Constitution states: "Until the criminal procedure legislation of the Russian Federation is brought into conformity with the provisions of this Constitution, the former procedure for arrest, custodial confinement and detention of persons suspected of having committed a crime shall be preserved." KONST. RF, pt. 2, § 6 (1993).

110. Foglesong notes, for example, how accounting practices for reducing crime statistics may have helped drive police practices contrary to ECHR norms. A crime is "solved" once charges have been lodged against a suspect:

In most cases credible charges can be laid only after an initial interrogation of the suspect, therefore the innovation in accounting procedures gave police considerable incentives to arrest suspects more often.

[The Procuracy] has strong incentives to overlook violations of the law in the work of the police if they contribute to the impression that the war against crime is being waged successfully.

Foglesong, *supra* note 106, at 551-52.

111. *See supra* note 76.

112. DANILENKO & BURNHAM, *supra* note 43, at 466 n.28. With regard to Article 122 of the post-Soviet revision of the Soviet Criminal Procedure Code, Danilenko notes that the Code permits an additional ten days of detention in "exceptional situations" to determine

Russian Constitutional Court, attempts by regional governments to extend this period still further have been rebuffed as unconstitutional.<sup>113</sup> Following re-classification as an “accused,” pre-trial detention (*zakliuchenie pod strazhu*) in Russia may amount to a period of several years.<sup>114</sup> Hard to quantify but reliable analysis suggests that such lengthy pre-trial detention increases the likelihood of final conviction.<sup>115</sup>

In the Russian system, the decision regarding initial confinement in custody and pre-trial detention rest with the procurator, *not with the judge*.<sup>116</sup> Such authority is in conflict with the European case law on pre-trial detention. A judicial officer must be completely independent of executive-enforcement functions to qualify as the “judge or other officer” authorized to “exercise judicial power” in the question of detention.<sup>117</sup> A procurator, because of his role in investigation, oversight, prosecution, and potential appeal in a criminal case, does not qualify, nor do his subordinates (e.g., criminal investigators). Citing the European Court of Human

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whether a “suspect” should become an “accused.” *Id.* At least one draft of the Soviet-era revised Criminal Procedure Code, however, eliminated this 240-hour extension. UPK RF [Criminal Procedure Code] art. 122 (1994).

113. Delo o proverke konstitutsionnosti punkta ‘b’ chasti pervoi stat’i 1 Zakona Respubliki Mordoviia, ot 20 ianvaria “O vremennykh chrezvychainykh merakh po bor’be s prestupnost’iu,” [Russian Federation Constitutional Court Case re: the Constitutionality of the Statute of Mordovia dated Jan. 20, 1996, “On Temporary Emergency Measures in the Fight against Crime”] Vestn. Konst. Suda RF, 1997, No. 5 at 25–30 (holding that, despite its characterization as “administrative detention,” a procurator may not detain a person suspected of membership in an organized criminal group for thirty days because this constitutes both an unconstitutional violation of the presumption of innocence as well as unconstitutionally long detention).

114. An eleventh hour amendment to the revised post-Soviet Criminal Procedure Code permits extension of pre-trial detention beyond the normal limit of up to an additional eighteen months only for “particularly grave crimes” (“*osobo tiazhkiye prestupleniia*”) by order of the General Procurator. See *O vnesenii izmeneniia v stat’iu 97, No. 183-FZ*, [Federal Law No. 183-FZ,] UPK RF [Code of Criminal Procedure] (2001), published in ROSS. GAZETA, Dec. 22, 2001, available at <http://www.akdi.ru/gd/proekt/087971GD.SHTM>. The amendment entered into effect on January 1, 2002, and, absent further legislation, will operate until the effective date of the new Criminal Procedure Code.

115. To the extent that this is an indication that lengthy periods of pre-trial detention decrease or reverse the presumption of innocence, this itself might be a violation of the ECHR. Article 5, § 3 and Article 6, §§ 1–2 provide for the presumption of innocence and the right to a fair and speedy trial. See for example, *Kalashnikov v. Russia*, App. No. 47095/99 (Eur. Ct. H.R. Sept. 18, 2001), <http://www.echr.coe.int/>, the most recent case involving these articles.

116. See UPK RF [Code of Criminal Procedure] arts. 96, 97, 122 (1994); see also DANILENKO & BURNHAM, *supra* note 43, at 477. (Unless otherwise noted, all citations to the Criminal Procedure Code are of the current, i.e. Soviet-era, law.)

117. *Brincat v. Italy*, 249 Eur. Ct. H.R. (ser. A) at 12 (1993) (holding that “if it then appears that the ‘officer authorised by law to exercise judicial power’ may later intervene, in the subsequent proceedings, as a representative of the prosecuting authority, there is a risk that his impartiality may arouse doubts which are to be held objectively justified”).

Rights case *Brincat v. Italy*,<sup>118</sup> Bowring notes that the ECHR does not recognize the procurator as falling under the category of “other officer authorised by law to exercise judicial power” that appears in Article 5, Section 3.<sup>119</sup> Indeed, there are good reasons to be circumspect of the role of procurators in the decision to detain an individual. In clear violation of the ECHR protection of the presumption of innocence<sup>120</sup> are public statements by authorities about the likelihood of guilt of those arrested or detained or charged with a crime. The statement of a former director of the FSB (formerly KGB) that “I’m all for the violation of human rights if the human in question is a bandit or a criminal”<sup>121</sup> would not meet with much support in Strasbourg. Made with regard to a particular defendant, such a statement would be a clear violation of the ECHR and would be seen to invalidate any subsequent trial.

The 2001 Criminal Procedure Code, to its credit, will radically change this practice when Article 29, § 2 comes into force. Under the new Code, the court, *not* the procurator, determines whether these “means of restraint” (*mery presecheniia*) will be used against the accused (and in extraordinary cases, a suspect).<sup>122</sup> As one might expect, the Code met with strong opposition from procurators, from whom it also will take away the autonomous power to issue arrest and search warrants, transferring the same power to the courts.<sup>123</sup> Russian lawmakers expected that such a radical departure from long-standing practice by prosecutors would require a transitional period. The law implementing the new Criminal Procedure Code, therefore, established a transitional period for judges, prosecutors, and other personnel in the criminal justice system to adapt to the new Code. While the bulk of the Code would come into force on July 1, 2002, the new judge-centered practices controlling pre-trial detention would not come into effect for another eighteen months, on January 1, 2004.<sup>124</sup>

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118. *Id.*

119. Bowring, *supra* note 6, at 367.

120. ECHR, *supra* note 3, art. 6, § 2.

121. Foglesong, *supra* note 106, 550 n.32 (citing John Lloyd, *Crime Action Splits Russians: Crisis Decree Could Revive the KGB*, FINANCIAL TIMES (London) June 27, 1994, at 3).

122. See No. 174-FZ [Federal Law No. 174-FZ], UPK RF [Code of Criminal Procedure] art. 29 § 2 (2001); *id.* at art. 37 § 2 (5); *id.* at art. 101 § 1; *id.* at 108 §§ 3–4.

123. See Victor Yasmann, *Duma Approves New Criminal Procedures Code on Second Reading*, 5 RFE/RL NEWSLINE, June 21, 2001, at <http://www.rferl.org/newsline/search/>.

124. See *O vvedenii v deistvie ugolovno-protsessual'nogo kodeksa Rossiiskoi Federatsii* (No. 177-FZ), [On introduction into force of the criminal procedure code of the Russian Federation (Federal Law No. 177-FZ)], UPK RF art. 10 (2001) published in ROSS. GAZETA, Dec. 22, 2001, No. 249, available at <http://www.akdi.ru/gd/proekt/079044GD.SHTM>.

In a surprising—and inspiring—decision (*postanovlenie*) by the Russian Federation Constitutional Court, however, this transitional period was struck down.<sup>125</sup> The Court heard petitions from several Russian citizens who had been named “suspects” in criminal cases and placed in pre-trial detention by order of the procurator. The citizens maintained that this action violated Article 22 of the Russian Constitution: “arrest, detention and custody shall be permitted only by authority of judicial order.”<sup>126</sup> Due to the transitional provisions of the Russian Constitution, however, Article 22 had been widely held to be in a state of suspended animation pending the adoption of new laws to replace the Soviet criminal procedure code.<sup>127</sup> Although the new Russian Criminal Procedure Code did finally replace its outdated Soviet predecessor, it was to be implemented only gradually.<sup>128</sup> The Court, however, put an end to this gradualism, making repeated and direct citation to the European Convention on Human Rights, specifically Article 5, Sections 3 and 4.<sup>129</sup> The Court ruled that, a new law of criminal procedure having been passed, the transitional period established in the Constitution was over; new transitional periods for the law itself could not be tacked on to the one that had just tolled.<sup>130</sup> The Court directed the Federal Assembly that the provisions of the new Criminal Procedure Code establishing judicially controlled pre-trial detention must enter into force on July 1, 2002, along with the rest of the Code.<sup>131</sup>

Even with a new Code in place, however, actual compliance is not guaranteed (as the experience of the neglected law on habeas corpus suggests). The intended phased implementation of the Code (adoption of measures regarding pre-trial detention were left

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125. *Postanovlenie Konstitutsionnogo suda Rossiiskoi Federatsii “Po delu o proverke konstitutsionnosti statei 90, 96, 122 i 216 Ugolovno-protsessual’nogo kodeksa RSFSR v sviazi s zhalobami grazhdan S.S. Malenkina, R.N. Martynova i S.V. Pustovalova,”* [Decision of the Constitutional Court of the Russian Federation “Case on the constitutionality of articles 90, 96, 122 and 216 of the Criminal Procedure Code of the RSFSR in connection with the complaints of citizens S.S. Malenkin, R.N. Martynov and S.V. Pustovalov”], Mar. 14, 2002 [hereinafter *Case of Malenkin, Martynov, & Pustovalov*]. At the time of publication, the Constitutional Court had not published its decision on its website or in the official government newspaper, the *Rossiiskaya Gazeta*. The copy of the decision used in this Note is available at <http://www.garant.ru>.

126. KONST. RF, art. 22, § 2 (1993).

127. KONST. RF, pt. II, § 6 (1993) (“Concluding and Transitional Provisions” established a transitional period during which, prior to the passage of a new law of criminal procedure, the existing Soviet criminal procedures would be enforced, notwithstanding the rights and freedoms guaranteed by the new Constitution.).

128. *See supra* note 76.

129. *Case of Malenkin, Martynov, & Pustovalov, supra* note 125, at \*2.

130. *Id.* at \*3.

131. *Id.* at \*4-5.

a full eighteen months later than most of the Code) is indirect evidence of concern for its effect “on the ground.”<sup>132</sup> Two important issues related to this timeline of arrest and detention, regardless of which Criminal Procedure Code may be used, involve practices reportedly used to delay the processing of cases by Russian police.<sup>133</sup> First, the current Russian Criminal Procedure Code extends to the police a seventy-two hour period of detention from the time when the police protocol has been drafted, *not* the time of arrest. However, Russian lawyers report that up to twenty-four hours may pass before such a protocol is actually written, despite the fact that a person already has been detained. Since the protocol is not, in their experience, written immediately, the actual time of detention is longer than the official time of detention.<sup>134</sup> Second, several Russian human rights lawyers noted a Kafka-esque dilemma that confronts them in representing clients detained by police or criminal investigators. The Procurator is required to forward materials to the judge within twenty-four hours;<sup>135</sup> a courier or other interagency means of delivery to the court building are typically used. When confronted with a habeas corpus-style motion, however, the judge may claim not to have received materials that the prosecutor claims to have sent—neither official, therefore, accepts the timeliness of the defense counsel’s petition for review. Citing a study by the State Legal Administration conducted in 1993, Professor

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132. At an informal meeting with five current Russian judges specializing in criminal cases, the author was told that both financial and psychological impediments were cited as reasons for this gradual adoption. One judge expressed the opinion that the immediate adoption of court-supervised pre-trial detention would require the doubling of judges in the Russian criminal justice system and an extraordinary expenditure of resources. Another judge noted that the shift in power from the procurator to the judge would need to be done gradually for the simple reason that neither group of court officials currently possessed the education, experience, and even mentality for an abrupt change. Gradualism, not shock therapy, was the best approach. Interview with judges from Azov, Rostov, Ulyanovsk, and Vologda, in Ann Arbor, Mich. (Mar. 13, 2002) (on file with author).

133. Interview with Russian human rights lawyers at the Council of Europe Summer School, in Moscow, Russ. (July 2000) (cited on condition of anonymity) (on file with author). These statements are based on the lawyers’ experience defending clients in the Russian criminal justice system.

134. Article 122, § 3 of the Criminal Procedural Code lists the required contents of the protocol (indicating the basis, motive, hour, day, month and year, place of arrest, explanation for arrest, time of composition of the protocol) and requires that “in the course of twenty-four hours to make a written communication to the procurator.” The procurator then has eight hours from the moment he receives notification to either sanction the confinement or free the detainee. UPK RF [Code of Criminal Procedure] art. 122 (1994).

135. UPK RF [Code of Criminal Procedure] art. 220 § 1 (1994) (addressing the appeal in court of arrest or prolongation of the period of keeping in custody); *see also* DANILENKO & BURNHAM, *supra* note 43, at 478.

Foglesong corroborates the remarks made by Russian human rights lawyers on the state of this malfeasance in 2000.<sup>136</sup>

Both Russian and European case law exists on these issues. The broadest statement of the principle that the state is obliged to organize its judicial system to guarantee due process rights (such as those enshrined in Articles 5 and 6) has been made by the European Court in the case of *Guincho v. Portugal*.<sup>137</sup> In short, inefficiency or lack of resources is no excuse for delays that violate human rights. Russian case law has also been developed by the Russian Federation Constitutional Court. According to the *Case on the Constitutionality of Articles 220(1) and 220(2) of the Criminal Procedure Code*,<sup>138</sup> no limitation may be placed on the categories of persons permitted to file suit to contest a detention order, nor may a limitation be placed that complaints will only be heard by a court where the detainee is lodged.

The positive effect of the European Convention on Russian judicial interpretation was made clear in an April 20, 1999 decision [*postanovlenie*] of the Russian Constitutional Court.<sup>139</sup> Coincidentally, the decision nearly corresponded with the anniversary of Russian ratification of the Convention. In this case, combining the inquiries of two lower courts about the constitutionality of extending periods of arrest in order to conduct supplementary investigations, the Constitutional Court specifically cited Article 6

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136. See Foglesong, *supra* note 106, at 560–61:

According to a study commissioned by the State Legal Administration of the President in the Summer of 1993, while jail administrators promptly reported complaints to procurators (perhaps because of pervasive overcrowding), in about only one-third of the cases were materials delivered to the courts within the twenty-four hour time limit. Less than half (42 percent) made it to court within three days, and only two-thirds arrived within five days. In the words of the Supreme Court, the time requirements of the law were “completely ignored” by the procuracy.

137. 7 Eur. H.R. Rep. 223 (1984) (holding foreseeable problems of backlog and delay confronting legal systems must be remedied by member-states to avoid violation of Article 6); see *supra* note 52, and accompanying text.

138. DANILENKO & BURNHAM, *supra* note 43, at 478–80 (reproducing and translating Vestn. Konst. Suda RF, 1995, No. 2/3, a case holding that a person ordered detained, but for whom an order was never executed, may nevertheless challenge the legality of his detention, notwithstanding the criminal procedure code limitations on venue and classes of persons entitled to file).

139. *Delo o proverke konstitutsionnosti polozhenii punktov 1 i 3 chasti pervoi stat'i 232, chasti chetvertoi stat'i 248 i chasti pervoi stat'i 258 Ugolovno-protsessual'nogo kodeksa RSFSR v sviazi s zaprosami Irkutskogo raionnogo suda Irkutskoi oblasti i Sovetskogo raionnogo suda goroda Nizhnii Novgorod* [case re: the examination of the constitutionality of article 232, part 1, points 1 and 3; article 248, part four; and article 258, part one of the RSFSR Criminal Procedure Code in connection with the inquiries of the Irkutsk District Court of Irkutsk Oblast' and the Soviet District Court of the city of Nizhnii Novgorod], Vestn. Konst. Suda RF, 1999, No. 4, at 40–49.

of the ECHR in its discussion of legal norms governing the interpretation of the Russian Constitution and Criminal Procedure Code. The Court held:

Under these circumstances the extension of the maximum period of arrest, which is brought about by the return of the case for additional investigation, is disproportionate to the socially justified aims of this measure of restraint and violates the right of the accused to judicial examination in a reasonable period of time or to timely release from prosecution, i.e. it is not in agreement with Articles 46 and 55 (parts 2 and 3) of the Constitution of the Russian Federation and also with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>140</sup>

Aside from the discrepancy between Russian and European accepted practice as to the permitted *length* of pre-trial detention, Russian law also has far broader *grounds* for detention than the ECHR. Under the ECHR, *any* detention, regardless of the claimed justification, is only permissible if “in accordance with a procedure prescribed by law.”<sup>141</sup> Article 5 reiterates the crucial matter again in § 1(c) that a detention must be “lawful.”<sup>142</sup> As a condition precedent and above any domestic law criteria, detention is lawful only when “effected for the purpose of bringing [the person] before the competent legal authority.”<sup>143</sup> The *only* grounds on which detention is then permitted are those based on “reasonable suspicion” that a person has committed an offence,<sup>144</sup> or when “reasonably considered necessary” to prevent an offence,<sup>145</sup> or to prevent flight after an offence has been committed.<sup>146</sup> On the other hand, the Russian Criminal Procedure Code (both the current and

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140. *Id.* at 48.

141. ECHR, *supra* note 3, at art. 5, § 1.

142. *Id.* at art. 5, §1(c). The European Court clarified its interpretation of this requirement in *Loukanov v. Bulgaria*, 24 Eur. H.R. Rep. 121, 138–39 (1997) (holding that detention of a former Bulgarian minister for participation in the grant of state loans was not a criminal offense and therefore “not ‘in accordance with a procedure prescribed by law’”).

143. ECHR, *supra* note 3, at art. 5, § 1(c).

144. The European Court’s interpretation of “reasonable suspicion” has been a narrow one. *See, e.g., Fox, Campbell and Hartley v. U.K.*, 13 Eur. H.R. Rep. (ser. A, No. 182) 157, 168–70 (1991) (holding that the “honestly” held belief by police that petitioners were terrorists did not rise to the level of “reasonable suspicion” sufficient for detention).

145. Preventive detention is permitted only if done with the intent to arraign the detainee promptly before a judge and if done in response to the commission of specific acts, not to general suspicions of criminality. *See CLEMENTS ET AL., supra* note 5, at 143.

146. ECHR, *supra* note 3, at art. 5, § 1(c).



the new code) provides a much wider array of grounds for detention: detention is permitted in both versions when “the existence of other information [*innie dannie*] provides a basis for suspecting the person of committing a crime.”<sup>147</sup> This “other information” may include cases of police confrontation of a person who subsequently attempts flight, a person who lacks permanent residence, or a person unable to prove his or her identity.<sup>148</sup> The new Code goes even further, providing that the procurator can request pre-trial detention on other grounds *beyond* those enumerated in this section upon successful petition to the court.<sup>149</sup> Also in potential conflict with the Convention, Article 89 of the Criminal Procedure Code (recodified as Article 97 of the 2001 Code) provides a much broader standard for the detention of an accused: in addition to “sufficient grounds to believe” that flight or further criminal conduct is likely, potential interference with the investigation is also an acceptable basis for detention. So, too, is detention in order to guarantee the execution of a future sentence.<sup>150</sup> One can imagine

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147. UPK RF [Code of Criminal Procedure] art. 122, § 3 (1994), recodified as UPK RF art. 91, § 2 (2001) (describing the detention of someone suspected in the commission of a crime); *see also* DANILENKO & BURNHAM, *supra* note 43, at 466.

148. UPK RF [Code of Criminal Procedure] art. 122, § 3 (1994) (“Given other information, which gives foundation to suspect a person of commission of a crime, he may be arrested only in the case where that person attempts flight or when he does not have a permanent residence or when he cannot establish his identity.”); *see also* Foglesong, *supra* note 106, at 553–54.

149. UPK RF [Code of Criminal Procedure] art. 91, § 2 (2001) states:

Given other facts, giving foundation to suspect the person of committing a crime, he may be detained, if this person attempts to flee, or does not have a permanent place of residence, or his identity is not established, or if by the procurator, and also by the investigator or inquirer with the agreement of the procurator, a petition is presented in court about the selection in relation to the named person of measures of restraint in the form of pre-trial detention.

150. *See* UPK RF art. 89 (1994):

Given sufficient grounds to believe that the accused may disappear from the inquiry, preliminary investigation or trial, or hinder the establishment of truth in the criminal case, or may be engaged in criminal activity, and also for the guarantee that the sentence is carried out, the person who has conducted the inquiry, investigator, procurator and court have the right to employ one of the following measures of restraint of the accused: a written undertaking not to leave a place, personal guarantee or bail of a social organization, confinement under guard [pre-trial detention].

The new Code, UPK RF art. 97, § 1 (2001), provides for pre-trial detention: “given sufficient foundation to suppose that the accused: (1) will escape from inquiry, preliminary investigation or trial; (2) may continue to engage in criminal activity; (3) may threaten a witness, other participants in the criminal legal proceedings, destroy evidence or in some other way impede the proceedings of the criminal case.” *Id.* Further, UPK RF art. 97, § 2

the frequency with which police and procurators would detain suspects and accused persons on those ambiguous grounds, and the difficulty for the defense of proving the negative, that the detainee will *not* “impede” the investigation if freed, let alone the necessity of guaranteeing a sentence that—presumption of innocence to one side—has yet to be determined. In fact, as the Kalashnikov case (described below) makes clear, the behavior of court authorities sometimes manages even to defy imagination. Another provision in conflict with Convention standards, the dangerousness of certain *offenses*<sup>151</sup>—not the dangerousness of the alleged offender—are grounds for pre-trial detention under the current Code (but, thankfully, this provision appears to have been excised from the new Code).<sup>152</sup> These discrepancies are summarized on the following pages:

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(2001) provides: “Measures of restraint also may be chosen for the guarantee of the execution of a sentence.” *Id.*

151. See UPK RF art. 96 (1994). Among the crimes listed as dangerous are: treason, espionage, terrorism (of various forms), sabotage, rape, statutory rape, sodomy, kidnapping, theft, robbery, swindling, extortion, bribetaking, various economic crimes, and drug offenses; see also DANILENKO & BURNHAM, *supra* note 43, at 477.

152. For a defense of this practice, see the dissenting opinion of Justice N.V. Vitruk, in *Delo o proverke konstitutsionnosti chast'i p'iatoi stat'i 97 Ugolovno-protsessual'nogo kodeksa RSFSR v svyazi s zhaloboi grazhdanina V.V. Shchelukhina* [case re: the Constitutionality of Article 97(5) of the Criminal Procedure Code of the RSFSR in connection with the complaint of citizen V.V. Shchelukhin] Vestn. Konst. Suda RF, 1996, No. 4 at 11. He writes:

More and more frequently in practice criminal cases have begun to spring up with a large number of accused persons and perpetration by them of crimes (banditism, robbery, rape, economic crimes, and other forms of organized, professionalized criminality), the punishment for which is connected with protracted terms of deprivation of freedom and the death penalty. As a measure of restraint, fixed terms of confinement proved ineffective.

GROUNDS FOR DETENTION UNDER RUSSIAN LAW  
AND UNDER THE EUROPEAN CONVENTION

<i>Conditions Precedent to Grounds for Detention</i>		
CURRENT RUSSIAN CRIMINAL PROCEDURE CODE	NEW RUSSIAN CRIMINAL PROCEDURE CODE	EUROPEAN CONVENTION
Procurator, not the Court, considers and orders pre-trial detention	Court, not the Procurator, considers and orders pre-trial detention	<p>“shall be brought promptly before a judge or other officer authorized by law to exercise judicial power . . . .” (Art. 5, § 3)</p> <p>“for the purpose of bringing him before the competent legal authority” (Art. 5, § 1 (c))</p>
<i>Grounds for Detention</i>		
CURRENT RUSSIAN CRIMINAL PROCEDURE CODE	NEW RUSSIAN CRIMINAL PROCEDURE CODE	EUROPEAN CONVENTION
<p>“person caught in the act of committing a crime or shortly thereafter . . . .” (Art. 122, § 1 (1))</p> <p>“eyewitnesses, including victims, directly indicate the given person, as the one who committed the crime. . . .” (Art. 122, § 1 (2))</p> <p>“on the suspect, or on his clothes, in his proximity or dwelling there will be discovered manifest signs of the crime. . . .” (Art. 122, § 1 (3))</p>	<p>“person caught in the act of committing a crime or shortly thereafter . . . .” (Art. 91, § 1 (1))</p> <p>“victims or witnesses indicate the given person as the one who committed the crime . . . .” (Art. 91, § 1 (2))</p> <p>“on this person or his clothes, in his proximity or in his dwelling there will be discovered manifest signs of the crime.” (Art. 91, § 1 (3))</p>	<p>“reasonable suspicion of having committed an offense” (Art. 5, § 1 (c))</p>

<i>Grounds for Detention (Continued)</i>		
CURRENT RUSSIAN CRIMINAL PROCEDURE CODE	NEW RUSSIAN CRIMINAL PROCEDURE CODE	EUROPEAN CONVENTION
<p>"Given sufficient grounds to believe that the accused will escape from inquiry, preliminary investigation or trial, or impede the establishment of the truth in a criminal case or will engage in criminal activity, and also for the guarantee of the execution of the sentence . . . ." (Art. 89)</p>	<p>"given sufficient grounds to suppose that the accused will escape from inquiry, preliminary investigation or trial, may continue to engage in criminal activity, may threaten witness, other participants in the criminal legal proceedings, threaten the investigation, destroy evidence or in other ways impede the carrying-out of the criminal case . . . ." (Art. 97, § 1 (1)-(3))</p>	<p>"reasonably considered necessary to prevent his committing an offence" (Art. 5, § 1(c))</p>
<p>dangerousness of the <i>offense</i> (<i>not</i> the offender) (Art. 96, § 2)</p> <p>"Given other facts, giving foundation to suspect a person of committing a crime, he may be detained only in those cases if this person attempts flight, he does not have a permanent place of residence, or when the identity of the suspect cannot be established." (Art. 122, § 2)</p>	<p>"Measures of restraint may be chosen as well for the guarantee of execution of the sentence." (Art. 97, § 2)</p> <p>"Given other facts, giving foundation to suspect the person of committing a crime, he may be detained, if this person attempts to flee, or does not have a permanent place of residence, or his identity is not established, or if by the procurator, and also by the investigator or inquirer with the agreement of the procurator, in court presents a petition about the selection in relation to the named person of measures of restraint in the form of pre-trial detention." (Art. 91, § 2)</p>	<p>"reasonably considered necessary to prevent . . . fleeing after having [committed offence]" (Art. 5, § 1(c))</p>

While there is obviously some overlap between similar categories, the Russian Criminal Procedure Code, old and new, is in every case more sweeping and broader in its criteria permitting

detention than the European Convention. This overbreadth is a clear case of conflict between the two legal systems. Although Russia's reservation, noted above, preserves the right to use these articles of the Criminal Procedure Code without violating its ECHR obligations, this reservation must be viewed as it declares itself to be: temporary. The new Criminal Procedure Code moves Russia closer to compliance with the ECHR (particularly by reserving decisions on detention exclusively to an independent judicial officer), but shortfalls and large areas of nonfeasance—both in the new Code as written and potentially as put into practice—remain.

### *B. Speedy Trials and Right to Defense Counsel*

The ECHR permits only “lawful” detention.<sup>153</sup> If the detention period is greater than that permitted by the law of the member-state, by definition, it is not “lawful” and therefore in violation of the ECHR. Excessively long periods of detention before trial may also not be “lawful” in this sense, but it is also unlawful under the more specific criteria of ECHR Article 5, § 3, which requires “trial within a reasonable time or . . . release pending trial.”<sup>154</sup> The case law of the European Court of Human Rights places the burden on the state to show “‘relevant and sufficient reasons to justify detention.’”<sup>155</sup> With regard to the Russian Federation, what do such subjective terms as “reasonable,” “sufficient,” and “justify” actually mean? It is clear that an argument of insufficient court resources or a bottlenecked docket will not be deemed sufficient by Strasbourg.<sup>156</sup> As leading practitioners in that venue have written, “[e]ven where relevant and sufficient reasons exist, the Court will review them in the light of the diligence shown by the authorities in the conduct of the proceedings. The longer the delay, the greater the justification required for rejecting release pending trial.”<sup>157</sup> Article 5, § 3 is the subject of a reservation by Russia.<sup>158</sup> However, “reasonable suspicion” for detention arguably decreases in the absence of, or with repeated delays in, the ongoing investi-

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153. ECHR, *supra* note 3, at art. 5, § 1(c).

154. *Id.* at art. 5, § 3.

155. CLEMENTS ET AL., *supra* note 5, at 148 (citing *Wemhoff v. F.R.G.*, 1 Eur. H.R. Rep. (ser. A, No. 7) 55 (1968)).

156. Both court-clog and insufficient resources are chronic problems in Russia. See Paul Goble, *Russian Courts Overwhelmed with Cases*, 5 RFE/RL NEWSLINE, Mar. 27, 2001, at <http://www.rferl.org/newsline/search>.

157. CLEMENTS ET AL., *supra* note 5, at 149.

158. See reservations reproduced in Appendix A.2.

gative activity of the procurator. Article 5, § 1(c), therefore, may be used to reach goals similar to those covered under Article 5, § 3.<sup>159</sup>

Courts in Russia's inquisitorial system of criminal justice privilege the written report of the procurator (the "protocol") much more than courts in adversarial criminal justice systems. It is the core around which the entire criminal case revolves and, as such, crucially important for the defendant to study with counsel. Under the revised Soviet-era Criminal Procedure Code,<sup>160</sup> the period of time a detainee takes to familiarize himself with the materials in his case (a task that may require considerable time) is *not* counted as part of the time of pre-trial detention, and can even be *extended* in the event of a failure by the detainee to familiarize himself in the allotted time. The Russian Constitutional Court has held that this rule is unconstitutional.<sup>161</sup> In its ruling the Court referenced not only its own constitutional law (citing the "principle of proportionality" embedded in Article 55, § 3 of the Russian Constitution), but the relevant portions of the International Covenant on Civil and Political Rights (Article 9, § 1).<sup>162</sup> The reaction to this ruling, however, did not resolve the problem; the Criminal Procedure Code was amended to require an anticipatory motion by the procurator to extend a term of pre-trial detention. Within five days, the judge must either rule to extend the period of detention for a period not longer than six months or release the detainee.<sup>163</sup>

The 2001 Criminal Procedure Code requires that the accused be given the materials in his case no later than thirty days before the conclusion of his lawful period of detention.<sup>164</sup> Failing this, the accused must be released, and his release does not impede his right to continue to examine the materials in his case.<sup>165</sup> Notwithstanding the

159. CLEMENTS ET AL., *supra* note 5, at 149.

160. UPK RF [Code of Criminal Procedure] art. 97, § 5 (1994) reads: "The time for acquaintance of the accused and his defender with the materials of the criminal case is not counted in the determination of the period of detention."

161. *Delo o proverke konstitutsionnosti chasti piatoi stat'i 97 Ugolovno-protsessual'nogo kodeksa RSFSR v svyazi s zhaloboi grazhdanina V.V. Shchelukhina* [case re: Constitutionality of Art. 97(5) of the Criminal Procedure Code of the RSFSR] Vestn. Konst. Suda RF, 1996, No. 4, at 2-10. For the translation, see DANILENKO & BURNHAM, *supra* note 43, at 483.

162. *Id.* (holding that "[i]n effect, the application of Art. 97(5) CrPC RSFSR renders a nullity the law establishing a direct right to a judicial remedy at any point in the criminal process for improper detention . . .").

163. *See id.* at 485.

164. UPK RF [Code of Criminal Procedure] art. 109, § 5 (2001) reads: § 5: "The materials of the completed investigation of the criminal case should be presented to the accused in pre-trial detention and to his defender not later than 30 days before the conclusion of the time-limit of detention . . ."

165. UPK RF [Code of Criminal Procedure] art. 109, § 6 (2001) reads:

Constitutional Court's opinion in the *Shchelukhina* case, Article 109, § 7 permits the procurator to petition the court for extension of this period in certain circumstances, the same as in the previous amendment.<sup>166</sup>

The right to legal counsel enshrined in Article 48, § 2 of the Russian Constitution seems loosely to correspond to the requirements the European Court has established for the realization of Article 6, Section 3(c) of the ECHR. One possible area of concern is the right of the criminal investigator to refuse a request by defense counsel to call a particular witness.<sup>167</sup> The European Court has made clear that the defendant enjoys the same right as the prosecution to summon and hear witnesses.<sup>168</sup>

Russian practice of distinguishing between the rights of a "witness" [*svidyatel*] and a "suspect" [*podozrevaemii*] poses serious concerns to the right to legal counsel. Whereas a suspect (and, of course, the accused) is accorded a right to counsel<sup>169</sup> and the privilege against self-incrimination,<sup>170</sup> the witness has no such protection.<sup>171</sup> In fact, the witness is under a legal duty to assist the

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If after the conclusion of the preliminary investigation the materials of the criminal case were presented to the accused and his defender later than thirty days before the conclusion of the time-limit of detention, than at its expiration the accused is subject to immediate release. The accused and his defender preserve their right to examine the materials of the criminal case.

166. UPK RF [Code of Criminal Procedure] art. 109, § 7 (2001):

In the event that, if after the completion of the preliminary investigation, the period for presentation of the materials in the given criminal case to the accused and his defender . . . was observed, however thirty days for the acquaintance with the materials of the criminal case does not appear sufficient, the investigator with the agreement of the procurator of the subject of the Russian Federation has the right not later than five days before the expiry of the time-limit for detention to petition for the extension of this period before a court of a subject of the Russian Federation or military court of a corresponding level.

167. UPK RF [Code of Criminal Procedure] art. 51(3) and (4) (2001); DANILENKO & BURNHAM, *supra* note 43, at 492 (suggesting that informal rules, e.g., the risk of remand by a judge to continue investigation, may dissuade criminal investigators from exercising this right).

168. See *Unterpertinger v. Austria*, 13 Eur. H.R. Rep. (Ser. A, No. 110175) 175 (1986); see also *Van Mechelen v. Netherlands*, 25 Eur. H.R. Rep. 647 (1997) (holding a violation of Article 6 in the use of anonymous police witnesses who did not testify).

169. KONST. RF art. 48, § 2 (1993).

170. *Id.* at art. 51

171. UPK RF [Code of Criminal Procedure] art. 56, § 4 (2001) (protecting the right against self-incrimination, which includes the protection against giving evidence against one's spouse and close relatives).

criminal investigator in the collection of evidence.<sup>172</sup> As Professor Danilenko notes, there is a slippery and indeterminate line between the witness and the suspect:

[I]f the person is called as a “witness,” the criminal investigator warns that person that he or she is subject to criminal charges for refusing to testify. If the person is called as a “suspect” or “accused,” the warning that should be given is a radically different one—a warning against self-incrimination. Thus, someone who is interrogated as a “witness” who should be interrogated as an “accused” or a “suspect” will be advised that they must testify on pain of criminal liability. In other words, the situation is worse than the “accused” or “suspect” simply not being advised of his or her constitutional right not to testify. The “accused” or “suspect” is told erroneously that he or she is *required* to testify.

Persons appearing as witnesses and warned that they must testify could easily cross the line at some point and become “suspects”—perhaps based on testimony they were compelled to give as “witnesses.”<sup>173</sup>

From the point of view of the Convention, the implications of this potential bait-and-switch are enormous. The Article 6 right to an adequate defense is jeopardized.

The Russian Federation Supreme Court has already ruled that the procurator risks the exclusion of evidence at trial if this line is improperly crossed.<sup>174</sup> Recently, a case raising these issues was decided by the Russian Constitutional Court, the *Maslov* case.<sup>175</sup> Maslov was compelled to be conveyed to a regional law enforcement authority dealing with organized crime, where he was held for more than sixteen hours and subjected to a variety of investigatory

172. Article 308 of the Criminal Code provides sanctions for the refusal of a witness to give testimony. See CRIMINAL CODE, *supra* note 79, at 175–76.

173. DANILENKO & BURNHAM, *supra* note 43, at 472–73.

174. See *Postanovleniia prezidiuma i opredeleniia sudebnykh kollegii verkhovnogo suda Rossiiskoi Federatsii, Verdikt kollegii prisiazhnykh zasedatelei o nevinovnosti podsudimogo obiazatelen dlia predsedatel'stvoiuushchego sud'a*, Biull. Verkh. Suda RF, 1996, No. 8, at 10. Reprinted and translated in DANILENKO & BURNHAM, *supra* note 43, at 473–74.

175. *Delo o provere konstitutsionnosti polozhenii chasti pervoi stat'i 47 i chasti vtoroi stat'i 51 Ugolovno-protsessual'nogo kodeksa RSFSR v sviazi s zhaloboi grazhdanina V.I. Maslova* [case re: constitutionality of the provisions of part one of Article 47 and part two of Article 51 of the Criminal Procedure Code of the RSFSR in connection with the appeal of citizen V.I. Maslov] Vestn. Konst. Suda RF, 2000, No. 5, at 46–52 [hereinafter Maslov Case].



activities, including interrogation. His request for the presence of legal counsel was rejected by the criminal investigator, who, citing Articles 47 and 51 of the Criminal Procedure Code,<sup>176</sup> noted that Maslov was at that moment neither a suspect nor an accused, but merely a witness. The Court held that the constitutional protection of the right to counsel was not limited by a person's "formal procedural status" in a criminal investigation.<sup>177</sup> In a remarkable paragraph, the Court went beyond interpretation of the Russian Constitution to cite international human rights norms established in Article 14 of the International Covenant on Civil and Political Rights.<sup>178</sup> The Court then went on to cite not only Russian obligations under Article 6 of the ECHR, but specifically cited case law of the European Court of Human Rights on the subject of the right to counsel in the first hours of interrogation!<sup>179</sup> The importation of ECHR norms and cases into the decision-making process of the Russian Constitutional Court is a very positive sign in this otherwise bleak recital of ECHR violations. The Court ultimately held the investigator's interpretation of Article 47 of the Criminal Procedure Code to be unconstitutional but held Article 51 of the Code not in contradiction to the Constitution in so far as its interpretation did not limit the right to counsel before the conclusion of a criminal investigation.<sup>180</sup>

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176. UPK RF [Code of Criminal Procedure] art. 47 (2001) permits the help of counsel only from the moment a person is declared a suspect in a criminal case or a protocol for detention is drawn up. The relevant section of UPK RF art. 51 (2001) interprets at what stages of the process of an investigation a suspect or accused may, through counsel, examine different products of the investigative record.

177. Maslov Case, *supra* note 175, at 52.

178. *Id.* at 50.

179. Among the cases the Court chose to cite were the Quaranta v. Switzerland (Series A, No. 205, 1991), the Ymbrioscia Case (Series A, No. 275, 1993), Murray v. United Kingdom, 22 Eur. Ct. H.R. 29 (1996), Eckle v. F.R.G., 5 Eur. Ct. H.R. (ser. A) 1 (1982), Foti v. Italy, 5 Eur. Ct. H.R. (ser. A) 313 (1982), and Deweer v. Belgium, 2 Eur. Ct. H.R. (ser. A) 439 (1980).

180. The 2001 Criminal Procedure Code would seem to preserve this state of affairs. While a witness possesses the constitutional right not to give evidence against himself (as does a suspect or accused), he does not have the right to refuse to answer the call of an inquiry officer, investigator, procurator or the court for interrogation. UPK RF [Code of Criminal Procedure] (2001), *supra* note 81, at art. 56, § 6 (1) (2001). The 2001 Criminal Procedure Code also makes clear that, absent a valid reason, refusal to appear may result in the witness being taken into custody. *Id.* at art. 56, § 7.

*C. Double Jeopardy*

The Russian Constitution permits the prosecution to appeal an acquittal in a criminal case—even by verdict of a jury<sup>181</sup>—and to request a retrial on the same charge: Article 50, § 1 of the Constitution specifies that no one may be “convicted” [*osuzhden*]<sup>182</sup>—that is, not merely “tried” [*ispytan*]<sup>182</sup>—twice for the same crime.

This provision is in stark contrast to international law on the subject of double jeopardy. Article 14, § 7 of the International Covenant on Civil and Political Rights states: “No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”<sup>183</sup>

Surprisingly, however, Protocol No. 7 to the ECHR would appear to provide a lesser guarantee against double jeopardy. Article 4 of Protocol 7 states: “No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.”<sup>184</sup> What constitutes “finality,” however, is the crucial question, and one that seems to have been left to the domestic law of states-parties to the Convention. Protocol No. 7 permits the re-opening of a case on grounds of newly discovered evidence or a fundamental defect in the earlier proceedings.<sup>185</sup> The practice of remand for supplemental investigation by the criminal investigator, whether utilized by the original trial court or upon cassational (the “normal” appeal by the losing party, lodged before the court judgment has entered into force, i.e. within seven days) or supervisory review (appeal via “protest” of the procurator or chair or deputy chairperson of a higher court regarding judgments that have entered into force) on appeal, would seem to coincide with this Convention obligation.

This is particularly surprising in light of Article 53 of the ECHR: “Nothing in this Convention shall be construed as limiting or

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181. Trial by jury is now available in only nine of eighty-nine regions in the Russian Federation (the territories of Altai, Krasnodar, and Stavropol, and the provinces of Ivanovo, Moscow (but not the City of Moscow), Riazan, Rostov, Saratov, and Ulianovsk). See DANILENKO & BURNHAM, *supra* note 43, at 530 n.176.

182. KONST. RF, art. 50, § 1 (1993).

183. *International Covenant on Civil and Political Rights*, Dec. 16, 1966, Art. 14, § 7, 999 U.N.T.S. 171.

184. ECHR, *supra* note 3, at Protocol No. 7, art. 4, § 1.

185. *Id.* at Protocol No. 7, art. 4, § 2.

derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party."<sup>186</sup> As one legal scholar has observed, "the overall approach to appeal and review remains essentially unaltered from the Soviet era and therefore gives greater weight to public rather than to private or individual interests."<sup>187</sup>

#### IV. THE EUROPEAN CONVENTION AND RUSSIAN LAW: ACTIVITY IN STRASBOURG AND MOSCOW

The European Court of Human Rights, sitting in Strasbourg, is the judicial body established by the ECHR to decide cases alleging violation of the ECHR provisions.<sup>188</sup> The Court's jurisdiction extends to the interpretation and application of the ECHR,<sup>189</sup> including allegations of breach of ECHR provisions made by one member-state against another,<sup>190</sup> as well as by individuals claiming to be victims of breach by a member-state.<sup>191</sup> The Court screens complaints made to it according to rigid criteria of admissibility.<sup>192</sup> Before a case may be heard on its merits, it must pass this first stage.

Between May 1998 and June 2001, not a single Russian case was declared admissible by the European Court of Human Rights.<sup>193</sup> The dearth of admissible cases was not, however, for lack of complaints. By the end of 1999, Strasbourg had received 1787 complaints alleging breaches in the jurisdiction of the Russian Federation.<sup>194</sup> An informed source at the Court notes that this

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186. *Id.* at art. 53.

187. BUTLER, *RUSSIAN LAW*, *supra* note 34, at 270.

188. ECHR, *supra* note 3, at art. 19.

189. *Id.* at art. 32.

190. *Id.* at art. 33.

191. *Id.* at art. 34.

192. *Id.* at art. 35. In addition to the requirements of exhaustion of domestic remedies by a complainant within six months of the final decision of the alleged violation, the Court may dismiss an individual application as "incompatible with the provisions of the Convention or the protocols," "manifestly ill-founded," or as "an abuse of the right of application." See Eur. Conv. H.R. Art. 35, Sec. 3; CLEMENTS ET AL., *supra* note 5, at 39-40. The Court employs four other measures of admissibility: *ratione temporis*, *ratione materiae*, *ratione personae*, and *ratione loci* (dealing with, respectively, criteria of time, subject matter, personal and geographic jurisdiction). *Id.* at 14-24.

193. Interview with legal expert from the Eur. Ct. H.R. in Moscow (June 29, 2000) (cited on condition of anonymity) (on file with author).

194. Bowring, *supra* note 6, at 375. This number is disputed. In a personal conversation with the author, Marjorie Farquharson, former Programme Counsellor for the Russian Fed-

number has skyrocketed. As of July 2001, over 6000 complaints have been lodged against the Russian Federation. Over 1500 of these complaints have been registered by the Court; 3000 await processing; and 1500 have already been rejected as inadmissible by committee.<sup>195</sup> According to the Russian judge sitting on the Court, Judge Anatolii Kovler, the second largest area of complaint (after pension cases) was under Article 6.<sup>196</sup> Most of the complaints have been rejected as inadmissible on grounds of *ratione personae* (e.g., complaints about Soviet-era violations against deceased relatives), *ratione materiae* (e.g., complaints about pensions, housing or banking problems), or *ratione temporis* (complaints about a violation committed prior to Russian accession to the Convention).<sup>197</sup>

It is of some interest, perhaps, that not all cases have been declared inadmissible without the need for further investigation.<sup>198</sup> Even if a case is ultimately held to be inadmissible, the Court's procedures provide avenues for state action that may lead to a cessation of alleged violation. The admissibility process after a complaint has been registered by the Court is as follows: the President of one of the Courts Chambers (seven-member panels; the forty member Court rarely sits in plenary session) assigns a judge to act as a Rapporteur on the complaint (ideally a member of the Court with some experience with the domestic law in question). Based on the Rapporteur's report, the Chamber may declare the complaint inadmissible or it may communicate the complaint to the member-state concerned, requesting information. Following the government's and complainant's response, an admissibility hearing may be scheduled. According to a lawyer at the Secretariat of the Court for Russian Federation cases, a number of cases (including one regarding pre-trial detention) have at least been

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eration and Ukraine, Directorate General of Human Rights for the Council of Europe noted that the number of cases rejected as inadmissible in 1999 was 763 (July 4, 2000). It may be, however, that the discrepancy is explained by the lag time between receipt and registry of complaints with the Court and rejection as inadmissible.

195. Interview with a legal expert of the Eur. Ct. H.R., Moscow (July 2001) (cited on condition of anonymity) (on file with author).

196. Interview with A.I. Kovler, *Rossiiia zanimaet segodnia 5–6 mesto po kolichestvu zaivlenii ot grazhdan strany v Europeiskii sud po pravam cheloveka*, [Today Russia is in 5–6 place in terms of the number of applications from citizens of countries to the European Court of Human Rights], SOVET EVROPY I ROSSIIA, [COUNCIL OF EUROPE AND RUSSIA], (2000) at 6–12; see also Bowring, *supra* note 6, at 376.

197. Interview with Nuala Mole, Director of the AIRE Centre for Human Rights, in London, U.K. (June 30, 2000) (on file with author) [hereinafter Mole Interview, June 30, 2000]. The AIRE Centre is the Council of Europe liaison office in the United Kingdom.

198. Interview with legal expert on the Eur. Ct. H.R. in Moscow (June 29, 2000) (cited on condition of anonymity) (on file with author).

communicated back to the Russian Government for a response.<sup>199</sup> As of July 2001, forty-five complaints communicated to the Russian Federation were currently pending.<sup>200</sup>

On June 21, 2001, the Court for the first time declared a Russian case admissible, in the admissibility decision *Burdov v. Russia*.<sup>201</sup> This case involved a Russian pensioner awarded compensation in 1991 for poor health due to his assistance in emergency operations during the April 1986 Chernobyl nuclear catastrophe. The pensioner, having won a civil suit in a Russian court in 1997 against his local social services authorities for lack of payment over the course of the past six years, nevertheless failed to receive any of the funds due to him until March 2001 (when, following initiation of this ECHR action by the applicant, the Russian Government paid the debt). The Court noted that, the Russian Government not having specifically acknowledged a violation of the applicant's rights under the Convention, mere fulfillment of the pecuniary aspect of the claim was insufficient to dismiss the action. The complaint to the European Court was ordered to be heard on the merits regarding a violation of Article 6 of the Convention and Article 1 of Protocol One (Protection of Property) to the Convention.

In a remarkable decision as this Note went to press, the European Court of Human Rights doubled the historical significance of the *Burdov* case by making it not only the first admissibility decision to be made against Russia, but also the first case against Russia to be decided on its merits and just satisfaction awarded for a violation of rights under the ECHR. On May 7, 2002, two years after making application to the European Court of Human Rights, six years after his first legal victory in the Russian legal system, and twelve years after his obligatory service and injury at Chernobyl, *Burdov v. Russia* was decided in favor of the applicant, Anatoly Tikhonovich Burdov.<sup>202</sup> The Court found that there had been a violation of Article 6 Section 1 and Article 1 of Protocol No. 1 of the Convention.<sup>203</sup> The Russian Government had sought to avoid a ruling against itself by finally paying compensation in March 2001, coldly suggesting that Burdov could make a claim in the Russian

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199. *Id.*

200. Interview with legal expert of the Eur. Ct. H.R. in Moscow (July 2, 2001) (cited on condition of anonymity) (on file with author).

201. App. No. 59498/00, at \*6 (Eur. Ct. H.R. June 6, 2001), at <http://www.echr.coe.int/eng> (holding "admissible, without prejudging the merits, the issues of non-enforcement of the judgments (Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 to the Convention)").

202. App. No. 59498/00, at \*2 and \*8 (Eur. Ct. H.R. May 7, 2002), available at <http://www.echr.coe.int/eng>.

203. *Id.*

courts if he felt entitled to any damages for the untimely enforcement of his judgements.<sup>204</sup> The Court held that the amount offered—which was made only after Burdov's application was communicated to the Russian Government by the Court—in no way afforded adequate redress, specifically since it “did not involve any acknowledgement of the violations alleged.”<sup>205</sup> Therefore, Burdov was still a victim of a violation of his rights under the ECHR.<sup>206</sup> The Court held that the right to a fair trial included the right to execution of a judgement; lack of funds was no excuse for such an interminable delay as was suffered by the applicant.<sup>207</sup> In a sad coda to such a historic case (and one that underlines the limitations of the ECHR process for immediate practical relief to victims), the Court held Burdov's claim for U.S. \$300,000 in non-pecuniary damages to be excessive; for his troubles, Burdov was finally awarded EUR 3,000 (roughly U.S. \$2,715).<sup>208</sup>

In November 2001, the European Court declared another case admissible, *Kalashnikov v. Russia*,<sup>209</sup> setting a date for hearing on the merits for the summer of 2002.<sup>210</sup> The facts of this complaint were particularly gruesome, all the more so for their ubiquity in the Russian penal system:

The prisoner in question was Valerii Kalashnikov, the former president of the Northeast Commercial Bank in Magadan (no relation to the famous Soviet arms manufacturer). He was arrested on embezzlement charges in June 1995 and spent nearly five years waiting for his case to be heard. During that time he lived with 23 other prisoners in a cell designed for eight. In his complaint, Kalashnikov said that three people shared one bed and slept in shifts, 16 prisoners sitting on the floor, or on cardboard boxes, waiting for their turn. There was

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204. *Id.* at \*4.

205. *Id.* at \*5.

206. *Id.*

207. *Id.* at \*5 and \*6.

208. *Id.* at \*8.

209. App. No. 47095/99, at \*29 (Eur. Ct. H.R. Sept. 18, 2001), <http://www.echr.coe.int/> (holding “admissible, without prejudging the merits, the applicant's complaints concerning (a) his conditions of detention (ECHR Article 3), (b) the length of his detention on remand (ECHR Article 5 § 3), and (c) the length of the criminal proceedings (ECHR Article 6 § 1); [and] declares inadmissible the remainder of the application.”).

210. Sadly, this case is also an example of the extremely long process of making a complaint to the European Court of Human Rights. Kalashnikov's application was lodged with the Court on December 1, 1998. The Court did not decide to hold an oral hearing on admissibility until May 15, 2001. See Press Release, Registrar, Hearing in the Case of *Kalashnikov v. Russia* (Sept. 18, 2001), at <http://www.echr.coe.int/eng/>.

an open toilet situated next to the eating space and the cell was full of cigarette smoke.

Kalashnikov contracted numerous fungal infections and lost almost 30 kilograms in weight. These conditions and the indeterminate length of his time on remand amounted to torture, his lawyer said.<sup>211</sup>

Over the course of his detention, Kalashnikov filed motions for release from detention over fifteen times and conducted a hunger strike; all his efforts at release were refused on the same grounds, typically “the seriousness of the offence with which he was charged and the danger of his obstructing the establishment of the truth while at liberty.”<sup>212</sup> Refusals continued even *after* the investigation of his case had been completed, making it impossible to interfere with the “establishment of the truth.”<sup>213</sup> In the ultimate display of Kafka-esque bureaucratic gall, the prosecution sought and received a further delay in Kalashnikov’s trial to conduct a psychiatric evaluation of Kalashnikov’s ability to undergo trial, “in view of the length of the applicant’s detention.”<sup>214</sup>

The Russian Government aggressively argued to have the case declared inadmissible. Incredibly, the state asserted that the claim was inadmissible because Kalashnikov had not exhausted the Russian domestic appeals process before making his international claim.<sup>215</sup> Further, Russia claimed that the length of detention could only be counted from 1998 (the date of accession to the ECHR), not from 1995 (the date of incarceration).<sup>216</sup> None of these claims satisfied the Court, which declared the case nevertheless admissible for decision on the merits.<sup>217</sup>

The European Court of Human Rights has developed a number of established practices in its handling of complaints alleging violations by the Russian Federation. According to a leading British practitioner who has been a direct participant and pioneer in the development of the Court’s case law, the Registrar of the European Court does not consider the Russian Federation Constitutional

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211. Farquharson, *supra* note 6. This capsule summary captures only cursorily the extent of the horror of Kalashnikov’s plight. For a more complete description of Kalashnikov’s experience in pre-trial detention, see the admissibility decision, *supra* note 209.

212. *Kalashnikov*, App. No. 47095/99, at \*3.

213. *Id.*

214. For the official, detailed statement of facts comprising this descent into hell, see *id.* at \*7.

215. *Id.* at \*19.

216. *Id.* at \*22.

217. *Id.* at \*31; see also Farquharson, *supra* note 6.

Court to be an effective domestic remedy that must be exhausted before consideration in Strasbourg.<sup>218</sup> This assessment is based on the discretionary nature of the Russian Federation Constitutional Court's judicial review of individual complaints.<sup>219</sup> Since not every case is guaranteed a hearing before this judicial body, it is not considered an effective domestic remedy.

Likewise, the European Court of Human Rights has now ruled that the Russian process of supervisory review [*nadzor*] is not considered to be an effective domestic remedy for the same reason—it is a discretionary form of judicial review.<sup>220</sup> Parties to a dispute in Russia (including criminal defendants) have a *right* to initiate supervisory review or to have supervisory review initiated on their behalf.<sup>221</sup> Only the chairmen of higher courts and the procuracy may lodge a protest with a second-level court for supervisory review.<sup>222</sup> Such a special appeal may result in review of a lower court's final decision on both questions of fact and law.<sup>223</sup> In *Tumilovich v. Russia*, an admissibility decision involving an applicant who had made six separate applications for supervisory review of a court judgment denying her payment of back wages, the European Court of Human Rights held that applications for supervisory review are:

[E]xtraordinary remedies, the use of which depends on the discretionary powers of the President of the Civil Chamber of the Supreme Court and the Deputy Prosecutor General, and do not, therefore, constitute effective remedies within the meaning of Article 35 § 1 of the Convention. Accordingly, these late rejections of the applicant's applications for a

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218. Mole Interview, June 30, 2000, *supra* note 197.

219. Although an individual, interestingly, is *not* required to exhaust all remedies available in the "ordinary" Russian court system before filing a complaint with the Russian Federation Constitutional Court, that court is not required to decide all cases within its narrow jurisdiction. In addition, the Russian Federation Constitutional Court does not have jurisdiction to review the *judgments* of other courts, only the "constitutionality of a law" applied or to be applied in a given case. See KONST. RF, art. 125, § 4 (1993). There is also some dispute in the Russian legal system as to the duty of "ordinary" courts to refer a case for review by the Russian Federation Constitutional Court.

220. See *Tumilovich v. Russia*, App. No. 47033/99, at \*4 (Eur. Ct. H.R. June 6, 1999), available at <http://www.echr.coe.int/eng> (holding the application inadmissible *ratione temporis*); see also *Pitkevich v. Russia*, App. No. 47936/99, at \*20 (Eur. Ct. H.R. Feb. 8, 2001), available at <http://www.echr.coe.int/eng> (holding the application inadmissible on other grounds).

221. DANILENKO & BURNHAM, *supra* note 43, at 540.

222. *Id.*

223. See *id.* at 541.



supervisory review are not relevant to the determination of the Court's competence *ratione temporis*.<sup>224</sup>

The effect of this interpretation by the European Court of Human Rights is serious and far-reaching. If, before lodging a complaint with the European Court, a prospective complainant waits until a request for supervisory review has been denied (assuming the officials authorized to make a protest can be convinced to do so), the complaint may be held inadmissible for having exceeded the Court's six-month time limit. However, it should be noted that cassational appeals for review by a court of second instance may be filed by the parties to a dispute regarding a judgment that has not yet entered into legal force; this would appear to be a domestic remedy that must be exhausted before a complaint is sent to Strasbourg.

In *Kalashnikov v. Russia*,<sup>225</sup> the European Court for Human Rights strengthened this principle. The Court declared that the exhaustion of domestic remedies (required by Article 35 § 1 for admissibility of a complaint) does not include those remedies that are only theoretically, but not practically, available:

However, the only remedies which must be tried under Article 35 § 1 of the Convention are those that relate to the breaches alleged and which at the same time are available and adequate. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they lack the requisite accessibility and effectiveness. . . .<sup>226</sup>

The European Court of Human Rights further emphasized that the burden of proof for failure to exhaust a practically available domestic remedy is on the shoulders of the state. The Court declared that such proof would require a showing that the remedy "was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success."<sup>227</sup>

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224. *Tumilovich*, App. No. 47033/99, at \*4 (holding application inadmissible *ratione temporis*).

225. *Kalashnikov v. Russia*, App. No. 47095/99 (Eur. Ct. H.R. Sept. 18, 2001), <http://www.echr.coe.int/>.

226. *Id.* at \*20.

227. *Id.* at \*21.

## CONCLUSION

There can be little doubt that accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms was a bold and important step forward for the advancement of human rights and legal reform in the Russian Federation. The moratorium on the continued use of the death penalty is often cited as one of the great advances garnered by Russian accession to the European Convention.<sup>228</sup> Less obvious, but no less important, is the slow seepage of European human rights norms into Russia, a country far more porous and open to international criteria than ever before. Particularly heartening is the citation of international treaties and case law from the European Court of Human Rights in the opinions of the Russian Constitutional Court.

Those words of optimism, however, should not obscure the long road to acceptance in the international human rights community on which only the first tentative steps have been taken in Russia. Struggling with its Soviet legacy, the Russian Federation is only gradually accumulating new conceptions of the role of the state, rights of individuals, and the rule of law. Tremendous reforms are needed in the education, compensation, and independence of the judiciary at all levels of Russia's complex federal structure. Russian lawyers must be educated about the tools available to them and their clients through the ECHR.<sup>229</sup> The new criminal procedure

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228. DANILENKO & BURNHAM, *supra* note 43, at 585 ("The primary reason for Russia's backing away from the death penalty has been its wish to become a member of the Council of Europe. Russia was finally admitted as a member in February 1996. In becoming a member, it had to agree to an immediate moratorium on implementation of the death penalty and its elimination within three years. The moratorium was implemented and as of this writing, it is still in place."). The death penalty is the subject of ECHR, *supra* note 3, at Protocol No. 6.

229. The recent words of one leading Russian human rights lawyer raise great hope in this regard:

I understand that the European Court of Justice will not rule that Grigorii Pasko is not guilty [*infra* note 231] or that Valentin Moiseev is not guilty. This goes beyond the framework of their judicial mandate. The European Court does not deal in questions of guilt or innocence. But if, according to a decision by the European Court, a person is recognized as a victim of an unfair trial, then you understand that a verdict calling him a spy will become rather unconvincing. And that is what my representatives are hoping to achieve.

Karina Moskalenko (who has filed a petition with the European Court of Human Rights on behalf of Grigorii Pasko and former diplomat Valentin Moiseev), *quoted in* Jeremy Branstern, *Russia: Supreme Court Rulings Bring Hope to Pasko, Others Accused of Treason*, RFE/RL

code must be revised further to remove the need for Russia's reservation to the ECHR. Expansion of the use of jury trials and formal renunciation of the death penalty are also needed reforms. Monumental physical reform is required of Russia's penal system, inherited from the Soviet Union but (if it can be imagined) grown far worse with age and disrepair.

The first Russian case has now at long last been heard on its merits and a decision rendered against the Russian Federation. It is the first of a tremendous flow of complaints against Russia, but by no means the last, if Russia remains in the Council of Europe. Celebrated cases like those of Aleksander Nikitin,<sup>230</sup> Grigorii Pasko,<sup>231</sup> and Igor Sutyagin,<sup>232</sup> as shocking as they are, obscure many more cases of egregious violations of rights to counsel or a fair trial. The dismissal of Judge Sergei Pashin may also be taken as an indicator of low judicial independence.<sup>233</sup> It is far too early to make pronouncements or predictions on the "sticking power" of the Council of Europe initiatives and requirements for membership on the Russian state and civil society. But the ECHR is a start, and a step, in the right direction.

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WEEKDAY MAGAZINE, Feb. 15, 2002, at <http://www.rferl.org/nca/features/2002/02/15022002104851.asp>.

230. Nikitin, arrested in St. Petersburg in 1996, spent ten months in pre-trial detention awaiting trial on charges of treason and divulging state secrets for his work to reveal radioactive pollution by the Russian Navy. To the surprise of many observers, the Russian Supreme Court withstood considerable political pressure in twice rejecting the appeal of procurators, in April and September 2000, to reopen the case. See Fred Weir, *Russia's Nuclear Whistleblower Lands Back in Court*, CHRISTIAN SCI. MONITOR, Sept. 12, 2000, at 7.

231. In a case mirroring that of Nikitin, Pasko was arrested in 1997 in Vladivostok on charges of treason for his efforts to expose the nuclear dumping practices of Russia's Pacific Fleet. Pasko was detained in a labor camp for almost two years. Pasko was acquitted of the charge in 1999 but the Supreme Court ordered a new trial in November 2000. Due to the fact that Pasko and his attorneys had yet to complete their review of the criminal investigator's case file, Pasko's trial was postponed until June 4, 2001. On July 11, 2001, Pasko's second trial on the same offense resumed in a military court in Vladivostok. Pasko was convicted and sentenced to four years imprisonment. While his appeal is pending, he has been refused release from confinement. This is true despite the fact that his appeals have been successful. A petition on Pasko's case has been filed with the European Court of Human Rights. See Julie A. Corwin, *Russian Military Court Refuses to Release Pasko Pending Outcome of Appeals Process*, 6 RFE/RL NEWSLINE, Feb. 5, 2002; Julie A. Corwin, *Pasko Trial Delayed Again*, 5 RFE/RL NEWSLINE, Mar. 23, 2001; Victor Yasmann, *Pasko Goes on Trial Again . . . Behind Closed Doors*, 5 RFE/RL NEWSLINE, July 12, 2001; Julie A. Corwin, *Pasko Case Sent Back for Retrial*, 4 RFE/RL NEWSLINE, Nov. 22, 2000. All of the above articles may be found at <http://www.rferl.org/newsline/search/>; see also Bransten, *supra* note 229, at \*1-3.

232. Igor Sutyagin, a researcher specializing in nonclassified military newspapers at the highly respected Institute of Canada-USA Studies in Moscow, was arrested in October 1999 on treason charges. He has spent over fifteen months in jail awaiting trial. See John Sullivan, *The Grad Student Sent into the Cold*, N.Y. TIMES (NEW JERSEY), Jan. 14, 2001, § 14, at 6; Weir, *supra* note 230, at 1.

233. See Sophie Lambroschini, *Judge's Dismissal Underlines Problems Facing Russian Judiciary*, 4 RFE/RL NEWSLINE, Oct. 23, 2000.

## APPENDIX A.1:

## ARTICLES FIVE &amp; SIX OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

*Art. 5—Right to Liberty & Security*

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
  - a. the lawful detention of a person after conviction by a competent court;
  - b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
  - c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
  - d. the detention of a minor by a lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
  - e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
  - f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

*Art. 6—Right to a Fair Trial*

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:

- a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- b. to have adequate time and facilities for the preparation of his defence;
- c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

APPENDIX A.2:  
RESERVATION OF THE RUSSIAN FEDERATION TO THE  
EUROPEAN CONVENTION FOR THE PROTECTION  
OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

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RESERVATION APPENDED TO THE INSTRUMENT OF RATIFICATION  
DEPOSITED ON 5 MAY 1998

In accordance with Article 64 of the Convention [Article 57 since the entry into force of the Protocol No. 11], the Russian Federation declares that the provisions of Article 5, paragraphs 3 and 4, shall not prevent the application of the following provisions of the legislation of the Russian Federation:

—the temporary application, sanctioned by the second paragraph of point 6 of Section Two of the 1993 Constitution of the Russian Federation, of the procedure for the arrest, holding in custody and detention of persons suspected of having committed a criminal offence, established by Article 11, paragraph 1, Article 89, paragraph 1, Articles 90, 92, 96, 961, 962, 97, 101 and 122 of the RSFSR Code of Criminal Procedure of 27 October 1960, with subsequent amendments and additions;

—Articles 51-53 and 62 of the Disciplinary Regulations of the Armed Forces of the Russian Federation, approved by Decree No. 2140 of the President of the Russian Federation of 14 December 1993—based on Article 26, paragraph 2, of the Law of the Russian Federation “On the Status of Servicemen” of 22 January 1993—instituting arrest and detention in the guard-house as a disciplinary measure imposed under extra-judicial procedure on servicemen—private soldiers, seamen, conscripted non-commissioned officers, non commissioned officers and officers.

The period of validity of these reservations shall be the period required to introduce amendments to the Russian federal legislation which will completely eliminate the incompatibilities between the said provisions and the provisions of the Convention.

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[Appendices to the Reservation, consisting of extracts from the relevant codes, decrees and legislation described above, are not reproduced] Source: Treaty Office of the Council of Europe, <http://conventions.coe.int>.