Report

Between Revenge and Oblivion: A Transitional Justice Concept for Russia

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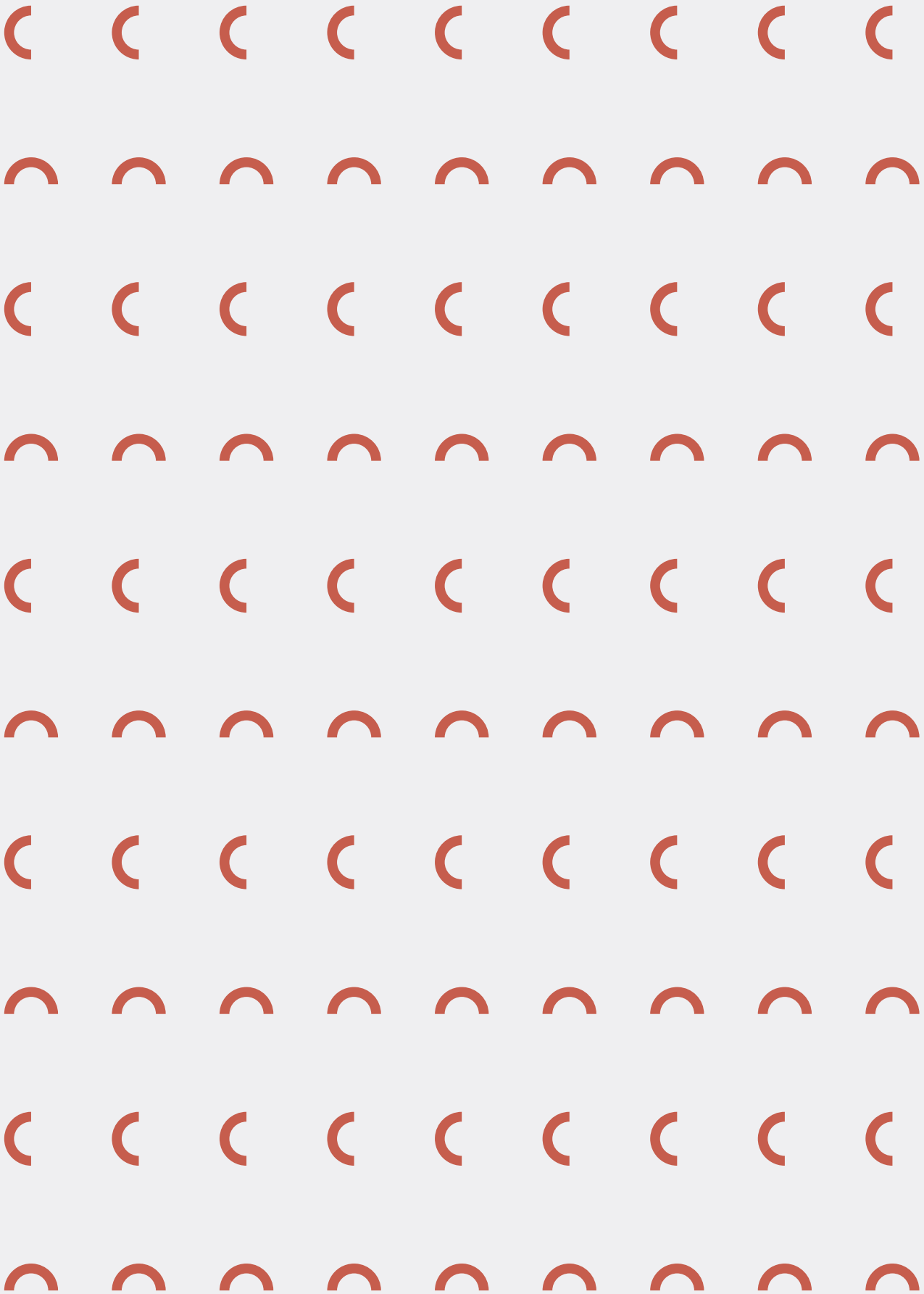

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Preface to the English edition

We are pleased to present the English version of our report. The the theme of report is a possible model of transitional justice for a future Russia, a Russia after Putin. The report offers a vision of legal means for overcoming the consequences of systemic impunity for crimes perpetrated by, or with the connivance of, the Soviet and Russian authorities — first and foremost, during the years of Putin's rule. Recommendations by the United Nations and other international organisations, as well as the experiences of foreign states, provided the starting point for this project. At the same time, the model of transitional justice that we propose is based on an analysis of typical manifestations of state-related criminality, and of the shortcomings of the Russian legal system that prevent such criminality from being effectively overcome.

The report was written by us — a Russian lawyer and a Russian human rights activist — primarily for Russians. However, the tragic events that have stunned the world since the release of the first edition potentially make it relevant for a wider international audience. Since the beginning of the full-scale Russian invasion in Ukraine, systemic impunity for crimes in Russia has assumed truly global significance. After the Putin regime unleashed an aggressive war against Ukraine, its atrocities have become widely known. However, they have a long prehistory with a hard-to-quantify number of victims that, alas, until recently many preferred not to see. This observation applies, first and foremost, to the majority of Russian citizens, who exchanged their freedom for what appeared to be stability, but as a result find themselves deprived of both. But it also applies to Western politicians, for whom the benefits of making business with autocracy had outweighed their proclaimed values of freedom, democratic solidarity, and human rights. Now, millions of people are reaping the bitter harvest of this wilful blindness and deafness, and the world is facing a full-scale war at the centre of Europe, a man-made energy crisis, and nuclear blackmail.

We prepared our report under the conditions of an authoritarian regime in Russia, because we were convinced: It will not last forever and plans need to be made well in advance. Whenever a regime that systematically violates human rights comes to an end, the new government faces the task of overcoming its tragic legacy. The resolution of this problem usually includes considerations such as establishing the truth, restoring the rights of victims, prosecuting perpetrators, restricting access to certain positions of government for representatives of the former authorities, and so on. Experience shows that the window of opportunities, as a rule, opens suddenly and, when this occurs, it is necessary to act quickly. In the period when authoritarian institutions rapidly disintegrate and political instability ensues, it is extremely difficult to draw up a sensible reform plan "on the fly." By identifying key judicial problems, we have at least tried to provide an outline.

Our report was released in Russian in 2020, but it was finished even earlier — at the end of 2019. At that time, despite the gradual ratcheting up of repression against dissenters, civil liberties still existed to some degree in Russia, and people still found a way to express their opinion about the authorities without the risk of imprisonment. In what was, as is now obvious, a comparatively peaceful environment, we sought to design transitional justice for an undetermined future on the principle of an ideal

model. We based this on the idea of the interconnectedness of different domains of systemic impunity — from usurpation of power to corruption and from crimes perpetrated during armed conflict to obliviousness about the atrocities of the Communist regime in the USSR. It was a detached view, looking back from a prospective future to the present and past without making compromises to pressing political demands, the substance of which we consciously took off the table.

However, since writing the report, the situation in the country has deteriorated so rapidly that the analysis of factors that we proposed was already incomplete by the time the first edition was published. Over the next three years, we witnessed a series of pivotal events such as, changes introduced to the Constitution of Russia, which would allow Putin to stay in power indefinitely; the poisoning and arrest of opposition leader Aleksey Navalny; the deployment of new tools for manipulating election results (electronic voting); the final crushing of democratic opposition structures; and, finally, full-scale military aggression against neighbouring Ukraine. In the context of this war, Putin's authoritarian (or, as it has also been labelled, "hybrid") regime degenerated, literally in just a few weeks, into a genuine fascist-type dictatorship. The regime has become the source of widespread war crimes and crimes against humanity on the territory of Ukraine and of repression unprecedented scale in Russian modern history.

Nevertheless, we are convinced that our recommendations largely remain relevant, and that the events of the last few years fully fit into our proposed classification of the types of systemic criminality existing in modern Russia. Perhaps the only significant amendment would involve the setting up of a court for the criminal prosecution of the main perpetrators of the crimes committed by the Putin regime. In our framework, we consider two alternative solutions — an internationalised (hybrid) court or a purely national court — each with inherent advantages and disadvantages. The atrocities committed during the Russo-Ukrainian war decisively tip the scales in favour of international justice.

We hope that this report convinces our foreign readers of the necessity of helping Russia return to the path of legal state-building after Putin's rule comes to an end.

Introduction

1. Problem description

Impunity for crimes has become an everyday issue in today's Russia, and it is regularly reported by human rights organisations and the media. International human rights mechanisms – primarily the European Court of Human Rights (ECtHR) – have considered hundreds of Russian cases,[1] and the Russian authorities also admit the existence of the problem of impunity.[2]

Generally, a crime can remain without an adequate legal response for reasons the state cannot prevent. Even the most effective law enforcement system cannot investigate all crimes, bring all perpetrators to justice, or provide full reparation for damages, nor can it fully ensure effective guarantees against recidivism.

However, many failures of law enforcement are due to non-performance of official duties or otherwise defective laws, rather than because of objective barriers or impediments. A government[3] that is reluctant to prevent or investigate crimes and intentionally covers them up creates a context for government-sanctioned (systemic) impunity.

When a state fails to fulfil its law enforcement function with respect to such "sanctioned" crimes, the consequences of these criminal acts remain unaddressed and tend to accumulate over time. Perpetrators are not held responsible; they continue their socially dangerous behaviours and keep benefitting from them. In turn, victims suffer from the inability to seek the truth and obtain redress for the crimes they endured. Furthermore, they have to live in fear of facing repeated offences without having any protection at all. Impunity sanctioned by the authorities corrupts the indulgent state apparatus, undermines society's political and legal systems, and causes citizens to lose faith in the rule of law.

Most often, the political driver of systemic impunity is the connivance or the deliberate cover-up of crimes by the government. Appropriate legal responses to such crimes are only possible when or if the government is willing to end impunity and deal with its consequences.

1 According to the HUDOC website, over a period of almost 21 years, the European Court of Human Rights has found Russia's investigation of violations of the right to life and the prohibition of torture to be ineffective in 406 and 369 cases, respectively. In a number of judgments, the Court determined violations of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) by more than one person. In comparison, over 50 years, Turkey was found guilty of similar violations in 476 and 314 cases, respectively: https://hudoc.echr.coe.int (accessed: 07.02.2020).

2 This usually occurs in the context of competition between various agencies. For example, Prosecutor General Yuri Chaika regularly criticised other law enforcement agencies – primarily the Investigative Committee – for inadequate responses to crimes. In 2012, he stated that investigative agencies tolerated the concealment of crimes, and, in 2017, he accused them of illegally initiating criminal cases and carrying out illegal arrests in connection with them: http://www.newsru.com/crime/08aug2012/genproccrimestat.html; https://rg.ru/2017/07/05/chajka-za-kachestvo-sledstviia-dolzhny-otvechat-sledovateli-i-prokurory.html (accessed: 15.06.2020).

3 Hereinafter, the term "government," unless referencing the corresponding body of state power of the Russian Federation, is used in a broader sense as the entirety of the central bodies of state power.

However, even if such political will were at some point to emerge in Russia, the law enforcement system may fail to ensure an adequate response to systemic crimes. The number and complexity of the events to be investigated and legally assessed becomes a significant problem. Simultaneously addressing many thousands of episodes obviously increases the workload for law enforcement agencies, bringing them to the verge of collapse.[4]

In fact, sanctioned unlawful behaviour has become a routine occurrence in Russian law enforcement agencies and Russian courts themselves, as many of their employees have become part of this specific professional culture. Investigation and legal assessment of systemic crime cannot be entrusted to people who have been tainted themselves and who should be held responsible for their past wrongdoings.

Since (almost) nobody in Russia is currently being punished for actions that are formally prohibited by law yet permitted in practice by the authorities, many choose to consider these actions lawful. This is especially true of violations that cause harm to entire social groups or society as a whole, rather than to individuals (for example, corruption). When there is no collective demand for justice, the government has no incentive to deal with the consequences of past atrocities, even if it decided to end impunity in the future.

Legal norms may be another obstacle to an appropriate legal response to the violations permitted by the authorities. Not all acts that are unlawful and dangerous to society – including those causing significant harm to citizens–are regarded as crimes. Prescription terms for many crimes that have not been prosecuted may have already expired or will expire in the near future.

It is also important to note that, over time, investigating past crimes becomes much more difficult, as does proving the guilt of the alleged perpetrators.

Consideration should also be given to other circumstances related to the general context of countering impunity. Even when contributing to the restoration of justice, political transformation is often conditioned by the performance of specific extrinsic tasks and constraints. One may expect the reconstruction of state institutions based on the rule of law to become a priority. Even if in theory rebuilding governmental institutions does not conflict with the policy of preventing impunity, it would require the government to balance its efforts and resources between dealing with the past and reforming institutions for the future, often tipping the balance in favour of the latter.

A new government coming to power after regime change often expects that dispensing justice would help reinforce its own legitimacy while at the same time deconstruct that of its predecessors. In other words, seeking the truth about the atrocities committed by a previous government is expected to discredit its representatives in the eyes of citizens. Such political reasoning certainly has a negative impact on the impartiality and credibility of justice.

4 By comparison, in the united Germany, investigations into unpunished crimes associated with the East German socialist regime involved up to a hundred thousand people. See: Marxen K., Werle G., Schäfter P. Die Strafverfolgung von DDR-Unrecht. Fakten und Zahlen. Berlin: Stiftung zur Aufarbeitung der SED-Diktatur, 2007. S. 54.

The government's (in itself quite understandable) aspiration for national reconciliation can be another dangerous political obstacle to justice. Engaging in legitimate democratic processes those social groups upon which the previous regime relied can be not only a guarantee of success for the new government, but also an essential precondition for its political survival. The government may inevitably be tempted to build national reconciliation by forgetting the dark pages of the past.

Along with the loyalty of its citizens and political elites, the new government would potentially need money and economic investments. These can be sourced from corrupt assets that have been transferred abroad. Under these circumstances, amnesty is usually considered an incentive to bring these illegal assets back to the country.

Non-political constraints can also impede the effective elimination of systemic impunity. These include the lack of money and sufficiently trained personnel to replace either those exposed to unlawful behaviour or those lacking the skills to work under the rule of law.

These elements of power-sanctioned violations, as well as the specific challenges and constraints affecting the justice system in the context of political transitions, require special legal mechanisms to remedy the consequences of these violations. In contemporary international practice and science, these legal mechanisms are commonly referred to as "transitional justice."

The purpose of transitional justice is to provide an effective legal response to previously unpunished gross violations of human rights and other serious violations of the rule of law that were condoned by the authorities. The aim is also to uncover the circumstances of such violations, prosecute the perpetrators and subject them to legal and fair punishment, repair the harm inflicted on victims, and guarantee non-recurrence of the violations.

2. Purpose of the report

No one can predict the timing and nature of a future political transition in Russia. Nevertheless, it is clear that transitional justice can be carried out only under specific scenarios, involving a transformation of the Russian political regime. This would presuppose building a democratic law-governed state in the future and a legal assessment of past crimes. Without these two objectives, transitional justice would be impossible to implement. Even if a new Russian government introduced some elements of transitional justice, these could serve the purpose of persecution of its opponents or other purely political purposes.

In the hope that Russia will return to the path of building a democratic and constitutional state, one should start planning for the development of transitional justice mechanisms well in advance. Otherwise, when the time comes, ill-considered, arbitrary decisions could be made, and, as a result, the consequences of years of impunity will remain unaddressed. For this reason, we have attempted to prepare a model for future transitional justice processes in Russia and are offering it for further discussion.

The report briefly describes the theory of transitional justice, its most common foreign and international practices, its legal and methodological basis (sections 3-4 of the Introduction), as well as the rationale for choosing acts and events eligible for

transitional justice in Russia (Chapter 1) and their characteristics (Chapters 2-6). The most valuable part of the report develops the concept of transitional justice legislation (Chapter 8) and its institutional organisation (Chapter 9).

The proposed concept of transitional justice is based on an "ideal model" in which the transitional government is not bound by any obligation to its predecessor and has the necessary political will, actual capacity, and sufficient time to implement any measures it deems essential, limited only by considerations of respect for human rights and the rule of law.

The political reality would undoubtedly require various concessions and compromises from such an "ideal model," rendering some of the proposed measures either unacceptable or requiring potentially quite substantial adjustments. Yet, at this stage, preparing an "ideal model" rather than a "realistic" one seems to be the methodologically correct approach. It is always easier to sequester and adjust an already thought-out and developed model than to try to predict the future political landscape or to develop new plans on the fly amid ongoing events. The latter would inevitably be necessary if the political situation turned out to be more favourable to transitional justice than in any of the endless possible "realistic scenarios." The "ideal model" would, therefore, always have a more significant "margin of flexibility" than any of the "realistic" scenarios.

This report is addressed to three potential groups of readers: to Russian and international lawyers; to people of all backgrounds who share the values of democracy and the rule of law and support their promotion inside Russia; and to the victims of unpunished crimes and human rights violations inside Russia. First, we offer our readers a perspective on the surrounding reality, where a breach of a right remains illegal even if committed or unaddressed by the authorities. Second, we want to demonstrate that the legal barriers, which – according to the conventional legal understanding, may prevent the restoration of justice and reparation of the caused harm – are not insurmountable. Third, it is essential to prove that, on the other hand, overcoming these barriers would not necessarily presuppose an extra-legal arbitrariness but would be possible within the framework of universally recognised principles of law.

3. Overview of transitional justice

The concept of transitional justice evolved from the search for an optimal combination of the twin goals of dispensing justice and introducing democratisation that are often (though not always) pursued by governments in post-repressive authoritarian states. How can these new governments simultaneously restore justice, maintain peace, overcome the consequences of mass violence, and at the same time promote democracy? Transitional justice developed as a response to the trend that emerged in many post-authoritarian societies to forget the past for the sake of national reconciliation and to save precious limited resources.[5]

The UN Secretary General's report "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies" defines transitional justice as "the full range of processes and mechanisms associated with a society's attempts to come to terms with a

5 See: Бобринский Н.А. К вопросу о концепции «правосудия переходного периода» // Библиотека криминалиста. Научный журнал. 2014. No. 1 (12). pp. 328–337.

legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."[6] According to the oft-used definition of American lawyer Ruti Teitel, transitional justice can be defined as "the conception of justice associated with periods of political change, characterised by legal responses to confront the wrongdoings of repressive predecessor regimes."[7] As noted in another writing of Teitel, "what is distinctive about contemporary transitional jurisprudence is that its constructions of the rule of law respond to systematic persecution under legal imprimatur."[8] Pablo de Greiff, UN Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence (2012-2018), remarks on the definition of transitional justice: "It is now commonly understood that the term refers to the set of measures implemented in various countries to deal with the legacies of massive human rights abuses."[9]

Transitional justice is primarily designed to respond legally to massive human rights violations that have gone unpunished for political reasons and to provide redress for the victims of such violations using a *victims-centred* approach. In addition to its primary purpose, transitional justice has secondary objectives related to political transformations and institution-building, including restoration of the rule of law, democratisation and protection of the newly-established democratic order, as well as national reconciliation. Another important aspect of transitional justice can involve the revival of public morality – the society's attempt to self-cleanse from the serious legacy of large-scale past abuses by condemning the main perpetrators and, in general, breaking with the repressive past and debunking the previous regime's myths and ideology. In recent years, some countries have attempted to use transitional justice to deal with the consequences of corruption and economic oppression (see further section 1 of Chapter 1).

According to a widespread concept used *inter alia* by the UN, [10] transitional justice consists of a combination of basic mechanisms (institutions), including prosecution initiatives, truth-seeking commissions, reparations, and various guarantees to prevent the recurrence of new violations of human rights (among which one can usually distinguish vetting – hereinafter referred to as "lustration"). This combination of various transitional justice instruments is rarely used fully in practice; typically, states resort to one or more these mechanisms.

Although the reference to *transition* implies a limited time frame for the application of transitional justice, many of its mechanisms remain in place long after the establishment of a sustainable democracy.

Researchers find examples of transitional justice in ancient history.[11] However, as a set of legal measures united by common goals and supported by a theoretical framework, transitional justice emerged only at the turn of the 1980s-1990s. The fall of military

6 See: The rule of law and transitional justice in conflict and post-conflict societies. Report by the Secretary General of the United Nations Organization, S/2004/616 § 8.
7 See: Teitel R. Transitional Justice Genealogy // Harvard Human Rights Journal. Vol. 16. 2003. p. 69–94, 69.
8 See: Teitel R. Transitional Justice. Oxford; New York: Oxford University Press, 2000. p. 492.
9 See: De Greiff P. Theorizing Transitional Justice // Transitional Justice / ed. by M. Williams, R. Nagy, J. Elster. New York: New York University Press, 2012. p. 31–77, 34.
10 See: UN Approach to Transitional Justice. Guidance Note of the Secretary General. March 2010: https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf (accessed on 15.06.2020); Бобринский Н.А. Правовые основы правосудия переходного периода в документах Организации Объединенных Наций // Библиотека криминалиста. Научный журнал. 2014. № 5 (16). p. 320–328.
11 See: Elster J. Closing the Books: Transitional Justice in the Historical Perspective. Cambridge: Cambridge University Press, 2004.

regimes in Latin America and subsequent attempts to restore civil peace and democracy in many of these countries exposed challenges with ensuring legal responses to crimes committed by former regimes that went far beyond the limits of ordinary criminal justice. These problems have attracted the attention of international human rights activists and human rights researchers who began to seek an optimal combination of dispensing justice and building a legitimate democratic system. In that context, the term "transitional justice" came into use.

The dismantling of the socialist system in Eastern Europe and the USSR, the settlement of armed conflicts in the Balkans and in several African countries, and the elimination of the apartheid regime in South Africa, all revealed the universal significance of transitional justice in overcoming the consequences of gross human rights violations over the course of democratisation. The 1990s saw the active development of transitional justice institutions such as truth commissions, lustration, and restitution of property rights. During that time, special prosecution bodies were created based on international law, including the international tribunals for the former Yugoslavia and for Rwanda, hybrid criminal courts, and the International Criminal Court (ICC), established in the Hague. The UN Commission on Human Rights formulated a Set of Principles for protecting and promoting human rights through action to combat impunity. There have been striking (though not indisputable) examples of transitional justice in the 2000s, including the settlement of consequences of the Indonesian occupation in East Timor, de-Baathification policies in Iraq, the trial of the Khmer Rouge in Cambodia, and the convictions of former Liberian President Charles Taylor and former Peruvian President Alberto Fujimori for gross violations of human rights.

Various transitional justice mechanisms are currently in place in dozens of countries worldwide. Of the relatively recent comprehensive initiatives in this area, we should mention the Truth and Dignity Commission in Tunisia, the laws on de-communisation and cleansing of the government in Ukraine, and the agreement between the government and the Revolutionary Armed Forces of Colombia (FARC) on victims of the armed conflict in that country.

Thus far, Russia has confined itself mostly to symbolic measures to overcome the burdensome legacy of Soviet state terror. These include the rehabilitation and abrogation of several articles of the Soviet criminal codes that suppressed dissent and freedom of conscience, and the passing in 1991 of the Russian law "On the Rehabilitation of Victims of Political Repressions."[12] The latter contains provisions for the compensation of victims, the reparation of confiscated property, criminal prosecution of those who participated in the investigation and the trial of the various cases of political repression, as well as the restoration of Russian citizenship to those repressed.

However, these norms have had minimal application in practice. Mechanisms of transitional justice, which have been used widely in post-Communist Europe – including lustration, access to political police archives, and restitution of ownership of nationalised property – are virtually unknown in Russia (for more on this, see Chapter 6).

12 Law of the Russian Federation No. 1761-I of October 18, 1991 "On Rehabilitation of Victims of Political Repressions" // Bulletin of the Congress of People's Deputies of the Russian Federation and the Supreme Soviet of the Russian Federation of 31 October 1991. 1991. No. 44. Art. 1428.

Some elements of transitional justice have been used in Russia not in connection with the post-communist transformation, but rather in situations of internal armed violence or political conflicts. These include the "political amnesty" of 1994 (for members of the State Committee on the State of Emergency (*Rus.* GKChP) and defenders of the Supreme Soviet of Russia)[13] and the amnesties granted to participants of the armed conflicts in the North Caucasus.[14]

Transitional justice sits between the two extreme approaches that often occur in societies transforming from repressive authoritarianism to democracies: those of retaliation and forgetfulness. Retaliation occurs when victims who have long been deprived of justice (or those who speak for them) take justice into their own hands and retaliate against their tormentors. Classic examples are Operation Nemesis, carried out by the Dashnaktsutyun party against the organisers and perpetrators of the Armenian genocide (1919-1922); the street executions of state security officers during the Hungarian uprising of 1956; and the execution of Nicolae and Elena Ceaușescu in Romania (1989). In the case of forgetfulness, the perpetrators go unpunished while the survivors are expected to forget the past. In this context, unaddressed impunity inspires new tormentors, while society fails to develop the necessary immunity to dictatorship, which is therefore prone to re-emerge in new forms. Examples are post-Soviet Russia, Azerbaijan, and the former Soviet republics of Central Asia. Transitional justice offers balance; it seeks national reconciliation through justice, helps develop immunity to lawlessness, and protects the future from the recurrence of the past. In this sense, transitional justice can be said to be equally opposed to both violence and powerlessness.

In each specific context, the performance of transitional justice depends on what is commonly referred to as a *conflict of positive values*. The choice of approaches and instruments ultimately depends on how a society and its authorities deal with this conflict and the priorities guiding them.

Both in the doctrine and the practice of a sustainable law-governed state, the benefits of democracy, peace, and justice are seen as consistent values, as well as being interrelated and complementary to each other. However, in post-conflict and post-authoritarian societies, they can sometimes compete with one another, or at least be perceived as having competing values. Thus, in some cases, the total or partial non-prosecution for human rights violations becomes part of a "contract" (formal or informal) between the outgoing authoritarian regime and the new democratic government; one can say that through such "deals" democracy and peace are bought at the cost of justice. However, in situations of blatant injustice that affects a significant number of victims, this "deal" can be unilaterally terminated by the aggrieved party, either through mob law and revenge (sometimes amounting to organised terror against actual or alleged perpetrators) or through an outbreak or re-emergence of an armed conflict. In less critical contexts, injustice "poisons" society for years, making it difficult or impossible to build a law-governed state. In several countries, the loyalty of

13 Resolution of the State Duma of the Federal Assembly of the Russian Federation No. 65-1 GD of 23 February 1994: "On declaring a political and economic amnesty." This resolution granted amnesty to members of the GKChP, defenders of the Supreme Soviet of Russia in October 1993, as well as people prosecuted for several economic crimes envisaged by the then Criminal Code of the RSFSR.

14 In particular: Resolution of the State Duma of the Federal Assembly of the Russian Federation No. 4125-III GD of 6 June 2003 "On declaring amnesty in connection with the adoption of the Constitution of the Chechen Republic"; Resolution of the State Duma of the Federal Assembly of the Russian Federation No. 3498-4 GD of 22 September 2006 "On declaring amnesty for persons who committed crimes during the counter-terrorism operations in the territories of subjects of the Russian Federation located within the Southern Federal District."

victims is "bartered" for the revelation of the truth about the committed atrocities and/or lustration is carried out. In more inspiring examples (including the developments in Argentina), a long-term nonviolent struggle for justice by the victims has gradually led to the abolition of existing amnesties and the prosecution of a significant number of perpetrators, including former heads of repressive regimes and the secret police. In more stable political environments, with adequate resources and a robust civil society (such as Germany after re-unification), balancing the victims' right to justice and society's need for stable democratic development has been much easier and quicker to achieve.

The effectiveness of transitional justice mechanisms remains a matter of public and academic debate. If we consider only the immediate tasks of transitional justice mechanisms – criminal prosecution, truth-seeking, and reparations – Argentina, Chile, Germany, the Czech Republic, and the Baltic states, among others, provide good examples of their effective application. Many post-authoritarian and post-conflict countries that have practised transitional justice have made significant progress toward democratisation and the rule of law, but it is difficult to precisely determine the extent of its impact on these social achievements.[15]

Despite its broad application and support by respected international bodies, the concept of "transitional justice" is not universally accepted. It has been criticised primarily for its unjustified, opportunistic, or merely accidental mixture of legal and political objectives, i.e. those of justice and democratisation, as well as for imposing theories that claim to be universal without taking into account the actual needs of societies that have survived armed conflicts or repressive regimes.

Nevertheless, unlike the concept of "transitional justice," the underlying impunity for crimes sanctioned by the government is universally recognised as a problem that needs to be addressed. In this report, we have therefore attempted to avoid mechanically transposing the ideas of "transitional justice" onto the Russian context. Instead, we propose specific means to counter systemic impunity in Russia, drawing on domestic and foreign experience.

15 See, for example: Horne C.M. Building Trust and Democracy: Transitional Justice in Post-Communist Countries. Oxford: Oxford University Press, 2017.

4. Legal framework and methodology for the concept

This report presents factual data about the violations and governments' responses that have been obtained from:

- Media reports and investigations;
- Decisions of foreign and international courts, primarily the ECtHR;
- Documents from the Department for the Execution of Judgments of the ECtHR;
- Documents from non-judicial international human rights mechanisms, in particular the UN Committee against Torture;
- Reports and publications of human rights bodies, non-governmental organisations and associations, including Russian ones: the Presidential Council for Civil Society and Human Rights; the Golos movement; the Committee Against Torture (Nizhny Novgorod); the Memorial Human Rights Center; the OVDInfo media project; the Sova Centre for Information and Analysis; the Agora Human Rights Group. Foreign and international ones are also included: Human Rights Watch; Amnesty International; International Partnership for Human Rights; Ukrainian Helsinki Union for Human Rights;
- Research monographs, articles, and reports, including, in particular, "International Tribunal for Chechnya: Legal Prospects for Individual Criminal Prosecution of Persons Suspected of Committing War Crimes and Crimes against Humanity during the Armed Conflict in the Chechen Republic" (2009) and "Public Investigation of Torture and Other Violations of Fundamental Human Rights" edited by S. M. Dmitrievsky (2015), as well as research projects by the Institute for the Rule of Law (IRL) at the European University in St. Petersburg, in particular, "Criminal Statistics: Mechanisms of Formation, Reasons for Distortion, Ways to Reform" (2015).[16]

The legal assessment of the events discussed in this paper is mainly based on the legislation in force on the territory of Russia at the time of their occurrence.[17] As a general rule, laws establishing or aggravating liability may not be applied retroactively (Article 54 of the Russian Constitution). For this reason in particular, unpunished crimes of the Soviet era have been considered in the context of Soviet law due to the absence of another positive domestic law in Russia at that time. Pre-revolutionary Russian law has been used to address violations committed during the 1917 Revolution.

We believe that in some cases, the law itself becomes a means of political persecution, and as such, loses its legal nature (see, in particular, the examples in section 2.6 of Chapter 2). Such laws are considered unlawful in accordance with the provisions of Chapters 1 and 2 of the Constitution of the Russian Federation (The Fundamentals of the Constitutional System and Rights and Freedoms of Man and Citizen).

Apart from the Russian Constitution and laws, particular events have been assessed in the context of international human rights law and international humanitarian law. International human rights instruments used in this report include the International Covenant on Civil and Political Rights; the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the European Convention for the Protection of Human Rights and Fundamental Freedoms; and the

16 For the sake of brevity, the content of some sources cited in Chapters 2 – 6 to describe factual circumstances was summarized by the authors. Any inaccuracies in these summaries lie solely with the authors.

17 Unless specifically stated otherwise, references to all legal provisions are given as of 10 October 2020.

Geneva Conventions of 1949 and additional protocols to them. Where international courts have already examined relevant violations, legal assessments have been based on the court findings in the relevant cases.

Along with the provisions of Russia's international treaties, customary international law has been used for the legal assessment of the described events. International custom is "evidence of a general practice accepted as law."[18] This refers primarily to customary norms establishing responsibility for international crimes (for more details, see section 3 of Chapter 7).

The legally binding character of international custom is evidenced by its universal application by the states that consider it a legal norm (*opinio juris*). The primary sources of contemporary customary international criminal law are usually referred to as statutes and jurisprudence of *ad hoc* international criminal tribunals (for the former Yugoslavia and Rwanda) and the ICC. According to the case law of the ECtHR, an act can be criminalised under customary international law.[19] For this reason, the classification of crimes under international law in this report may have not only theoretical but also practical meaning.

On a separate note, we present the sources of the ideas that constitute the concept of transitional justice as proposed in this report. These are international treaties; recommendations of international intergovernmental and non-governmental organisations; legal positions of international courts and the Constitutional Court of Russia; foreign legislation; foreign and Russian academic literature; recommendations of Russian human rights organisations; and programmes of political parties and public organisations.

The two main sources of substantive proposals for the concept of transitional justice are the document of the UN Commission on Human Rights – "Updated set of principles for the protection and promotion of human rights through action to combat impunity" by Rapporteur Diane Orentlicher – and UN General Assembly Resolution 60/147 of December 16, 2005, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law." The framework and definitions of the concept are largely borrowed from these instruments. Along with these papers, which summarise international best practices in transitional justice, we used some other UN documents, including the report of the UN Secretary General "The Rule of Law and Transitional Justice in Conflict and Post-Conflict societies," dated August 23, 2004; Resolution 2005/66 of the UN Commission on Human Rights "The Right to Truth," dated April 20, 2005; the series of tools issued by the Office of the UN High Commissioner for Human Rights, "Rule of Law Tools for Post-Conflict States"; the Guidance Note of the Secretary-General, "UN Approaches to Transitional Justice"; and recommendations of the UN Committee Against Torture in the framework of consideration of Russia's periodic reports on compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

18 Statute of the International Court of Justice. Art 38.

19 See: ECtHR Kolk and Kislyiy v. Estonia. Applications nos. 23052/04 and 24018/04. Decision of 17 January 2006; Kononov v. Latvia [GC]. Application no. 36376/04. Judgment of 17 May 2010. For more detail, see: Богуш Г.И., Есаков Г.А., Русинова В.Н. Международные преступления: модель имплементации в российское уголовное законодательство: монография. М.: Проспект, 2017. p. 50–58.

Among the Council of Europe's recommendations, the most notable ones are the Committee of Ministers' Guidelines on Eradicating Impunity for Serious Human Rights Violations (2011); resolutions of the Parliamentary Assembly of the Council of Europe No. 1096 "Measures to dismantle the heritage of former communist totalitarian systems" (1996), No. 1481 "Need for international condemnation of crimes of totalitarian communist regimes" (2006) and No. 1738 "Legal remedies for human rights violations in the North Caucasus" (2010); and opinions of the Venice Commission for Democracy through Law – in particular those regarding vetting laws.

The referred case law of the European Court of Human Rights includes ECtHR judgments in *Aslakhanov and others v. Russi*a (2012) and *Abakarov v. Russia* (2015), as well as the Grand Chamber judgment in *Margush v. Croatia* (2014), the recent judgment in *Polyakh and others v. Ukraine* (2019), and the admissibility decisions in *Kolk, Kislyiy and Penart v. Estonia*.

Documents of other international organisations include the report of the International Committee of the Red Cross, "Families of Missing Persons: Responding to their Needs" (2009), as well as the definition of "grand corruption" offered by Transparency International.

Recommendations of Russian human rights and academic organisations that we have used as sources for our proposals include the "Draft State and Civil Society Program on Perpetuating the Memory of Victims of the Totalitarian Regime and on National Reconciliation," prepared in 2011 by the Presidential Council for the Development of Civil Society and Human Rights; the "Concept for Comprehensive Organizational and Managerial Reform of the Law Enforcement Agencies of the Russian Federation," developed in 2013 by the Institute for the Rule of Law (IRL) at the European University in St. Petersburg; and the shadow NGO report to the Committee against Torture on the Russian Federation's compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2012-2018).

The presented concept of transitional justice contains several references to judgments of the Constitutional Court of Russia, specifically judgement No. 11-P of 5 July 2001 (on retroactive amendment of the amnesty ruling), No. 5-P (on reversing judicial decisions in criminal cases) of 11 May 2005, and No. 39-P (on the right to return to victims of political repressions) of 10 December 2019.

A number of foreign laws have served as important sources for this concept of transitional justice, in particular: the laws of Germany on the suspension of the statute of limitations for the crimes of the Socialist Unity Party of Germany (1993); on the rehabilitation and compensation of the victims of criminal prosecution measures contradicting the legal statehood (1992); on the annulment of administrative decisions contradicting the rule of law and related additional requirements (1994); the law of South Africa on national unity and reconciliation (1995); provisions of the Criminal Code (as amended on 12 July 1995) and the Constitution of Poland (1997) on the statute of limitations for crimes; and the Czech law on participants of anti-communist opposition and resistance (2011).

From Russian scientific literature, we would like to highlight the monograph by G. I. Bogush, G. A. Esakov and V. N. Rusinova: "International Crimes. Model of Implementation in the Russian Criminal Legislation" (2017). Some of the ideas outlined in this paper had previously been expressed in our previous publications.

Chapter 1. Acts Eligible for Transitional Justice: Eligibility Criteria and Description Approaches

Transitional justice seeks to address a social problem that is commonly described in relevant documents either as "systemic injustice" ("systemic lawlessness"), "impunity for human rights violations," "crimes of the former repressive regime," or "past large-scale violations of the rule of law." As a rule, we are talking about violations of the law or infringements of human rights (not always the same as violations of statutory law) that go unpunished.[20] At the same time, the violations themselves, impunity for them, or both, are linked to state actions.

This Chapter attempts to relate these intuitive attributes to some well-established legal categories.

1. Criterion I: Violations of Law

There is a prevailing assumption that transitional justice extends to politically motivated violence that encroaches upon human rights, as well as to violence that is carried out in armed conflicts, and is prohibited by international humanitarian law. Below are some illustrative excerpts on the areas of competence from the founding acts of several truth commissions that are typical institutions of transitional justice.[21]

> **National Truth and Reconciliation Commission. Chile, 1990.**
> "…disappearance after arrest, executions, and torture leading to death committed by government agents or people in their service, as well as kidnappings and attempts on the life of persons carried out by private citizens for political reasons…"

> **Truth Commission of El Salvador, 1991.**
> "The commission shall have the task of investigating serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth."

20 *Бобринский Н.* Постсоветское переходное правосудие в России: достижения и упущенные возможности // Сравнительное конституционное обозрение. 2018. № 1 (122). pp. 142–168.

21 Excerpts from Charters of the truth commissions available at the project website, "Truth Commissions Digital Collection" of the US Institute of Peace, at: https://www.usip.org/publications/2011/03/truth-commission-digital-collection (accessed 19.06.2020). For more on truth commissions, see: *Hayner P.* Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions. London: Routledge, 2010; Rule-of-law tools for post-conflict States: Truth Commissions. UN document HR/PUB/06/1. New York, Geneva: UN, 2006.

Truth and Reconciliation Commission of South Africa, 1995.
" '[G]ross violation of human rights' means… 'the killing, abduction, torture or severe ill-treatment of any person' or 'any attempt, conspiracy, incitement, instigation, command or procurement' to commit such an act, which 'emanated from conflicts of the past… within or outside the Republic, and the commission of which was carried out, advised, planned, directed, commanded or ordered, by any person acting with a political motive.'"

National Reconciliation Commission of Ghana, 2002.
"…to seek and promote national reconciliation among the people of this country by recommending appropriate redress for persons who have… been adversely affected by abuses and violations of their human rights arising from activities or in activities of public institutions and persons holding public office during periods of unconstitutional government."

Equity and Reconciliation Commission of Morocco, 2004.
"To establish the nature and the scale of the gross human rights abuses [including] forced disappearances, arbitrary detentions, torture, sexual crimes and deprivation of the right to life, committed through the unrestricted and unduly use of state power, as well as cases of forced migration."

Committee on Clearing Up Past Incidents for Truth and Reconciliation. Republic of Korea, 2005.
"The Committee… shall determine the facts for the following cases.
<…>

3. Mass illegal victimisation of civilians from August 15, 1945 to the Korean War period.

4. Incidents of death, injury or disappearance, and other major acts of human rights violations, including politically fabricated trials, that were committed through illegal or seriously unjust exercise of state power, such as violating the constitutional order, from August 15, 1945 to the end of the authoritarian regimes.

5. Terrorist acts, human rights violations, violence, massacres and suspicious deaths by parties that denied the legitimacy or were hostile towards the Republic of Korea from August 15, 1945 to the end of the authoritarian regimes."

These excerpts all refer to violations of fundamental human rights such as the right to life, the right to liberty and security of a person, and the prohibition of torture and ill-treatment. Two primary sources of international standards in the field of transitional justice – the UN Set of Principles against Impunity[22] and UN General Assembly Resolution 60/147[23] – also refer to gross violations of human rights and international humanitarian law.

In some countries, however, transitional justice mechanisms also extend to violations of political and economic rights resulting from election fraud, bribery, and the illegal expropriation of property. Such mechanisms may include laws on the property restitution and compensation for expropriated business in the post-socialist countries of Central and Eastern Europe,[24] as well as the transitional justice institutions set up in Kenya and Tunisia. For example, Kenya's Truth, Justice and Reconciliation Commission (2008) was mandated to establish violations of economic rights and investigate financial crimes, including grave cases of corruption and abuse of natural and state resources, arbitrary and illegal acquisition of state land, as well as abuse of state institutions for political purposes. Along with human rights violations, Tunisia's Specialized Judicial Chambers (2014) were mandated to hear cases of electoral fraud, financial corruption, and misappropriation of budgetary funds.[25]

This report takes a broader approach to the purpose of transitional justice and analyses not only violations of personal human rights, but also breaches of political, civil and economic human rights as guaranteed by the Russian Constitution and international agreements entered by the Russian Federation, as well as violations of the fundamentals of Russia's constitutional system. This broad selection permits us to go beyond "classic" human rights violations such as extrajudicial executions or torture, and cover offences against public administration – for example, abuse of power and bribery. If unpunished, these offences may also infringe on the political or economic rights of citizens exercised through state institutions and with budgetary funds, and thereby undermine the constitutional principles of democracy, the separation of powers, and the welfare state.

Although transitional justice is designed to remedy the consequences of the most serious violations of law, these are not necessarily limited to criminal offences, but can also include constitutional and administrative offences, and civil injury. Anyway, to determine whether a particular violation of human rights or the fundamentals of the constitutional systems needs to be addressed by transitional justice, its *a priori* assessment as a criminal offense is not required.

22 OHCHR. Updated Set of principles for the protection and promotion of human rights through action to combat impunity. UN document E/CN.4/2005/102/Add.1 of 8 February 2005, at: https://undocs.org/ru/E/CN.4/2005/102/Add.1 (accessed 19.06.2020).

23 UN General Assembly Resolution 60/147 of 16 December 2005, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, at: https://www.un.org/ru/documents/decl_conv/conventions/principles_right_to_remedy.shtml (accessed 19.06.2020).

24 See: *Damsa L.* The Transformation of Property Regimes and Transitional Justice in Central Eastern Europe: In Search of a Theory. Cham, Switzerland: Springer, 2016; *Allen T., Douglas B.* Closing the Door on Restitution: The European Court of Human Rights // Transitional Jurisprudence and European Convention on Human Rights / ed. by A. Buyse, M. Hamilton. Cambridge: Cambridge University Press, 2011. pp. 208–238. From publications in Russian, see: Реституция прав собственности / под ред. Б.С. Пушкарёва. М.: Посев, 2005; *Синкявичюс В.* Восстановление права собственности на национализированное имущество (опыт Литовской Республики) // Правоведение. 2005. № 1. pp. 36–53.

25 Republic of Tunisia. Organic Law on Establishing and Organizing Transitional Justice, at https://www.ohchr.org/Documents/Countries/TN/TransitionalJusticeTunisia.pdf (accessed 19.06.2020).

Manifestations of impunity in criminal law

Judicial impossibility (of holding to account)

- **The action is not criminalised**
- **The statute of limitations for criminal prosecution has expired**
- **The guilty party has not been stripped of immunity from criminal prosecution (chapter 52 of the Criminal Procedure Code)**
- **Amnesty**

De facto impossibility

- **The crime has not been discovered (natural latency)**
- **Groundless refusal to open a criminal case (artificial latency)**
- **The guilty party has not been identified or has absconded**
- **The prosecutor has groundlessly declined to bring charges**
- **Groundless acquittal or unjustly lenient sentence as a result of judicial error**
- **Miscarriage of justice**

2. Criterion II: Systemic Impunity

One of the specifics of transitional justice is that it extends to events that happened in the past rather than in the future, and this is related to the problem of impunity.

The concept of impunity is rarely used in Russian legal practice and science.[26] However, it is sufficiently established in UN and Council of Europe recommendations. According to the definition provided in the UN Set of Principles to Combat Impunity, "impunity" means the "impossibility, **de jure or de facto,** of bringing the **perpetrators** of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are **not subject to any inquiry** that might lead to their being accused, arrested, tried, and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims. Impunity arises from a failure by a state to do the following: meet its legal obligations to investigate violations of law; take appropriate measures against perpetrators – particularly in the area of justice – by ensuring that those suspected of criminal acts are prosecuted, tried and duly punished if proven guilty in a court of law; provide victims with effective remedies and ensure that they receive reparation for the injuries suffered; ensure the inalienable right to know the truth about violations."[27]

26 We know of only one legal monograph that relies on this term, see: *Смирнов А.* Уголовно-правовая безнаказанность. М.: Юрлитинформ, 2014.

27 UN document E/CN.4/2005/102/Add.1 of 8 February 2005.

The Council of Europe's guidelines on eradicating impunity[28] explain that impunity arises when those responsible for acts that amount to serious human rights violations are not held accountable. Impunity is either caused or facilitated notably by the absence of a diligent reaction from institutions or state agents to serious human rights violations, particularly if the state's reaction does not comply with European standards of effective investigation. An effective investigation must meet the criteria of adequacy, thoroughness, impartiality, independence, and promptness, and be open to public scrutiny.

In this report, impunity means inadequate **legal response/reaction to a violation of law, which is expressed in the failure to bring perpetrators to justice and (or) to make reparations for the inflicted harm or to restore victims' rights.**

Russian criminology traditionally uses the concept of "latent crime" to refer to the totality of unregistered crimes. This notion, in turn, distinguishes between crimes that are *unreported to* law enforcement agencies – and are hence unknown to them –, and crimes that are *deliberately concealed by* them.[29] Clearly, all latent crimes remain unpunished.

In the context of criminal proceedings, impunity may manifest itself as a violation of the norms of the Criminal Procedure Code of the Russian Federation (hereafter – the Criminal Procedure Code, particularly of Article 21, which mandates prosecutors, investigators, and inquirers to initiate criminal proceedings in every case where signs of crime are detected; Articles 140 and 146, which provide for the mandatory initiation of criminal proceedings on the basis of specific reasons and grounds; Article 144(2), which requires to conduct a pre-investigation check of every report of a crime that appears in the mass media; Article 297 on legality, substantiation and fairness of sentences in criminal cases; etc. In criminal law, impunity may result from malfeasance in office and crimes against justice.

It is worth mentioning that the need to combat impunity is at the heart of the principles of complementarity of the ICC. The Court only considers a case if the State that has jurisdiction over it is unwilling or genuinely unable to carry out an investigation or a prosecution of a crime. Article 17(2) of the Rome Statute of the ICC[30] lists indicators of unwillingness to investigate and prosecute:

> (a) "The proceedings were or are being undertaken, or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes;[31]
>
> (b) "There has been an unjustified delay in the proceedings, which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

28 Eradicating Impunity for Serious Human Rights Violations. Guidelines adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies. I (1). See the text with commentary at: https://rm.coe.int/1680695d6e (accessed 19.06.2020).

29 See, for example: Теоретические основы исследования и анализа латентной преступности: монография / под ред. С.М. Иншакова. М. : Юнити-Дана : Закон и право, 2011.

30 The Rome Statute of the International Criminal Court of 17 July 1998.

31 A similar criterion is provided for exception from *ne bis in idem* (the prohibition of double jeopardy) under Article 20(3) of the Rome Statute.

> (c) "The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner, which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

"In order to determine inability in a particular case, the Court shall consider whether – due to a total or substantial collapse or unavailability of its national judicial system – the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings" (Article 17 (3) of the Rome Statute).

The concepts of "unwillingness" or "inability" in the Rome Statute are comparable to the concept of "impossibility" of prosecution, as identified in the definition of impunity provided by the UN Set of Principles to Combat Impunity.

Let us illustrate examples of impunity by looking at various scenarios of state law-enforcement actions. These scenarios are based on the assumption that a specific sane adult committed a socially dangerous and unlawful act. It disregards potential circumstances that might preclude the criminal nature of the act, such as necessary defence.

1. The act was not recognised as a crime, despite the harm that it has caused and its obvious public danger. For example, the systematic use of psychiatric treatment methods against dissidents in the USSR – a practice which seems to clearly meet the characteristics of a crime against humanity in international law, but is not criminalised in Russia and cannot be subject to criminal prosecution (for more detail, see section 1 of Chapter 6 of this report).[32]

2. The law enforcement agencies failed to detect the crime[33] and nobody reported the crime to them. In criminology, this situation is called *natural latency (latent or unreported crime)*.

3. Law enforcement authorities became aware of the crime but refused to initiate criminal proceedings (in criminology*, deliberately concealed crime*).[34]

4. Criminal proceedings were denied or terminated due to the expiration of the statute of limitations (§ 3 of Article 24(1) of the Criminal Procedure Code).

5. Criminal prosecution was denied, as the persons to be prosecuted had immunity from prosecution and the conditions necessary to overcome this immunity were not met (Chapter 52 of the Criminal Procedure Code).

6. A criminal case was initiated, but the perpetrator was either never found or was able to run away from the investigation (which is grounds for suspending the preliminary investigation under Article 208 of the Criminal Procedure Code).

32 Карательная психиатрия в России. М.: Международная Хельсинкская Федерация по правам человека, 2004.

33 Crime should be detected as part of law enforcement intelligence operations and documented in a Report on the Exposure of Signs of a Crime (Article 143 of the Criminal Procedure Code of the Russian Federation).

34 In addition to the actual refusal to initiate criminal proceedings, this scenario should include refusal to register a crime report; consideration of a crime report as a citizen's petition to the public authority, an administrative offense report, etc. rather than under Article 141 of the Criminal Procedure Code.

7. A criminal case was referred to court, but the prosecutor dismissed the charges without valid reasons, resulting in the termination of the criminal case or criminal prosecution (Article 246 (7) of the Criminal Procedure Code).

8. The perpetrator was identified, but the crime and/or the perpetrator's role were qualified in such a way that either he/she was exempted from criminal liability, or he/she was given an unreasonably lenient sentence.

9. The perpetrator was exempted from criminal liability or punishment by an amnesty.

10. An innocent person was convicted of committing the crime.

In scenarios 1, 4, 5, and 9, impunity arises because of the "*de jure* impossibility" (in the terms of the UN Set of Principles to Combat Impunity) to prosecute the perpetrator or punish him/her, as is the case in scenario 9. In other words, certain legal limitations beyond the control of the prosecuting and judiciary authorities prevent them from fulfilling their mandate.

However, "*de jure* impossibility" can also be of a different nature. For instance, the immunity enjoyed by holders of certain positions may preclude their criminal prosecution for political reasons (e.g. the President of Russia, as required, does not make a submission to the Russian Supreme Court which would allow the initiation of criminal proceedings against the Prosecutor General; the State Duma does not consent to the opening of criminal proceedings against one of its members) or due to departmental or corporate "solidarity" (e.g. members of a qualification board of judges refusing to institute criminal proceedings against a judge, etc.). An amnesty, which is granted by the State Duma, is by definition a political act.

It is noteworthy that, in Russia, decisions on declaring an act or omission criminal, establishing a statute of limitations for a crime, and declaring amnesties fall within the discretion of competent state bodies, according to their competencies as established by the Constitution. As a rule, provisions of the Criminal Code and amnesty decrees cannot be considered an inadequate legal response to a crime unless they contradict provisions of the Russian Constitution and international law.

With regard to the other scenarios (2, 3, 6, 7, 8, 10), we can talk about "de facto impunity."

The latent (unreported) crime (scenario 2) is usually attributed to the inevitable limitations of the effectiveness of law enforcement agencies. In addition, their intra-agency interests are to be considered (i.e. the dependence of performance evaluations on certain statistical indicators), as agencies tend to investigate thoroughly only those crimes that have an impact on their key performance indicators (e.g. drugs-related crimes) while at the same time, they evade investigating others.[35] Finally, at this stage, there could also be a "reluctance" to investigate, which manifests itself through deliberate efforts to ignore crime reports. Notably, this "reluctance" does not always contradict Russian law. In particular, the Criminal Procedure Code mechanism for

35 See: Криминальная статистика: механизмы формирования, причины искажения, пути реформирования: Исследовательский отчёт / М. Шклярук, Д. Скугаревский, А. Дмитриева, И. Скифский, И. Бегтин. СПб. : Центр независимых социальных исследований и образования ; М. : Норма, 2015. pp. 48-53.

initiating criminal proceedings based on communications about crimes in the media can hardly be considered effective. Although these communications are subject to inquiry under Article 144(2), the law does not oblige investigators and prosecutors to search the media for information about crimes on their own initiative. Therefore, even high-profile media reports of atrocities can "go unnoticed" by law enforcement agencies with no law being violated.[36]

The reasons for the concealment of crimes by the police include the same intra-agency interests mentioned above, when the police only investigate cases that can influence their detection rates while deliberately "filtering out" all others.[37] In these cases, impunity may also be a consequence of crime concealment. "Filtering" and deliberate crime concealment include denying registration of a crime report (which is illegal in any case), registering it as another kind of application rather than a crime report (in violation of Articles 144-145 of the Criminal Procedure Code), or unjustifiably refusing to initiate criminal proceedings. Depending on the circumstances, concealment of a crime may qualify either as abuse, excess of power or forgery.

Failure to identify a perpetrator and bring him/her to trial, misclassification of a criminal act, unjustified dismissal of charges, and prosecution of an innocent person can result either from malpractice by preliminary investigations, the state prosecution, or the judiciary, or from ineffective investigations that could be the result of corruption or political motives. If intentional, these actions may qualify as different crimes against justice, such as obstruction of justice or of preliminary investigation, prosecution of an innocent person, illegal exemption from criminal responsibility, falsification of evidence, or passing a deliberately unfounded judgment.

Impunity also occurs in the case of de-jure or de facto impossibility of reparation/compensation for the damage inflicted on the victim, particularly when:

- There are no legal grounds for compensation;
- The statute of limitations has expired;
- Compensation was unreasonably denied by court;
- Compensation provided by law or awarded by court is clearly disproportionate to the nature of the inflicted harm;
- The perpetrator has not been identified, which usually makes compensation impossible;
- The decision on compensation has not been enforced.

We can also discuss impunity as a failure to restore victims' rights concerning other categories of offences such as violations of constitutional, administrative, and electoral law.

As illustrated by the scenarios above, despite the principle of mandatory criminal prosecution (Article 21(2) of the Criminal Procedure Code), Russian law does not pursue the goal of punishing every crime. Far less does the government aims at the restoration of rights of every victim of non-criminal violations, because in most cases, the defence of such rights can be initiated only by the victims themselves.

36 Nevertheless, if there is evidence of deliberate neglect of data on the committed crime, the inaction of prosecutors and investigators can qualify as negligence.

37 Криминальная статистика, pp. 54-60.

For this reason, transitional justice is not designed to address consequences of impunity for all violations of human rights or the fundamentals of the constitutional system but should rather focus only on those manifestations of impunity that are systemic – that is, caused by the government policies. The following characteristics may suggest the systemic nature of impunity:

- Lack of any law enforcement response to reports of widely known crimes, e.g. those that get media coverage;
- Criminal assaults are systematic, yet law enforcement only responds to some of them, e.g. those that have caused a public scandal;
- Crimes are investigated ineffectively, despite the pressure from victims or other interested parties;
- There is evidence that the crimes were committed by high-ranking government officials, or remain unpunished at the behest again of high-ranking government officials.[38]

3. Criterion III: Retaining Interest in the Legal Response

The criterion of impunity does not suggest any time limits. However, transitional justice is not intended to overcome the consequences of all the unpunished atrocities committed by Russian rulers throughout the country's history. It can be extended only to those events in the past that still call for a legal response by virtue of genuine public interest or justified legal claims of individuals, namely, when:

- The offence amounts to an international crime that has no statute of limitations (aggression, war crimes, crimes against humanity, genocide);
- The reasonably suspected perpetrator is still alive;
- The victims of the crime or their close relatives are still alive;
- The harm caused by the offence can be remedied;
- Information about the offence is still classified.

We proceeded on the assumption that an interest in the legal response is present if at least one of the above-listed conditions is satisfied.

4. Criterion IV: Demand for Justice

Since transitional justice involves special measures that differ from the general rules applied when responding to violations, the choice of eligible criminal acts to be prosecuted lies not only in the realm of law but also in the political realm. Transitional justice is primarily used in response to the demand for justice from victims of repressive policies carried out by a previous regime.

38 Such situations include, among others, the so-called "self-amnesty." The Constitutional Court of the Russian Federation explained illegitimacy of self-amnesty as follows: "It is inadmissible to use means of amnesty to create conditions for exemption from criminal liability of those persons who participate in the decision on the amnesty, which due to the inherently broad discretionary nature of this constitutional power would clearly contradict the ideas of justice." See: Decision of the Constitutional Court of the Russian Federation of July 5, 2001 № 11-P "On verification of constitutionality of the Resolution of the State Duma of June 28, 2000 № 492-III DG: On Amending the Resolution of the State Duma of the Federal Assembly of the Russian Federation "On Amnesty in Connection with the 55th Anniversary of Victory in the Great Patriotic War of 1941-1945" over a request of the Sovetsky District Court of Chelyabinsk and complaints of citizens."

We do not aim to model the demands for justice to a moment in the future when these demands could be satisfied, but instead we proceeded from the specific situation that existed at the time of writing this report (2016-2019). The choice of events described in the following chapters is based on the assumption that, all other things being equal, the future transitional justice agenda will most likely include cases of impunity that are already being openly discussed and addressed through existing available legal remedies. However, it is understood that some previously unknown atrocities may be revealed after a fundamental change in the political situation.

* * *

The aforementioned criteria – (1) offences infringing either on human rights or the fundamentals of constitutional system, (2) their impunity for systemic reasons, (3) presence of a genuine interest in a legal response, and (4) public or victims' demand for justice – have been used to identify five main areas of unlawful activities that are eligible for transitional justice. These include crimes aimed at appropriation or retention of state power; crimes committed in the context of armed conflicts involving Russia; crimes of corruption; other violations of constitutional human rights; and crimes of the Communist regime in Soviet Russia. The last category is different from the others not only chronologically but also because certain measures have already been taken to overcome impunity for those crimes.

5. The Meaning of the Statements Included in the Report

The report does not contain an exhaustive description of the events that meet the eligibility criteria for transitional justice. The examples given in Chapters 2-6 are used for illustration purposes only.

In writing this report, we repeatedly faced the need to formulate different working hypotheses regarding systemic large-scale human rights violations and power abuse mechanisms, certain individuals involved in the crimes, forms and types of their involvement. For this purpose, we used the standards of proof recognised in legal science and practice.

As indicated by the Office of the UN High Commissioner for Human Rights, the construction of "rational hypotheses," including those on crime "scenarios,"[39] is one of the most essential tools utilised for analysing and investigating systemic crimes. Of course, these hypotheses do not claim to hold a monopoly on the absolute truth. They may be subsequently confirmed, refined, or refuted by either further research, official investigations, or legal proceedings. Like all scientific theories, they are constructed to take into account currently available facts in the most consistent way possible. For example, in a scenario where murders or forced disappearances repeatedly occur according to the same pattern in different parts of a given area, it seems reasonable to suggest that an organised design of criminal activities exists. In a context where electoral commissions in different parts of the country use almost identical methods for rigging elections in favour of a particular party, the police turn a blind eye to electoral fraud, and the investigative and judicial authorities consistently reject relevant complaints, the most consistent hypothesis would be that different state agencies coordinate their actions for the common purpose of manipulating election

39 Office of the United Nations High Commissioner for Human Rights. Rule-of-law tools for post-conflict States: Prosecution Initiatives. New York, Geneva: UN, 2006, pp. 6-7.

outcomes. Independent and impartial judicial proceedings may likely reveal new facts that would prove the assumptions wrong. However, until then, the analysis of the events in question should be based on an inference that most plausibly and consistently explains the currently available body of evidence.

Thus, the inferences made regarding the presence of elements of criminal activities in the events described below, as well as regarding the responsibility of certain individuals for these crimes, are merely hypothetical.

In the first place, any such inference should not be construed as a conclusively established fact. By saying that certain inferences indicate the existence of a crime and its perpetrator, we imply that these inferences (provided they are accurate):

- Contain information indicating the characteristics of a particular crime;
- Offer substantial grounds to believe that the individual (if identified) was presumably involved in the crime in question by his/her act or omission, or he/she failed to take appropriate measures to prevent and punish the crime, thus violating Russian or international law.

The word "presumably" emphasises that these individuals cannot at present be considered guilty until their guilt is proven by a competent national or international court established by law.

Secondly, speaking of the presumptive responsibility of an individual, we do not imply that s/he was necessarily personally involved in the objective (material) element of the offence. Here, the term "liability" embraces all kinds of constitutional, civil and criminal responsibility provided by Russian and international law, including (with respect to the latter): planning, ordering, committing, aiding and abetting in the planning of a crime, preparing and commissioning the crime individually or together with others within a shared criminal purpose, intent or plan. This also includes the responsibility of higher-ranking officials for their inaction with regard to the crimes of their subordinates.

Therefore, we are guided by prima facie standard of proof, which is applied in international criminal courts whenever a prosecutor decides to investigate or prosecute a case. The essence of this standard of proof was well-defined at the end of the 19th century by Russian lawyer Kronid Malyshev regarding civil proceedings: "In every fact there is a set of attributes which at first sight, *prima facie,* make it credible and convince us of its existence. If the plaintiff has proven the facts to this extent, a presumption arises against the defendant until further development of the adversarial proceedings."[40] The ECtHR defines the *prima facie* standard of evidence as a "sufficiently strong, clear and concordant inference."[41] Of course, such a version of the charge can be either confirmed or refuted in the course of the trial. This standard meets the necessary requirements that establish the reasons and grounds for opening a criminal case defined as "the existence of sufficient data, pointing to the signs of a crime" (Article 140(2) of the RF Criminal Procedure Code).

40 See: *Малышев К.* Курс гражданского судопроизводства. Т. 1. СПб. : Тип. М.М. Стасюлевича, 1876.
41 See: ECtHR. *Zakharova v. Russia.* Application no. 12736/10. Judgment of 8 March 2022. § 37.

The current assumption of the prevailing impunity for particular categories of offences in Russia as described in the report relies on the analysis of reported statistics that have been generated by NGOs and crime monitoring associations, as well as official crime and court statistics. It also relies on the ECtHR's data of Russia's non-compliance with its procedural obligations to investigate human rights violations; as well as on data on the actions taken by Russia to remedy such violations as provided by the Department for the Execution of Judgments of the ECtHR; and on findings from sociological surveys.

6. Methods for Describing Crimes

The descriptions of unpunished crimes in the following chapters are structured according to behavioural patterns that imply sustained recurrence of certain criminal acts in similar contextual circumstances.[42] This way of presentation is easier to comprehend than any more formal approach, e.g. presentation according to the targets of the crimes.

This report examines patterns of unlawful behaviour, or, in other words, contextual domains from different perspectives, and illustrates them with examples of reported crimes within the same pattern. It also identifies typical targets of the offences as well as the domains of the state activities where these unlawful acts allegedly occur. It further identifies the crimes with characteristics similar to those found in the reported unlawful acts, as well as the legal grounds for restorative measures (reparations). The review of the restorative measures is intended to show what kind of measures could apply to overcome the consequences of the offences under the current laws. A special mention is made of signs of impunity.

The vast majority of the acts described in this report are associated with the activities of the state, but this association varies from law-making to informal practices[43] involving governmental officials and other state agents. In order to determine the association between unlawful behaviours and the activities of the state, we drew on the concept of *domains of constitutional practice* from the theory of constitutional monitoring as developed by the Institute for Law and Public Policy.[44] In this concept, "constitutional practice" refers to the totality of activities of the state in different domains of constitutional regulation, including law-making, judicial decisions based on existing laws, and activities of executive authorities at different levels, guided by regulations as well as by informal traditions, norms, and practices that influence the actions all branches and levels of the government. Since any actions of the state authorities – rather than those relating to the domains of constitutional regulation – are relevant for this report, we have changed the term to "domains of the state activities," which includes the practices of any state and local government bodies. Like the authors of the study on constitutional monitoring, we distinguish four such domains: 4law-making, legal proceedings, "formal" (i.e. guided by regulations) activities of the executive branch, and informal practices.

42 For more about this method see: *Дмитриевский С.М., Гварели Б.И., Челышева О.А.* Международный трибунал для Чечни: правовые перспективы привлечения к индивидуальной уголовной ответственности лиц, подозреваемых в совершении военных преступлений и преступлений против человечности в ходе вооруженного конфликта в Чеченской Республике. Т. 2. Нижний Новгород, 2009. pp. 7–8.

43 См.: *Шаблинский И.Г.* Эволюция политического режима в России. Конституционные основы и неформальные практики. М. : ТЕИС, 2014. p. 8

44 Конституционный мониторинг: Концепция, методика и итоги экспертного опроса в России в марте 2013 года / под ред. А.Н. Медушевского. М. : Институт права и публичной политики, 2014.

Chapter 2. Offences Aimed at Appropriating and Retaining State Power

1. General Characteristics

This chapter provides an overview of unpunished crimes in the political domain (hereafter referred to as political crimes). In determining the focus of this chapter, we were guided by the provisions of the Russian Constitution (Article 1 § 1 and Article 3 § 1-3) relating to Russia as a democratic state and to the people being the only source of power.

According to the Constitution, the seizure of power and usurpation of official authority shall be prosecuted under federal law. Norms that protect the democratic system are enshrined in several chapters of a dedicated section of the Criminal Code of the Russian Federation (hereafter, Criminal Code).[45] These norms encompass various general targets against which criminal offences are directed, including citizens' constitutional rights, the fundamentals of the constitutional system, state power, and justice. There are crimes against human life and health, as well as against the freedom, honour and dignity of the person that may also be committed for the purpose of appropriating power. On the other hand, not all unlawful acts that aim to appropriate power are classified as crimes.[46]

45 In particular, Section X of the Criminal Code, "Crimes against State Power," includes Chapter 29 "Crimes against the Fundamentals of the Constitutional System and State Security" and Chapter 30 "Crimes against State Power." However, on the one hand, not all of the acts included in this Section encroach on the state power as such (for example, Chapter 30 includes crimes against the interests of the civil and municipal service, while Chapter 31 in general includes crimes against administrative order). On the other hand, the norms of the Criminal Code that secure the institution of elections and referenda, as well as political rights and freedoms are set out in other Sections or Chapters (for example, Chapter 19 "Crimes against the Constitutional Rights and Freedoms of Man and Citizen" under Section VII "Crimes against the Person"). Article 63.1 of the Criminal Code lists political hatred or enmity as aggravating circumstances. However, not all crimes in the political domain are committed for reasons of hatred.

46 See, for example, Articles 5.1–5.25 of the Code of Administrative Offences of 30 December 2001 no. 195-FZ.

To this end, the authors use as a unifying characteristic the alleged political objective[47] of the illegal acts discussed in this chapter, i.e. the illegal appropriation and retention of power (in other words, the usurpation of power). Power is understood as the actual ability of public authorities[48] to exercise their authority, or to control the exercise of authority by other officials. Individual acts that are perpetrated with the common political goal of assuming or retaining power can be committed with some other immediate objectives but still facilitate this goal. Thus, forcing journalists to spread positive information about government policies has the immediate objective of ensuring public acceptance, while instructing the Ministry of Justice to deregister a political party is aimed at eliminating political competitors. As a "rational hypothesis," we assume that all perpetrators of the illegitimate acts described in this chapter pursue the common political purpose of appropriating or retaining power. Their actual intentions could be revealed during investigation of these crimes.

In our understanding, the appropriation of power takes two primary forms: the unlawful acquisition of public office and illegal interference with public authorities. In the latter scenario, power that is vested in a particular state body under the law is "appropriated" through some form of coercive external influence on its leaders. Such influence is unlawful insofar as it contradicts the principle of separation of powers, affects the legitimate prerogatives of the affected state body, or exceeds the jurisdiction of the person in charge, who thereby appropriates "someone else's" power.

The difference between these two forms of appropriation of power can be illustrated in the following example. A person becomes the President of the Russian Federation through a rigged election. In this case, there is an "appropriation of office" and, consequently, of the power that belongs to the office holder. Alternatively, if the President of the Russian Federation issues an order to the chairperson of the national Investigative Committee – for example, to institute criminal proceedings against a political opponent or to acquit his cronies – then he effectively appropriates the authority granted to the Investigative Committee by law. After all, according to the law, the President himself has no right to exercise investigatory powers.

The diverse phenomena of Russia's socio-political life are described in this report through patterns of unlawful behaviours. As mentioned above (see section 6 of Chapter 1), this means the persistent repetition of similar unlawful acts in a particular context. A total of six clusters (blocks) have been identified: the unconstitutional expansion of the Russian President's powers; interference with the media; interference with democratic institutions; interference with legislative (representative) bodies of

47 This term is derived from the practice of the UN's international criminal tribunals. The tribunals distinguish between primary and ultimate political objectives. At the same time, a primary objective is usually understood as the actual outcome that the perpetrator wants to achieve to advance the ultimate political objective. In the case of different primary and political objectives, the latter does not necessarily have to be a criminal one. Thus, in the case of Milan Martić, the International Criminal Tribunal for the former Yugoslavia (ICTY) stated that the displacement of the non-Serb population from the Republika Srpska was the primary objective of the joint criminal enterprise. See International Criminal Tribunal for the former Yugoslavia. Prosecutor v. Martić. Case no. IT-95-11. Trial Chamber Judgment of 12 June 2007. § 427, 454. At the same time, the political objective for the illegal displacement of the non-Serbian population was "to unite Serb areas" for the establishment of "an ethnically Serb territory" (ibid. § 445). The Tribunal concluded that the objective "to unite with other ethnically similar areas" in itself does not amount to a crime. However, "where the creation of such territories is intended to be implemented through the commission of crimes within the [ICTY] Statute, this may be sufficient to amount to a common criminal purpose" (ibid. § 442). In this and similar cases, the "primary objective" is in fact an illegitimate means to achieve a usually legitimate political purpose that does not constitute a crime in the meaning of the ICTY Statute.

48 Hereinafter in this chapter, the term "public authorities" also includes local self-government bodies, unless specifically stated otherwise.

state power and political parties other than during elections; interference with the administration of justice; and political repression.

The proposed classification is based on the authors' analysis of factual material. We did not limit ourselves to certain chronological periods; however, the majority of the examples given in this chapter belong to the period from 2000 to 2019. The choice of this period does not rule out the fact that similar events that occurred during the first decade of the Russian Federation's existence are also of interest in terms of transitional justice.[49]

It is quite difficult to generalise about the perpetrators of political crimes. We limit ourselves to one brief remark: Representatives of the executive branch (also referred to in this chapter as the "administration") are involved in one form or another in all the described cases of unlawful behaviour. This system is of centralised nature and forms a pyramid of hierarchy with the President at the top. Various notions can be used to describe the structure of executive power in Russia, such as the "vertical of power" – the political slogan of Vladimir Putin's first presidential term that was put into practice – or "the extended President," a notion that, per its authors' definition, means the Russian President, his Administration, and organs of the executive branch.[50] The hierarchical nature of executive power does not rule out the potential existence of certain political crimes not only at the top but also at middle "levels" of the hierarchy. However, violations can never be left unpunished without the participation of the higher "levels" of the hierarchy, right to the very top.

So far, attempts to reveal the mechanisms of decision-making in committing large-scale political crimes, such as federal election fraud for example, have failed. Relatively complete information is available only on how these decisions are implemented at the regional and local levels (see section 2.3 of this chapter).

2. Patterns of Unlawful Behaviour

2.1. The Expansion of Presidential Power

The first contextual group of offences targeted at appropriating and retaining power is the unconstitutional expansion of the powers of the President of Russia. It consists of two kinds of offences: Extending **the term of the Russian President and vesting the Russian President with powers unrelated to his or her constitutional duties**[51].

49 On the evolution of legally questionable practices by the state authorities, see: Шаблинский И.Г. Эволюция политического режима в России. Конституционные основы и неформальные практики. М. : ТЭИС, 2014.

50 Конституционный мониторинг: Концепция, методика и итоги экспертного опроса в России в марте 2013 года / Под ред. А.Н. Медушевского. М. : Институт права и публичной политики, 2014. p. 87.

51 This report had been largely completed when President Putin initiated extensive amendments to the Russian Constitution in January 2020. Opinions expressed in this paragraph fully apply to the amendments, which subordinate the legislature, the judiciary and the prosecutor's office to the President, and which, in our opinion, contradict the constitutional principle of the separation of powers. We are talking about the new constitutional powers of the President, including the power to appoint chairmen of federal courts (with the exception of the Supreme and Constitutional Courts); to appoint and dismiss the Prosecutor General of Russia and his/her deputies; to submit to the Federation Council proposals for terminating the powers of the chairmen, vice-chairmen and judges of the Russian Constitutional and Supreme Courts as well as of the courts of cassation and appeals; and to nominate candidates for the chairman, vice-chairman and auditors of the Russian Accounts Chamber. These are covered, respectively, by Articles 83f, 83f1 and 83f3 of the Constitution of the Russian Federation, as amended by the Law on Amendment to the Constitution of the Russian Federation No. 1-FKZ, of 14 March 2020, "On Improving the Regulation of Certain Aspects of the Organization and Functioning of Public Authority."

The first kind includes a single episode, i.e. the prolongation of the Russian President's term of office from four to six years in 2008. Contrary to the seemingly formal nature of this amendment to the Russian Constitution, it resulted in the frequency of presidential elections being decreased by one and a half. This reduction can be seen as an unlawful restriction on the power of the people, which, as written in the Constitution, is expressed through free elections.[52] However, the Constitutional Court of Russia has repeatedly refused to evaluate the amendments for compliance with the provisions of the Constitution, including those regulating the fundamentals of the constitutional system.[53]

The second kind of unlawful expansion of presidential power is vesting the President with powers that are unrelated to his constitutional duties. Here, we are talking about the statutory powers of the President in domains unrelated to the constitutional functions of the head of state, in particular, those that belong to the functions of other government bodies. This category can be exemplified by the Russian President's right to nominate candidates for the positions of Chairman, Deputy Chairman, and auditors of the Accounts Chamber of the Russian Federation, as vested to him by Federal Law No. 41-FZ of 5 April 2013 "On the Accounts Chamber of the Russian Federation." Under Article 101 § 5 of the Constitution of the Russian Federation, the Accounts Chamber is a body that exercises parliamentary oversight over the implementation of the federal budget, and in this capacity, it should be independent from the President of the Russian Federation.[54]

The unlawful expansion of presidential power takes place in the legislative domain. This may have a criminal component only to the extent that deputies of the legislative bodies of the Russian Federation and its constituent entities have voted for the relevant laws as a result of unlawful coercion (see section 2.4 of this chapter for more details). Restorative measures applicable to the offences included in this cluster are limited to verification of the constitutionality of the relevant federal laws by the Constitutional Court of Russia[55] or their revocation or amendment by Parliament. Strictly speaking, these measures do not relate to transitional justice, as they only have prospective applicability.

2.2. Interference with the Media and Restrictions on Internet Freedom

The second cluster of illegal behaviours comprises interference with the media and the Internet for the purpose of appropriating or retaining power. The Russian Constitution protects the mass media through a guarantee of media freedom and a ban on censorship (Article 29 § 5) and the principles of ideological and political diversity (Article 14 § 1 and 14 § 3). Unlawful interference with media activities through the use of state power also encroaches on the democratic system (Article 3)

52 In 2009, the Constitutional Court of the Russian Federation refused to accept for consideration an application for revocation of this constitutional amendment. See: Ruling of the Constitutional Court of the Russian Federation of 16 July 2009, No. 922-O-O "On Refusal to Accept for Consideration an Application of the Public Charity Organization Philanthropic Club "Yesei" to Revoke Amendments to the Constitution of the Russian Federation."

53 See: Троицкая А. Российский Конституционный Суд и проверка поправок к Конституции: как распахнуть приоткрытую дверь // Сравнительное конституционное обозрение. 2016. no. 2. pp. 95–115.

54 See: Краснов М. Законодательно закрепленные полномочия президента России: необходимость или сервилизм? // Сравнительное конституционное обозрение. 2011. no. 4. pp. 91–103. It was noted above that the 2020 amendments propose including this provision in the Russian Constitution.

55 It should be noted that the Constitutional Court does not recognize its competence to verify the constitutionality of the amendments to the Constitution that have entered into force. See: Ruling of the Constitutional Court of the Russian Federation 2014 № 1567-O of 17 July "On the request of a group of State Duma deputies to verify the constitutionality of a number of provisions of the Law on Amendment to the Constitution of the Russian Federation "On the Supreme Court and the Prosecutor's Office of the Russian Federation."

in cases where officials use the media to influence popular opinion for their own political purposes.

This domain can be divided into five types of illegal behaviour: 1) unlawful control over the media, 2) obstruction of the activities of independent media, 3) external coordination and censorship of the activities of media editors, 4) persecution of journalists, 5) incitement of hatred towards political opponents and their defamation through controlled media.

Examples of **formal or informal control exercised by the executive branch** over leading media outlets include the case of NTV – the transfer of the media assets of Media Most, which included NTV, to the control of Gazprom – and the activities of the National Media Group (hereinafter "NMG"). In the former case, one of the all-Russian TV channels was indirectly nationalised;[56] in the latter case, a company owned by individuals considered friends of Vladimir Putin[57] have purchased a number of leading TV channels (controlling interest in Channel 5 and REN TV, and 29% of shares in Channel 1) and other media outlets during Putin's tenure as President and Prime Minister of the Russian Federation.[58]

The NTV case illustrates media transition to state control using a combination of formal state practices, including court proceedings and the actions of executive authorities, as well as informal practices that can be qualified as the extortion of bribes (Article 290 § 4c of the Criminal Code, as operated prior to 11 December 2003). The acquisition of media assets by NMG, if indeed assisted by the state, belongs entirely to the domain of informal practices. We do not have sufficient data to presume that these or other similar actions contain any elements of a crime. Nevertheless, a proper inspection might reveal, for example, signs of abuse or excessive use of power (Articles 285 and 286 of the Criminal Code).

The **obstruction of independent media activities** can manifest itself in **formal restrictive actions by the executive branch and government organizations**. This could include: the refusal of a state broadcasting network operator to renew a contract for communications services; the refusal to issue or extend a broadcasting license; informal pressure on the media or on organizations involved in broadcasting (such as cable network operators) to influence their editorial policies or interfere with their work (e.g. the pressure on the TV Rain in February-March 2014[59]); or a combination of formal and informal practices, when demands against the media are supported by inspections carried out by the law enforcement at the media outlet or its affiliated organisations (pressure on the RBC media holding company in the spring of 2016).

56 In particular, these events are described in the ECtHR judgement in Vladimir Gusinsky's case. See ECtHR. Gusinskiy v. Russia. Application no. 70276/01. Judgment of 19 May 2004.

57 Бондаренко М. Ящик Ротенбергов: как миллиардеры связаны с Национальной медиа группой // РБК. 2014. 17 ноября, https://www.rbc.ru/business/17/11/2014/5468ae40cbb20f2878362373 (accessed 20.06.2020).

58 The list of NMG's assets is published on their official website, https://nm-g.ru/actives/ (accessed 20.06.2020).

59 Касьян А. Война за «Дождь»: хроника атаки на телеканал в лицах // Forbes. 2014, 5 February, at: https://www.forbes.ru/kompanii-photogallery/internet-telekom-i-media/250503-voina-za-dozhd-khronika-ataki-na-telekanal-v-l (accessed 20.06.2020).

Case studies

Tomsk's TV-2 ceases broadcasting (based on reporting by Kommersant)[60]

On 9 January 2015, TV-2, a private TV company in Tomsk, stopped broadcasting after the Russian Television and Radio Broadcasting Network refused to renew its broadcasting contract, and then Roskomnadzor, the federal executive agency responsible for overseeing the media, refused to renew its broadcasting license.

Sovershenno Sekretno TV Channel ceases broadcasting (based on Kommersant[61] and the e-version of Sovershenno Sekretno[62])

In 2013, the private TV channel Sovershenno Sekretno had to stop broadcasting on cable networks because its network provider, National Cable Networks (a subsidiary of state-owned Rostelecom), unilaterally terminated its communications services contract. Rostelecom management told representatives of the television channel and other companies that used their communications services that the decision to close the TV channel Sovershenno Sekretno was made due to "ideological concerns" and the dissatisfaction of the Presidential Administration.

Pressure on RBC Media Holding (based on Meduza[63] and the BBC Russian Service[64])

In early 2016, Mikhail Prokhorov, the owner of the RBC media holding company, came under pressure from the authorities. On 14 April 2016, the headquarters of the entrepreneur's ONEXIM Group were searched. The Federal Security Service (FSB) attributed the searches to the investigation into the criminal case against the Tavrichesky Bank, which had been taken over by ONEXIM Group in February 2015. Presidential Press Secretary Dmitry Peskov noted that the law enforcement's actions had nothing to do with pressure on RBC; however, that statement only fuelled rumours about the holding's sale.

60 Козырев Д. ТВ-2 оторвалась от кабеля // Коммерсантъ. 2015, 9 February, at: http://www.kommersant.ru/doc/2663972 (accessed 20.06.2020).

61 Бородина А. «Мы снова столкнулись с политической цензурой» // Коммерсантъ. 2012, 8 October, at: http://kommersant.ru/doc/2040213 (accessed 20.06.2020).

62 Чевтаева И. Телеканал «Совершенно секретно» закрывают по идеологическим мотивам? // Совершенно секретно. 2013, 31 January, at: http://www.sovsekretno.ru/articles/id/3207 (accessed 20.06.2020).

63 Жигулев И. Покупатель проблем: Как Михаил Прохоров пытался статься политиком и медиамагнатом // Meduza. 2016, 4 May, at: https://meduza.io/feature/2016/05/04/pokupatel-problem (accessed 20.06.2020); Болецкая К. РБК не одобрен в чтении // Ведомости. 2016. 15 May, at: https://www.vedomosti.ru/newspaper/articles/2016/05/15/641069-rbk-chtenii (accessed 20.06.2020); «Доигрались, отморозились со статьями про офшоры». За что уволили руководителей РБК: версия источников «Ведомостей» // Meduza. 2016. 16 May, at: https://meduza.io/feature/2016/05/16/doigralis-otmorozilis-so-statyami-pro-ofshory (accessed 20.06.2020).

64 Козлов П., Рустамова Ф, Фохт Е. «Долго упирался»: почему Прохоров продал РБК и что ждет издание // Русская служба Би-би-си. 2017, 17 June, at: http://www.bbc.com/russian/features-40310113 (accessed 20.06.2020).

According to Meduza's sources in ONEXIM Group, the FSB, and Prokhorov's entourage, the searches in the entrepreneur's companies were authorised personally by the Russian President. Vladimir Putin had been outraged by publications about his family.

In May 2016, RBC's editor-in-chief Elizaveta Osetinskaya left the media holding company. A Reuters source close to RBC's management explained that the decision to let Osetinskaya quit early may have been caused by pressure from the Kremlin. Along with Osetinskaya, RBC's other editorial managers left the company.

At a meeting with the editorial staff in June 2016, the new executives of the consolidated RBC editorial board, Elizaveta Golikova and Igor Trosnikov, stated the requirement for self-censorship (using a catchy metaphor of "crossing the double solid line").

In June 2017, Mikhail Prokhorov sold RBC to businessman Grigory Beryozkin. According to a BBC Russian Service source, the deal was made under pressure from the Presidential Administration.

The actions of officials who organised the closure of media outlets or changes in their editorial policy may contain elements of the use of office for obstructing journalists' lawful professional activities (Article 144 § 2 of the Criminal Code). Coercion to sell media assets, meanwhile, has elements of the abuse or excessive use of office (Articles 285 and 286, respectively). The rights of media that have suffered from this kind of interference may be restored by issuing/renewing their license; restoring their communication services and compensating them for the damages they have suffered; and by restitution on the basis of invalidation of the coerced transaction or by reclaiming the resulting lost asset back from unlawful possession.

Along with exerting pressure on certain media outlets, government officials are allegedly involved in the **persecution of journalists**. This takes various forms, from attempts on their lives to expulsion from the territory of Russia.

Case study

Attack on journalist Oleg Kashin (based on reporting by Meduza[65] and Kommersant[66])

In August 2010, Oleg Kashin, a journalist for the Kommersant publishing house, had an argument on his LiveJournal blog with Pskov Oblast Governor Andrei Turchak. The governor demanded an apology within 24 hours, adding: "Your countdown starts now." Subsequently,

65 Дело Кашина: цепочка событий. Покушение на журналиста и расследование преступления. Коротко // Meduza. 2015. 7 September, at: https://meduza.io/feature/2015/09/07/delo-kashina-tsepochka-sobytiy (accessed 20.06.2020); Жигулев И. Псковское чудо. Каким запомнят губернатора Андрея Турчака жители региона. Репортаж Ильи Жигулева // Meduza. 2015. 18 September, at: https://meduza.io/feature/2015/09/18/pskovskoe-chudo (accessed 20.06.2020).

66 *Туманов Г.* Показания засвидетельствовали розыском // Коммерсантъ. 2016. April, at: https://www.kommersant.ru/doc/2963702 (accessed 20.06.2020); *Туманов Г.* «Муж удивился, когда узнал, что это из-за комментария» // Коммерсантъ. 2015. 16 September, at: https://www.kommersant.ru/doc/2811110 (accessed 20.06.2020); *Туманов Г.* «Я понимаю, что буду объявлен в розыск» // Коммерсантъ. 2015. 14 October, at: https://www.kommersant.ru/doc/2832292 (accessed 20.06.2020).

Turchak, one of the youngest regional leaders in Russia deleted his comments. Kashin did not apologise to Turchak.

On the night of 6 November of that year, Oleg Kashin was beaten outside his rented apartment building in the centre of Moscow. Kashin was taken to a Moscow hospital, where he was put into an induced coma. It took the journalist several months to recover. A criminal case was opened for attempted murder.

In 2014, the Investigative Committee of St. Petersburg began investigating another criminal case related to the kidnapping of the manager of the Leninets Plant, Alexander Gorbunov. Strangers took a large sum of money from him and literally beat him into confessing that the governor was behind Kashin's attempted assassination. Leninets is partially owned by the Turchak family, and Andrei Turchak used to be its vice president and board member. According to Kashin, while investigating this case, the investigators unexpectedly tracked down his attackers.

In June 2015, it became known that investigators arrested Gorbunov for arms possession. He was never charged with Kashin's attempted murder and was a witness in his case.

On 6 September 2015, Kashin published an article in which he directly identified his attackers. All three of them allegedly worked at Leninets and had received 3.3 million rubles from Gorbunov for attacking the journalist.

On 25 September, former Leninets employees Danila Veselov and Gorbunov were cross-examined. Veselov said that Gorbunov had instructed him to find the journalist and had then ordered him to beat him and "injure his limbs." Veselov's wife told Kommersant that, shortly before the attack, Veselov and Gorbunov had visited Moscow, where they met with Turchak at the restaurant White Sun of the Desert and told him to "beat the journalist so that he could no longer write." According to Veselov, he had an audio recording of the conversation.

Another former employee of the enterprise, Aleskander Meshkov, stated that, in 2010, he had carried out Gorbunov's instructions to find out Kashin's address.

Despite those testimonies, Gorbunov and Turchak were never prosecuted for their involvement in the attack on Kashin. Turchak's father, A.A. Turchak, is believed to personally know Vladimir Putin.

Russian Investigative Committee chairman threatens journalist Sergei Sokolov (based on Meduza[67])

67 *Сулим С., Берг Е.* Самоочищение Александра Бастрыкина. Главные дела и конфликты руководителя Следственного комитета // Meduza. 2016. 15 September, at: https://meduza.io/feature/2016/09/15/samoochischenie-aleksandra-bastrykina (accessed 20.06.2020).

A conflict between Novaya Gazeta and Alexander Bastrykin, chairman of the Investigative Committee, started in June 2012 after the newspaper published an article by Sergei Sokolov on an investigation into the case of the Tsapka gang, an organised criminal group that had committed mass murder in the Kushchevsky district of Krasnodar region. According to the journalist, one of those involved in the Kushchevsky murder case, Sergei Tsepovyaz, received an unduly lenient sentence – a 150,000-ruble fine – for covering up the crime. Sokolov called Bastrykin and other top officials of law enforcement agencies "servants" and "pillars of Tsapka's power and their business."

In response to the publication in Novaya Gazeta, Bastrykin demanded a public apology and invited Sokolov to a meeting in Nalchik. However, Bastrykin did not accept the journalist's apology at the meeting and rudely demanded that he leave the room.

After Bastrykin's plane landed in Moscow, Sokolov, who travelled on the same flight, was forced to get into Bastrykin's car. On the way, the car turned into a forest, where Bastrykin personally threatened Sokolov. Soon after the incident, the journalist left Russia, fearing for his safety.

In his open letter to Bastrykin, Dmitry Muratov, editor-in-chief of Novaya Gazeta, demanded that Bastrykin guarantee Sokolov's safety. After that, Bastrykin met with Muratov and other journalists, and at that time, he himself apologised. He never confirmed the alleged incident in the forest. Later, he also apologised to Sokolov over the phone. Muratov and Sokolov accepted the apology, and the incident had no criminal or disciplinary consequences for Bastrykin.

Depending on its content, persecution of journalists can be qualified under the relevant Articles of Chapter 16 (Crimes against human life and health), Chapter 17 (Crimes against the freedom, honour, and dignity of the person) and others, as well as under the aforementioned Article 144 of the Criminal Code. Many cases of such persecution have some elements of aggravating circumstances, as they are committed with the motive of political hatred or enmity (Article 63 § 1f of the Criminal Code). If an official engages in the persecution of journalists while in office, compensation for the inflicted damage may be imposed on the State (Article 1069 of the Civil Code of the Russian Federation (hereafter, Civil Code)). Investigations into crimes against journalists are often accompanied by procrastination and bias on the part of investigators and prosecutors, which can most likely be explained as an attempt to help the perpetrators evade responsibility (all of them or only instigators and organisers). These acts can be qualified under relevant Articles of Chapter 31 of the Criminal Code that refer to crimes against justice (for more details, see section 2.6 "Political Repression" below).

It has been repeatedly reported that the Presidential Administration coordinates the editorial policy of leading federal media,[68] which might violate the freedom of the media and the professional independence of their editors (Article 19 of the Law on Mass Media), to the effect that government officials give editors-in-chief binding instructions on what to show and say, and how. Whether or not this and other similar practices contain elements of obstruction of journalists' lawful professional activities (Article 144 § 2 of the Criminal Code) depends, inter alia, on whether the relations between officials and media editors are of an authoritative nature or are limited to "informing" and "recommending."

The fifth type of illegal interference in media activities for the purpose of appropriating or retaining power is associated with **the use of government-controlled information resources to discredit political opponents or incite hatred against them**. On a national scale, this entirely informal type of abuse can be illustrated by NTV's Anatomy of Protest series about the opposition movement (assuming that the series was ordered by the executive branch and not produced on the channel's own initiative). At the regional level, a similar case occurred during the pre-election campaign for the Chelyabinsk Oblast Legislative Assembly in 2015, when the vice-governor presumably organised media and Internet publications defaming representatives of the "Just Russia" (Spravedlivaya Rossiya) party.[69] In order to discredit political opponents, the media often uses wiretapped telephone conversations or secret video recordings, allegedly obtained by law enforcement agencies as part of intelligence operations. For example, in December 2011, at the height of protests against falsified elections to the State Duma, Life News published recorded phone calls of opposition leader Boris Nemtsov.[70]

Acts of this type, depending on the content and sources of publications, can be evaluated as slander, taking advantage of an official position (Article 128.1 § 3 of the Criminal Code), violation of privacy (Article 137 § 2), and violation of the privacy of correspondence, telephone conversations and messages (Article 138 § 2), with the aggravating circumstance of political hatred.

2.3. Encroachment on Democratic Institutions

Appropriating and usurping power are primarily associated with unlawful influence over democratic institutions.[71] The specificity of usurping power in the Russian case is that it is not radical political forces that play the decisive role in distorting the political will of the people, but the state itself, or rather the so-called "extended President" and its subordinate executive branch. As a result, the democratic system is turned upside down: Instead of the people ruling by electing their own government, the government interferes in the election process, influencing election results and thus de facto

68 На «Снобе» появилось запрещенное интервью Эрнста // Лента.Ру. 2013. 4 April, at: https://lenta.ru/news/2013/04/04/ernst/ (accessed 20.06.2020); *Быховская Г.* Я — сурковская пропаганда // OpenSpace.Ru — Архив. 2011. 6 December, at: http://os.colta.ru/media/air/details/32483/ (accessed 20.06.2020); *Сидоров Д.* Как делают ТВ-пропаганду: четыре свидетельства // Colta.ru. 2015. 6 August, at: http://www.colta.ru/articles/society/8163 (accessed 20.06.2020); *Рубин М., Жолобова М., Баданин Р.* Повелитель кукол. Портрет Алексей Громова, руководителя российской государственной пропаганды // Проект. 2019. 23 January, at: https://www.proekt.media/portrait/alexey-gromov/ (accessed 20.06.2020).

69 *Григорьева С.* Сеничеву грозит уголовная ответственность // Znak. 2016. 30 March, at: https://www.znak.com/2016-03-30/na_eks_vice_gubernatora_yuzhnogo_urala_mogut_vozbudit_delo_za_klevetu (accessed 20.06.2020).

70 Немцов требует наказать LifeNews за прослушку // Русская служба Би-би-си. 2011. 20 December, at: http://www.bbc.com/russian/mobile/russia/2011/12/111220_nemtsov_life_news_court.shtml (accessed 20.06.2020).

71 Комментарий к Конституции Российской Федерации / под общ. ред. Л.В. Лазарева. М.: ООО «Новая правовая культура», 2009. Comment to Article 3.4.

re-appointing itself. Democracy should be protected from government encroachments by the principle of the political neutrality of government authorities and their officials, which derives from the constitutional provisions on democracy, free elections, and political pluralism. This principle implies that the executive branch must not interfere with the political activities of civil society in general or support certain electoral candidates or parties. In practice, however, this principle is implemented in a very restricted manner. In our opinion, the symbol and, at the same time, the embodiment of the neglect of political neutrality by the government is the institutionalisation of "domestic policy" (a euphemism for manipulation of elections) that is administered by dedicated units in the Presidential Administration and in regional government agencies.

The authorities may interfere in the implementation of the power of the people in disparate ways. For simplicity, in this cluster, we distinguish five types of behaviour: interference in passive suffrage (the right to be elected); financial support to political parties and candidates loyal to the authorities; interference in election campaigns; influencing voters' choice in elections; and falsification of election results.

Interference by officials in passive suffrage enables them to **select the candidates and political parties** citizens can vote for in elections. Individuals acceptable to the authorities are eligible for registration as candidates, while undesirable ones are denied this opportunity. This unlawful purpose is achieved through several methods used at different stages of the electoral process.

Since political parties play a key role in elections (in particular, they have the prerogative to nominate lists of candidates for representative government bodies in federal and regional elections, and under certain conditions are exempt from the requirement to collect signatures for their candidates), political groups that are undesirable to the executive branch can be barred from elections by **preventing them from creating political parties**. This is done either through groundless refusal to register a political party (which happened with the Republican Party of Russia, whose registration was subsequently restored following a decision by the ECtHR,[72] and later with the Party of Progress[73]) or through its unjustified liquidation. Before the 2012 political reforms, the requirements for party registration were so tough that it was sufficient to strictly comply with the provisions of the law to deny a registration (in particular, a provision requiring a party to have at least 50,000 members). In 2012, the registration rules were significantly simplified so that illegal actions were necessary in order to limit the political association of disloyal groups, which would presumably display signs of criminal discrimination (Article 136 of the Criminal Code).

Another formalised tool for restricting passive suffrage that has become particularly widespread since the 2012 political reform is **the de facto prohibitive conditions for the registration of candidates and candidate lists.** This primarily concerns collection of voter signatures in support of candidates for elections to the State Duma and regional parliaments, and the signatures of municipal deputies in support of candidates in gubernatorial elections. The required number of signatures (3% of the total number of voters in the corresponding constituency in elections to the State

72 ECtHR. *Republican Party of Russia v. Russia.* Application no. 12976/07. Judgment of 12 April 2011.

73 Алексей Навальный: «Партия прогресса» продолжит работу несмотря на ликвидацию // Ведомости. 2015. 28 апреля, at: https://www.vedomosti.ru/politics/articles/2015/04/28/minyust-lishil-registratsii-partiyu-progressa-alekseya-navalnogo (accessed 20.06.2020).

Duma and regional parliaments[74]) is so high that it is extremely difficult to collect and prepare signatures in the required time (under 30 days). It can be assumed that this "barrier" was introduced as a special tool to keep out unwanted candidates on formal grounds. If this assumption is confirmed, the participation of officials in drafting and lobbying laws that impose an obligation to collect signatures can be regarded as obstruction of the exercise of electoral rights (Article 141 § 2b of the Criminal Code).

In addition to formalised barriers to participation in elections, there are also informal tools widely employed for the same purpose. These are usually used in combination with the actions of authorities (including electoral commissions) and judicial decisions, which, if appealed, provide an appearance of legitimacy. These include governmental pressure on candidates and their nominating political parties that aims to compel them to withdraw from the elections. A well-known case of when this kind of pressure was made public is the conflict between the then-chairman of the Right Cause (Pravoye Delo) Party, Mikhail Prokhorov, and the Presidential Administration over the plan to nominate Yevgeny Roizman as a candidate for the State Duma.[75] Similar situations also arose later, including the 2016 State Duma elections.

Case study

Exclusion of candidates from the Party of Pensioners list (based on reporting by Meduza[76] and Kommersant[77])

The Russian Party of Pensioners (*hereinafter*, RPP), which was exempt from the requirement to collect voter signatures, approved a federal list of candidates for the State Duma on 9 July 2016. The list included, among others, former Chelyabinsk Oblast Governor Mikhail Yurevich, as well as the former governors of Pskov Oblast and the Nenets Autonomous Okrug, Yevgeny Mikhailov and Vladimir Butov, deputy Oleg Savchenko, and former Kaliningrad Mayor Yuri Savenko.

On 15 July, the RPP Presidium decided to remove Yurevich, Mikhailov, Butov, Savchenko, and Savenko from the list. The day before, Kommersant cited a source as reporting that the Presidential Administration was unhappy about the RPP lists, and that the party had the choice of either crossing out the undesirable candidates or being prepared to be denied registration. According to the same source, the party's problems stemmed from the fact that the "pensioners" had secretly prepared and hidden their real candidates prior to its party congress. "The day before the congress, a girl from the [P]residential [A]dministration came, and they showed her another list [of candidates] and were playing with her head", says the source. According to the source, the party leadership knew about the "special" list, but the

74 Federal Law No. 67-FZ of 12 June 2002 "On Basic Guarantees of Electoral Rights of Citizens and the Right to Participate in Referendum of Citizens of the Russian Federation" // СЗ RF. 2002. no. 24. p. 2253. Article 37.1.2.

75 First Statement of the Golos Association on the results of long-term observation of the conduct of local, regional and State Duma elections scheduled for 4 December 2011. Stages of nomination and registration, at: http://files.golos.org/docs/5009/original/5009-golos-zayavlenie-1-02-11-2011-gosduma-pdf.pdf?1320324839 (accessed 20.06.2020).

76 *Сурначева Е.* Лидера Партии пенсионеров сместили после заявлений о давлении Кремля // РБК. 2016. 29 July, at: https://www.rbc.ru/politics/29/07/2016/579b222a9a79473da9949b22 (accessed 20.06.2020).

77 Бекбулатова Т. Иванов М. Секретные пенсионеры // Коммерсантъ. 2016. 15 July, at: https://www.kommersant.ru/doc/3038174 (accessed 20.06.2020).

> information never leaked. Earlier, a source close to the Motherland Party told Kommersant that a dozen people had been "deleted" from the party list before the congress under pressure from the authorities.
>
> After that, Yevgeny Artyukh, the then-RPP Chairman, published an open letter to President Vladimir Putin, complaining about the pressure exerted on the party by Timur Prokopenko, Deputy Head of the Presidential Administration's Domestic Policy Department.
>
> In turn, the Central Election Commission excluded 42 RPP candidates, including Mikhail Yurevich, from the federal list, and refused to verify the list for single-member constituencies, justifying the refusal with the fact that the party had nominated two candidates in three single-member constituencies.
>
> Subsequently, the Constitutional Court of Russia upheld Mikhail Yurevich's complaint that denying him registration violated the Constitution, but at the same time making a reservation that the ruling "does not affect the results of the State Duma elections... and cannot serve as grounds for their revision."[78]

Insofar as government officials used their offices in such situations, their actions can be viewed as obstruction of the free exercise of citizens' electoral rights (Article 141 § 2 of the Criminal Code).

While some candidates are forced to withdraw from the election, others are **assisted in nominating and preparing documents necessary for registration**. A striking manifestation of such assistance is the use of the so-called "administrative resources" for collecting signatures from municipal deputies to support candidates loyal to the authorities. Many deputies depend on the executive branch (for example, those employed by governmental agencies or organisations outsourced by the government) and have to support certain candidates as instructed by their supervisors.[79] Such instructions from public officers entail elements of the abuse of power (Article 286 of the Criminal Code). Along with the administrative pressure on municipal deputies and voters, there have been numerous reports of organised participation of state agencies in collecting and falsifying signatures in support of certain candidates and other documents required for registration.[80]

78 Decision of the Constitutional Court of the Russian Federation no. 11-P of 13 April 2017 "On the case of verification of constitutionality of Article 40.2, Article 42.10 and Article 42.11 of the Federal law 'On elections of deputies to the State Duma of the Federal Assembly of the Russian Federation,' Articles 128.1.2 and 128.1.3 and Article 239.10 of the Code of Administrative Court Procedure of the Russian Federation, over the complaint of citizens I.L. Trunov and M.V. Yurevich."

79 Analytical Report No. 3. Compliance with the principles and standards of democratic elections at the stage of nominating candidates and political party lists for the election scheduled for 13 September 2015, at: http://www.golosinfo.org/ru/articles/33761 (accessed 20.06.2020); Analytical Report No. 4. Compliance with the principles and standards of democratic elections at the stage of collecting and verifying signatures for the election scheduled for 13 September 2015, at: http://www.golosinfo.org/ru/articles/34781 (accessed 20.06.2020).

80 First Statement of the Golos Association on the results of long-term observation of the conduct of local, regional and State Duma elections scheduled for 4 December 2011. Stages of nomination and registration, at: http://archive.golos.org/asset/5348 (accessed 20.06.2020).

Forgery or the verification of knowingly forged signatures in support of candidates or their lists constitutes a crime under Article 142 § 2 of the Criminal Code only if there are certain qualifying elements, including forgery committed by a group of people upon prior agreement or through the use of bribery or coercion.

The next phase of informal selection of candidates and associations to participate in elections occurs at the stage of candidate registration. **Government representatives assist some candidates in getting registered while preventing others from registering**. Assistance may include election commissions drawing up documents required for nomination and registration retroactively (as may have happened when the Central Election Commission was notified of the nomination of Mikhail Prokhorov for the 2012 presidential election[81]), disregarding flaws in the submitted documents, or limiting the scope of their verification. Documents for undesirable candidates and parties, instead, are checked with particular scrutiny, which happened in 2015 with the signatures in support of the nomination of Republican Party of Russia-Parnas party lists in the regional elections in the Novosibirsk and Kostroma regions.[82]

Criminal liability of public officials for giving instructions or directions for the registration of candidates, lists of candidates, or on other matters under the exclusive authority of election commissions is provided for by Article 141 § 3 of the Criminal Code. Interference of officials in the verification of candidates' documents carried out by other government agencies as instructed by the election commission may be qualified under Article 286 (abuse of power) of the Criminal Code.

As for restorative measures, the current legislation provides for the cancellation of election results in cases where the refusal to register a candidate (or a list of candidates) was found to be unlawful after voting day (Article 77 § 2e and 77 § 6 of the Federal Law "On Basic Guarantees of Electoral Rights and the Right to Participate in Referendums of Citizens of the Russian Federation"[83] (hereafter, the Basic Guarantees Law)), as well as in case of other violations of election laws if these violations prevent the manifestation of the true will of voters (Articles 77 § 2f and 77 § 6 of the same law). However, these provisions are virtually unenforceable due to specifics of procedural norms (as discussed in more detail in section 1.6 of Chapter 7).

The financing of loyal political parties and candidates by the executive branch also contradicts the principles of the political neutrality of the state, political diversity, and free elections, as it puts such electoral associations and their candidates in a more favourable position compared to their rivals, thus allowing the administration to influence the election results. Back in 2007, the media reported on parties receiving money from the Kremlin's so-called "slush fund."[84] In 2015, a study was published on the funding of election campaigns of pro-governmental political parties and

81 Ibid; Самое серьезное решение // Лента.Ру. 2011. 13 December, at: https://lenta.ru/articles/2011/12/13/prokhorov/ (accessed 20.06.2020).

82 Analytical Report No. 3. Compliance with the principles and standards of democratic elections at the stage of nominating candidates and political party lists for the election scheduled for 13 September 2015, at: http://www.golosinfo.org/ru/articles/33761 (accessed 20.06.2020); Analytical Report No. 4. Compliance with the principles and standards of democratic elections at the stage of collecting and verifying signatures for the election scheduled for 13 September 2015, at: http://www.golosinfo.org/ru/articles/34781 (accessed 20.06.2020).

83 Federal Law "On Basic Guarantees of Electoral Rights and the Right to Participate in Referendum of Citizens of the Russian Federation" of from 12 June 2002 no. 67-FZ // SZ RF. 2002. no. 24. p. 2253.

84 *Морарь Н.* «Черная касса» Кремля // The New Times. 2007. 10 December, at: https://newtimes.ru/articles/detail/6628/ (accessed 20.06.2020); *Ермолин А.* Кремлевский кэш // The New Times. 2011. 19 December, at: https://newtimes.ru/articles/detail/47886/ (accessed 20.06.2020).

candidates. According to this study, they received money from commercial organisations with state participation and from non-profit organizations that, in their turn, were funded from the budget.[85] A relatively recent case occurred in Chelyabinsk Oblast, where the investigation of the criminal case against former Vice-Governor Nikolai Sandakov revealed that the United Russia party had been financed from the state budget.[86] New facts about the "slush funds" being used by the "party of power" in elections were disclosed during the trials of former officials from the Republic of Komi (in the case of Vyacheslav Gaizer) and in associated trials.

Case study

United Russia's "slush fund" in Komi (based on reporting by online magazine 7x7[87] and news agency BNK[88])

In an Inta court, Kirill Arabov, head of the Department of Physical Culture and Sports of the Vorkuta Administration, testified in the case of Pavel Smirnov, the former head of the city administration accused of bribery. He said that he had worked as a political technologist for the United Russia party since 2007.

According to Arabov, United Russia set up a "slush fund" to finance its campaign, and the fund was kept in Syktyvkar. The money did not go through the party's official campaign accounts but was deposited in cash by the party's members involved in business activities. "These people are in one way or another connected to the authorities and wouldn't like to change anything," Arabov noted.

Each municipality made its own cost estimate for the elections that was approved by Ilyas Ermolayev, adviser to the Head of Komi, and the information was reported to Anatoly Rodov, former deputy head of the administration of the Head and the Government of Komi, who decided how much money to send to a particular municipality.

The Syktyvkar Headquarters developed a general campaign strategy for the region, while the municipalities purchased ready-made campaign products: banners, flyers, etc. Money from the "slush fund" was also used to pay to Moscow political technologists invited prior to elections.

The total cost of United Russia's campaign in Inta was 20-25 million rubles, at the same time as numbers for this town in the polar region (i.e. the final votes for the ruling party) were always inflated.

85 Analytical report. Financing of Election Campaigns for the Election of the Heads of the Constituent Entities of the Russian Federation. 20 August 2015, at: https://www.golosinfo.org/ru/articles/35351 (accessed 20.06.2020).

86 *Крючкова И., Бабушкин К.* Сандаков бросил вызов Ахримееву // Znak. 2016. 31 March, at: https://www.znak.com/2016-03-31/zaderzhannyy_eks_chinovnik_obvinil_glavu_ufsb_po_chelyabinskoy_oblasti_v_davlenii_na_politikov_i_biznesmenov (accessed 20.06.2020).

87 *Поляков М.* Черная касса «Единой России» и раздача водки. Свидетель в деле экс-мэра Инты Смирнова рассказал, как региональная власть влияла на результаты выборов // 7x7. 2017. 15 April, at: https://7x7-journal.ru/item/94035 (accessed 20.06.2020).

88 Политтехнолог Кирилл Арабов в суде по делу Павла Смирнова рассказал про «Огненную воду» // БНК. 2017. 12 April, at: https://www.bnkomi.ru/data/news/61681/ (accessed 20.06.2020).

The use of cash for informal financing should generally be screened for elements of a crime under Article 141.1 § 1 of the Criminal Code (Providing large-scale financial support to the election campaign of a candidate or an election association for the purposes of securing specified election results). As indicated by these examples, funding an election campaign of the winner with funds other than allocated election funds may be sufficient ground for cancelling election results (Article 77 § 2a of the Basic Guarantees Law).

In numerous ways, governmental authorities also influence the pre-campaign stage that follows the registration of candidates. This influence is evident in the discriminatory provision of access to mass media; in the use by officials who are candidates of their official capacity during the campaign; in executive branch support to the candidates' campaign; and in the unjustified banning of campaign events of undesirable candidates. Although most of the offences of this kind are informal practices, some of them are lawful due to gaps in the legislation. For example, the requirement for mandatory leave by officials who are candidates during the election campaign does not apply to persons holding public offices of the Russian Federation (President and Prime Minister of the Russian Federation, federal ministers) and subjects of the Russian Federation (governors).

Targeted coverage of government-supported candidates in the state-owned mass media and the silencing of undesirable candidates can be regarded as a special case of external coordination and censorship of the media. Though the "dominance" of candidates nominated by the "vertical of power" in the media violates the principles of the political neutrality of the state and equality of candidates, it can be classified as a crime (abuse of power) only insofar as it is organised by public officials.

In addition to media support, as a rule, "administrative candidates" get organisational support from the executive branch and subordinated public institutions. During the election campaign, local administrations set up election headquarters that provide official assistance to election commissions. In addition, they campaign for these loyal candidates,[89] who are also supported by higher-level government bodies. This practice is so widespread that, in an interview, former head of the Russian Presidential Administration's Domestic Policy Department Oleg Morozov said: "As head of the Administration's Department, I personally managed the election campaign of a young gubernatorial candidate."[90] Such actions contain elements of abuse of power (Article 286 § 1 of the Criminal Code).

Another dimension of executive branch interference in election campaigns that should be highlighted is the use of one's official capacity to organise and conduct campaign events. A typical example is the coercion of employees of governmental agencies, institutions and enterprises to rally in support of presidential candidate Vladimir Putin in 2012.[91] Coercing participation in an election rally by using one's official capacity may qualify as crime under Article 141 § 2 of the Criminal Code, preventing citizens from freely exercising their electoral rights. The abuse by an election winner of his or her official capacity may constitute grounds for annulling the election results,

89 Информация об «ответственных за выборы» исчезла с сайта администрации Воронежского поселения // Голос. 2016. 25 March, at: https://www.golosinfo.org/ru/articles/81431 (accessed 20.06.2020).

90 *Ростовский М.* Исповедь кремлевского отставника Олега Морозова // MK.RU. 2015. 9 July, at: http://www.mk.ru/politics/2015/07/09/ispoved-kremlevskogo-otstavnika-olega-morozova.html (accessed 20.06.2020).

91 Election of the President of Russia on 4 March 2012. Analytical report. M. GOLOS, 2012. pp. 19-21.

but only if committed by the candidate (head of the electoral association) themselves, and if it has prevented the expression of the real will of voters (Article 77 § 2d of the Basic Guarantees Law).

While supporting the campaigns of some parties and candidates, the executive branch also obstructs the campaigning of other candidates by refusing to approve pre-election rallies and disrupting the distribution of campaign materials. These actions may be qualified as unlawful obstruction of a rally on the part of an official (Article 149 of the Criminal Code) or obstruction of the free exercise of electoral rights by using one's official capacity, including when accompanied by coercion (Articles 141 § 2a and 141 § 2b of the Criminal Code).

During voting, the executive branch **achieves the desired result by various methods of unduly influencing the will of the citizens,** mainly by coercing people to vote or by bribing voters. These unlawful efforts are generally not formalised and sometimes appear in grotesque ways.

Case study

"The Marginalised" or the "Fire Water" (based on reporting by online magazine 7x7[92])

Kirill Arabov, head of the Department of Physical Education and Sports of the Vorkuta Administration, was questioned by an Inta court in early April 2017 in relation to the case of former Inta Mayor Pavel Smirnov, who was suspected of bribery. The witness testified as a political technologist for United Russia. Kirill Arabov had supervised elections in Inta from 2007 to 2015 and said that "lowlifes" had been offered vodka in exchange for voting in the elections. That approach was called "The Marginalised."

7x7 quoted its source as saying that the "alcoholisation" of marginalised people was carried out not only in Inta, but also in Vorkuta. The police told the political technologists where marginalised residents of Vorkuta could be found, and a "brigadier" would go there and talk to the "outcasts," promising them vodka or brandy in exchange for voting. On voting day, those who agreed had to show a calendar (calendars were handed out at the exit of the polling stations to everyone who voted) or otherwise prove that they had voted to get alcohol in return. Boxes of vodka were kept in United Russia's office for this purpose.

Earlier at Pavel Smirnov's trial, Ilyas Yermolayev, former head of the Komi Administration for Territorial Development, also spoke about the "Marginalised" program that operated in Inta. According to Yermolayev, political technologists identified leaders among those "who gathered in garages" and talked to them. Then, some time before the election, they were given vodka to drink with friends and were persuaded to vote for United Russia. In Inta, 15,000 litres of alcohol were purchased for this purpose.

92 *Поляков М.* «Ящики с водкой хранились в офисе "Единой России"». Подробности предвыборных технологий партии власти в Воркуте // 7x7. 2017. 17 April, at: https://7x7-journal.ru/item/94081 (accessed 20.06.2020).

The coercion of employees and other people who occupy a subordinate official or employment position to vote for a particular candidate or political party, or simply to participate in the election, may be qualified as obstruction of the free exercise of electoral rights through the use of one's official capacity, in combination with coercion (Article 141 § 2a and § 2b of the Criminal Code). Vote-bribing can be qualified as obstruction, in combination with bribery (Article 141 § 2a of the Criminal Code). These circumstances may also be used as grounds for cancellation of election results (Articles 77 § 2b (bribery of voters) or 77 § 2f (other violations of electoral legislation) of the Basic Guarantees Law), "if the committed violations prevent the expression of the real will of voters."

The last and the most odious type of illegal interference by the executive branch in the exercise of democracy is the **falsification of voting results**. Voter fraud techniques have been described repeatedly (see, for example, the relevant chapter in the Golos Association's report on State Duma elections on 4 December 2011[93] and Novaya Gazeta's investigation into rigged elections to the City Duma of Kasimov in Ryazan Province in July 2012[94]), so there is no need to specify their content, especially since Criminal Code Articles 142.1 (Falsifying the results of voting) and 142.2 (Illegally issuing or receiving a ballot paper) provide a fairly complete list of these violations.

Case study

Falsified turnout in the Russian presidential elections on 18 March 2018 (based on reporting by the Tatarstan Observers Association[95] and Golos[96])

On 18 March 2018, on the day of the presidential election, many polling stations were equipped with video surveillance cameras. Joint efforts by activists and representatives of observer communities from different cities succeeded in recording and preserving a large number of broadcasts from the webcams.

The simplest method for analysing the reliability of the voting results is to calculate the turnout on the video and compare it with the official data, in particular with line 8 of final protocols from respective commissions.

An analysis of video records from 207 polling stations throughout the country showed a discrepancy of 100,779 people – or 50.41% of the actual turnout, 27.23% of the voter list, or 487 people per polling station on average.

Extrapolation of random video recordings from polling stations showed that in the eleven analysed regions, the turnout was allegedly overestimated by 2.78 million people.

93 Analytical report of the Golos Association on the elections of 4 December 2011. Chapter 8: Voting and Vote Counting, at: http://files.golos.org/docs/5383/original/5383-glava-8.doc?1328125542 (accessed 20.06.2020).

94 *Хачатрян Д.* Машина фальсификаций. Сделано в Касимове // Новая газета. 2012. 5 September, at: https://novayagazeta.ru/articles/2012/09/05/51301-mashina-falsifikatsiy-sdelano-v-kasimove (accessed 20.0.2020).

95 Избиркомы России 2018 // Ассоциация наблюдателей Татарстана, at: https://tatobservers.ru/analiz-vyborov-2018-goda/ (accessed 20.06.2020).

96 *Габдульвалеев А.* Почти на 3 млн. человек завысили явку в 10 регионах на выборах президента 2018 // Голос. 2020. 10 March, at: https://www.golosinfo.org/articles/144090 (accessed 20.06.2020).

In addition to Articles 142.1 and 142.2, separate elements of vote rigging can be qualified under Article 142 § 1 (falsification of electoral documents), Article 142 § 3 (illegal production, also storage or transportation of illegally produced ballots or absentee ballots), or Article 142 § 3 (requesting or instructing officials on the counting of election or referendum votes and other issues in the exclusive jurisdiction of the election commission, as well as unlawful intervention in the operation of the State Automated System 'Vybory' ('Elections')). Falsification of voting results can be considered grounds for voiding the decision of an election commission on voting results (Articles 77 § 1.2a and 77 § 1.2b of the Basic Guarantees Law) at a polling station. In turn, the results of falsified elections can be invalidated in general if they were invalidated in election precincts that comprise over 25% of voters in the election (Article 70 § 9b of the Basic Guarantees Law). Even if this condition is not met, falsification of voting results may be recognised by a court as a violation that prevents the expression of the real will of voters (Article 77 § 2f of the Basic Guarantees Law).

The mechanism for organising the executive branch's unlawful influence on elections has been poorly described thus far and can be assumed to be the responsibility of the so-called "domestic policy bloc" (the Domestic Policy Department of the Presidential Administration and similar structures in regional executive bodies). How this mechanism works at the regional level was shown by a trial related to former head of the Komi Republic Vyacheslav Gaizer. In September 2019, Syktyvkar City Court convicted Elena Shabarshina, chairperson of the Komi Election Commission from 2006 to 2015. The court found that, between 2010 and 2015, she received 1,560,000 rubles in bribes from Alexei Chernov, the Republic's deputy head. In return, Shabarshina provided Chernov, who oversaw the republic's "domestic policy," with intelligence on candidate nomination at various levels, complaints received, and the tabulation of results, and she handed him and his proxies protocols of precinct commissions on voting results prior to entering them into the Vybory system.[97] The region's executive branch seem to have needed all those actions to monitor and adjust the conduct and results of the elections.

2.4. Interference in the Activities of Representative Authorities and Political Parties

While the previous group of unlawful behaviours boils down to the "self-reproduction" of the executive branch as part of formal democratic procedures, their interference in the activities of representative authorities and political parties actually means the appropriation of their powers and rights. Deputies and party leaders must be able to act independently and be accountable for their lawful actions to their constituents or, respectively, to party members. The coercive influence that the executive branch has on their work deprives them of this autonomy, turning the people's representatives into agents of public officials.

Interference in the activities of political parties is mostly informal, while the executive branch has both informal and formal means of putting pressure on representative bodies. The latter include, for example, the procedure for appointing governors that

97 Сыктывкарский суд приговорил экс-председателя Избиркома Коми Елену Шабаршину к 6 годам колонии и штрафу в полтора миллиона рублей // 7x7. 2019. 19 September, at: https://7x7-journal.ru/articles/2019/09/19/shabarshina-sud-prigovor (accessed 20.06.2020); Елена Шибаршина обжаловала приговор // БНК. 2019. 2 October, at: https://www.bnkomi.ru/data/news/100719/ (accessed 20.06.2020); *Шучалина Д.* Экс-председатель избиркома Коми осуждена на шесть лет по обвинению в получении взятки // Коммерсантъ. 2019. 19 September, at: https://www.kommersant.ru/doc/4097182 (accessed 20.06.2020).

existed between 2004 and 2012 and granted the President the right to dissolve the legislature if it rejected a presidential nominee on three occasions.

Coercing deputies to vote is illegal when it occurs outside party or faction disciplinary mechanisms, and is instead external, particularly when coming from the executive branch. A notorious case of such pressure on State Duma deputies was their coercion to unanimously[98] adopt the so-called "anti-orphan law."[99] The involvement of public officials in pressuring parliament to vote for a decision favoured by the administration can qualify as abuse of power (Article 286 § 1 of the Criminal Code). If these actions were committed with the intent of discriminating against certain groups of citizens, they would then qualify as obstruction of the free exercise of electoral rights, or interference with the freedom of assembly, under Articles 136 § 2b, 141, or 149 of the Criminal Code, respectively.

A similar approach should be taken in situations where officials have forced political party leaders to expel party members disloyal to the administration or to take other favourable decisions, such as the expulsion of Dmitry Gudkov from the Just Russia party, allegedly on the initiative of the Presidential Administration.[100] Such coercion also has elements of the abuse of power.

2.5. Interference with Judicial Institutions

The appropriation of power through interference in the judiciary also occurs when pressure is exerted on its members, both through formalised mechanisms and informally. An example of such formalised pressure is a presidential decree that offered certain recommendations to the Supreme Court of the Russian Federation and set deadlines for their implementation.[101] Actually an instruction rather than a recommendation, this Presidential decree disregards the principles of the separation of powers and independence of the judiciary.

In contrast to the courts, preliminary investigative bodies are part of the executive branch and are subordinate to the President.[102] At the same time, the law guarantees independence to investigators of the Investigative Committee.[103] Moreover, based on the Code of Criminal Procedure, only individuals appointed to the positions of investigator, interrogating officer, or head of an investigation or inquiry department or unit may investigate crimes. This precludes any third parties, other than those provided for by law, from interfering in the preliminary investigation. The same applies to the involvement of prosecutors in the administration of justice as, by virtue of their special status, prosecutors are not part of the executive branch and, unlike

98 *Савина Е., Иваницкая А., Суперека А.* Депутаты голосовали за отмену усыновления под угрозами // Publicpost. 2012. 19 December, at: https://archive.is/20130624153332/http://publicpost.ru/theme/id/2868/#selection-1631.1-1634.0 (accessed 20.06.2020); Гудков: Депутаты от «ЕР» вынуждены были проголосовать за «закон Димы Яковлева» // Росбалт. 2012. 20 December, at: http://www.rosbalt.ru/main/2012/12/20/1073887.html (accessed 20.06.2020).

99 Federal Law No. 272-FZ of 28 December 2012 "On measures to influence persons involved in violations of fundamental human rights and freedoms and the rights and freedoms of citizens of the Russian Federation" // SZ RF. 2012. no. 53. p. 7597 (Part I).

100 *Габуев А.* В аппаратном строю // Коммерсантъ Власть. 2013. 8 April, at: https://www.kommersant.ru/doc/2156014 (accessed 20.06.2020).

101 Presidential Decree No. 147 of 1 April 2016 "On the National Plan to Combat Corruption for 2016-2017". § 6.

102 See, in particular: Federal Law no. 403-FZ of 28 December 2010 "On the Investigative Committee of the Russian Federation" // SZ RF. 2011. no. 1. p. 15, Article 1 § 3; "Provision on the Ministry of Internal Affairs of the Russian Federation" (approved by Decree of the President of the Russian Federation on 1 March 2011 no. 248); Federal Law no. 40-FZ of 3 April 1995 "On the Federal Security Service" // SZ RF. 1995. no. 15. p. 1269. Article 1 § 2.

103 Federal Law of 28 December 2010 no. 403-FZ "On the Investigative Committee of the Russian Federation". Article 5 § 2.1.

investigators, are not legally accountable to the President. Their independence is expressly confirmed in the Federal Law "On the Prosecutor's Office of the Russian Federation."

Therefore, commands addressed to investigative authorities to adopt procedural decisions or to refuse to perform their duties, which come from officials and are not grounded in law, should be treated as (depending on their targets and consequences): interference in the activities of the prosecutor, investigator, or interrogating officer (Article 294 § 3 of the Criminal Code); complicity in knowingly holding an innocent person criminally accountable (Article 299 of the Criminal Code); complicity in illegally releasing someone from criminal responsibility (Article 300 of the Criminal Code), or complicity in knowingly and illegally taking someone into or keeping them in custody (Article 301 § 2 or 301 § 3 of the Criminal Code).

Cases of such coercion are rarely made public. Examples include the Presidential Administration's alleged practice of coercing governors by organising a series of inspections by law enforcement agencies.

Case study

Extract from "Democracy Management Centre," an article by the magazine Kommersant Vlast[104]

"A humble adviser to the Department [of Domestic Policy of the Presidential Administration], or even the deputy head of the department, does not have formal levers to influence the governor, except for a briefing note to his superiors. True, sometimes a single note can cost an individual dearly, the Kremlin official explains. For the most part, there is a system of informal agreements, personal proclivities and dislikes, and, in extreme cases, cues about undesirable behaviours. 'For example, the president says to give an apartment to a war veteran, and the governor delays the process. Well, one can explain to the governor that he is wrong. How can one put pressure on the governor? Well, there are law enforcement agencies, and there is probably something that he owns, too. For example, business.' A former official, who wished to remain unnamed, tactfully explained the logic of working with the regions as follows: 'Each supervisor's task is to communicate with all law enforcement agencies in the region. The only thing is that we have never spoken to judges. We thought that was wrong. Communication with the judges was the responsibility of the Presidential Envoys [to the Federal Districts of Russia]; when there was a need, we called the Envoys Office.'"

104 *Сурначева Е.* Центр управления демократией // Коммерсантъ Власть. 2013. 22 April, at: https://www.kommersant.ru/doc/2167169 (accessed 20.06.2020).

Potential pressure on the investigation to acquit suspected perpetrators was reported in connection with the investigation into the attempted assassination of journalist Oleg Kashin[105] and the assassination of Boris Nemtsov.[106]

Commands or instructions from officials to judges should also be treated as an offence under Article 294 § 3 of the Criminal Code. One of the most high-profile public examples of this kind of abuse is the confession of Natalia Vasilyeva, assistant judge of the Khamovniki District Court of Moscow.

Case study

Circumstances concerning the verdict in the second case of Khodorkovsky and Lebedev (based on reporting by Gazeta.ru)[107]

On 30 December 2010, Judge Viktor Danilkin of the Khamovniki Court of Moscow found Mikhail Khodorkovsky and Platon Lebedev guilty under Articles 160 and 174.1 of the Criminal Code and sentenced them to 14 years in prison. In an interview with Gazeta.ru on 14 February 2011, Natalia Vasilyeva, assistant to Viktor Danilkin and part-time press secretary of the Khamovniki court, said that the case of Khodorkovsky and Lebedev was controlled by the Moscow City Court and the sentence was written by judges of that court. Viktor Danilkin himself subsequently denied these allegations.

2.6. Political Repression

The last domain of violations includes a range of abuses to suppress opposition outside the context of elections and the media. In other words – political repression. These attacks are directed not only against human life, health, liberty, property, and dignity, but also against democracy and political diversity, as they suppress political competition and deprive people of the opportunity to freely express their political will.

The Internet project OVD-Info conducted a study entitled "Political Repression in Russia in 2011-2014: Criminal Prosecutions."[108] It proposed defining political repression as persecution for political motives, which is understood as "the desire of the regime or its representatives to eliminate in any way either a political opponent or a person peacefully defending any political, public, religious ideas and principles, as well as fighting against any actions of the regime." The authors of OVD-Info's report distinguish three categories of political repression: criminal, administrative, and extrajudicial. This classification will be used in this report. Civil repression can be identified as a separate category, including the seizure of money or other assets from political opponents by the courts, and deprivation of parental rights in apparently unfounded claims.

105 *Сурначева Е., Рустамова Ф.* Раскрывшего покушение на Кашина отстранили от дела возможного заказчика // РБК. 2015. 10 September, at: http://www.rbc.ru/politics/10/09/2015/55f1b1479a7947a5a0cb952b (accessed 20.06.2020).

106 *Кустикова А., Соколов С., Челищева В.* Дело Немцова: След заказчика затоптан // Новая газета. 2017. 21 June, at: https://www.novayagazeta.ru/articles/2017/06/21/72859-delo-nemtsova-sled-zakazchika-zatoptan (accessed 20.06.2020).

107 *Баданин Р., Бочарова С.* «Приговор был привезен из Мосгорсуда, я точно знаю» // Газета.Ру. 2011. 14 February, at: https://www.gazeta.ru/politics/2011/02/14_a_3524202.shtml (accessed 20.06.2020).

108 *Дурново Г.* Политические репрессии в России в 2011–2014 годах: уголовные преследования, at: http://reports.ovdinfo.org/2014/cr-report/ (accessed 20.06.2020).

The OVD-Info report subdivides **criminal political repression** into two groups: non-targeted political persecution for the peaceful exercise of fundamental rights to freedom of assembly, speech, associations; and targeted persecution of political opponents of the regime. The first category includes criminal prosecution for violation of anti-extremist legislation and the persecution of those who participate in public meetings. It should also, in our opinion, include the widespread practice of criminal prosecution for justification of terrorism and for high treason that have no connection to any unlawful actions,[109] and prosecution for participation in the work of organisations classified as "foreign agents" (Article 330.1) or recognised as "undesirable" in the Russian Federation (Article 284.1). The Memorial Human Rights Centre also categorises persecution for the peaceful exercise of freedom of conscience as political repression.[110]

Extremism is prohibited under the Federal Law on Combating Extremist Activities.[111] Violations of this law are punishable under the Criminal Code, namely Articles 280 (public calls for extremist action); 280.1 (public calls for actions aimed at violating the territorial integrity of the Russian Federation); 282.1 (organising an extremist community); 282.2 (organising activities of an extremist community); and 282.3 (financing of extremist activities). Extremist offences also include incitement of hatred or enmity, as well as abasement of human dignity (Article 282).[112] Offences that are closely related to, and often dealt with in conjunction with, extremist offences, include "insulting the feelings of believers" (Article 148 § 1 and 148 § 2); public calls for terrorism, justification or promotion of terrorism (205.2); and the rehabilitation of Nazism (Article 354.1). Recognition of an organisation as extremist is a precondition for prosecuting it for organising extremist activities.[113]

Hundreds of people, both opposition activists and apolitical activists, have been prosecuted under Articles 280 and 282 of the Criminal Code, often for something as simple as making short comments on social media.[114] Members of banned religious communities, such as Jehovah's Witnesses, are prosecuted under Article 282.2 of the Criminal Code.

109 This practice emerged in association with a significant expansion of the corpus delicti of treason by Federal Law No. 190-FZ of 23 October 2012 "On Amendments to the Criminal Code of the Russian Federation and to Article 151 of the Criminal Procedure Code of the Russian Federation". See report of online project OVD-Info: *Not Just Crimea and Maidan. Political persecution in Russia in 2015 and 2016: Main Trends and Criminal Cases*. Section on "Application of the Article on High Treason", at: http://reports.ovdinfo.org/2017/pp15-16/#topics/treason (accessed 20.06.2020).

110 List of Political Prisoners Persecuted for Religion // Human Rights Center "Memorial", at: https://memohrc.org/ru/aktualnyy-spisok-presleduemyh-v-svyazi-s-realizaciey-prava-na-svobodu-veroispovedaniya (accessed 20.06.2020).

111 Federal law no. 114-FZ of 25 July 2002 "On counteraction to extremist activity" // CZ RF. 2002. no. 30. p. 3031.

112 The Supreme Court of the Russian Federation classifies as extremist any crimes committed on the grounds of political, ideological, racial, national or religious hatred or enmity or on the grounds of hatred or enmity against any social group, provided for by the Special Part of the Criminal Code. See: Resolution no. 11 of the Plenum of the Supreme Court of the Russian Federation of 28 June 2011 (ed. on 20.09.2018) "On judicial practice in criminal cases on crimes of extremist nature". It should also be noted that, in December 2018, Article 282 of the Criminal Code was amended so that now criminal liability arises only in the case of repeated incitement of hatred, enmity or humiliation of human dignity after being held administratively liable for a similar act within one year, or if the act was committed with violence or the threat of violence.

113 See the list of non-commercial organizations that courts have effectively decided to liquidate or ban their activities on the grounds provided by the Federal Law "On Counteracting Extremist Activity", at: https://minjust.ru/ru/nko/perechen_zapret (accessed 20.06.2020).

114 Statistics on sentences for individual extremist crimes can be found in the report by ARTICLE 19 and the SOVA Center; see: Anti-extremism: Russian Law Enforcement Practice and European Guarantees of Freedom of Speech, at: https://www.sova-center.ru/files/books/a19_sova_rus.pdf (accessed 20.06.2020). On Article 148 § 1 and 148 § 2 in the report by Agora International, see: Liberalization the Russian way (Liberalizaciya po russki), at: https://www.agora.legal/articles/Doklad-Mezhdunarodnoi-Agory-Liberalizaciya-po-russki/22 (accessed 20.06.2020).

Criminal prosecution for extremist offences and justification of terrorism usually involves including prosecuted individuals on the list of terrorists and extremists[115] and restricting financial transactions using bank accounts, securities transactions, and property.[116]

The Russian human rights community has reached consensus on the fact that the prohibition of extremism should be limited to acts of violence, including the use or threatened use of violence, calls for violence, or another kind of explicit support of violence.[117] Non-violent acts falling under the aforementioned Articles of the Criminal Code do not constitute a public threat and should not be prosecuted. The ECtHR has also taken the same approach.[118]

Persecution for participation in public rallies is usually formalised through Articles of the Criminal Code such as mass disorder (Article 212, the most prominent example being the Bolotnaya case, instigated after the rally in Moscow on 6 May 2012 marking the inauguration of President Vladimir Putin); involvement in violence against a public official that does not endanger human life and health (Article 318 § 1[119]); or hooliganism motivated by hatred or enmity (Article 213 § 1b or 213 § 2: participants of the 21 February 2012 rally in the Cathedral of Christ the Saviour were convicted under this Article[120]). In 2014, Article 212.1 was added to the Criminal Code, which punishes "repeated violations of the established procedure for organising or holding a meeting, rally, demonstration, march or picketing." In 2017, the Constitutional Court of the Russian Federation considered the complaint of activist Ildar Dadin, who had been sentenced to three years in prison, and declared the practice of prosecution for this crime unconstitutional, but Article 212.1 itself remained in force.[121] In 2018, prosecutions for "repeated violation of the established order" resumed and, in September 2019, activist Konstantin Kotov was sentenced to four years in a general regime penal colony for this "crime."

115 List of existing terrorists and extremists, at: http://www.fedsfm.ru/documents/terrorists-catalog-portal-act (accessed 20.06.2020). Also see the unofficial Internet resource on the dynamics of the number of people on the Rosfinmonitoring list: Updates to the list of extremists and terrorists, at: https://extrem.ishukshin.ru/ (accessed 20.06.2020).

116 See: Federal Law no. 115-FZ "On counteraction to legalization of proceeds of crime (money laundering) and financing of terrorism" dated 7 August 2001 // SZ RF. 2001. no. 33. p. 3418 (Part I). Articles 6 § 2-2.5.

117 See: Recommendations of the Presidential Council for the Development of Civil Society and Human Rights on Improving the Legislation on Countering Extremism and its Enforcement Practice. § 1, at: http://www.president-sovet.ru/presscenter/news/read/4875/ (accessed 20.06.2020); Anti-extremism: Russian law enforcement practice and European guarantees of freedom of speech.

118 ECtHR. *Dmitriyevskiy v. Russia.* Application no. 42168/06. Judgment of 3 October 2017. § 97–101; *Stomakin v. Russia.* Application no. 52273/07. Judgment of 9 May 2018. § 92–93.

119 On the practice of criminal prosecution under Article 318 of the Criminal Code see the report of the human rights group Protest Apology (Apologia Protesta): Violence at Protest Rallies: Article 318 vs. 286 of the Criminal Code, at: https://www.agora.legal/articles/Doklad-Apologii-protesta-%C2%ABNasilie-na-akciyah-protesta-statya-318-UK-RF/20 (accessed 20.06.2020).

120 n 2018, the ECtHR found that the conviction of the female protesters violated their right to freedom of expression (Article 10 of the European Convention on Human Rights). See: ECtHR. *Mariya Alekhina and Others v. Russia.* Application no. 38004/12. Judgment of 17 July 2018.

121 Decision of the Constitutional Court of the Russian Federation No. 2-P of 10 February 2017 "On the case of verifying the constitutionality of the provisions of Article 212.1 of the Criminal Code of the Russian Federation over the complaint of citizen I.I. Dadin."

Among the listed "political" crimes, those that stand out are ones that can be characterised as criminal without any foundation and anti-constitutional. This means that any prosecution for them is illegitimate, irrespective of the actual circumstances of the offence. In our view, crimes that are inherently without public danger and anti-constitutional include:

- Public actions expressing obvious disrespect for society and committed for the purpose of insulting the religious feelings of believers (Article 148 § 1 and 148 § 2). This prohibition goes beyond legitimate grounds for restricting freedom of expression that are provided for by Article 19 § 3 of the International Covenant on Civil and Political Rights and Article 10 § 2 of the European Convention on Human Rights. It is also formulated in vague or ambiguous terms that allow for their arbitrary application.[122]

- Public justification of terrorism or propaganda of terrorism (Article 205.2). Along with calls for terrorism, the criminalisation of which seems justified, this Article of the Criminal Code prohibits public statements such as "a statement recognising the ideology and practice of terrorism as correct, and needing support and imitation" ("justification of terrorism") and dissemination of information with the purpose of "shaping a terrorist ideology, a belief in its attractiveness or the idea that terrorism is acceptable" ("terrorist propaganda"). The concept of "terrorist ideology" used in these prohibitions is not defined by law and permits arbitrary interpretation.[123]

- Repeated violation of the established procedure for organising or holding rallies, meetings and demonstrations, marches, and pickets (Article 212.1). The Constitutional Court of the Russian Federation interpreted this provision of the Criminal Code in a restrictive manner in its ruling on the complaint of Ildar Dadin. In particular, the court directly indicated the impermissibility of imprisonment for such activities if the public event was of a peaceful nature and violating order did not cause or threaten to cause harm. The Court suggested that the legislature should specify the scope of this norm. Nevertheless, Article 212.1 has not been changed and is applied in violation of the legally binding interpretation by the Constitutional Court of the Russian Federation.[124]

- Activities of foreign or international non-governmental organisations (NGOs) recognised as undesirable in the Russian Federation on the territory of the Russian Federation (Article 284.1). Under this law, an organisation may be designated as "undesirable" by the Prosecutor General of the Russian Federation arbitrarily, with no need to substantiate the decision with any constitutionally relevant values (as necessary by virtue of Article 55 § 3 of the Constitution). In our opinion, it is unjustified to criminalise violations of an arbitrary restriction of the right of association.[125]

122 See: Антиэкстремизм: Российская правоприменительная практика и европейские гарантии свободы слова. pp. 28–29, 54.

123 Ibid, p. 53. Note that the concept of "terrorist ideology" is still defined in the Resolution no. 1 of the Plenum of the Supreme Court of 9 February 2012 "On some issues of judicial practice in criminal cases involving crimes of terrorist nature."

124 See: Именем авторов Конституции // Новая газета. 2019. 17 September, at: https://novayagazeta.ru/articles/2019/09/17/82001-konstitutsionnomu-sudu-stoit-obratitsya-v-gosdumu (accessed 20.06.2020).

125 See: Expert opinion of the Presidential Council for Civil Society and Human Rights on draft Federal Law No. 662902-6 "On Amendments to Certain Legislative Acts of the Russian Federation", at: http://president-sovet.ru/documents/read/329/ (accessed 20.06.2020).

- Public dissemination of knowingly false information about the activities of the USSR during the Second World War (Article 354.1 § 1 and 354.1 § 2) and dissemination of information regarding the days of military glory and memorable dates of Russia connected with the defence of the Fatherland, expressing obvious disrespect for the society (Article 354.1 § 3). These criminal provisions prohibit mere exercise of the freedom of expression with regard to historical events, which, by definition, cannot impinge on anyone's legally protected interests.[126]

- Malicious evasion of duties defined by the laws of the Russian Federation regarding non-commercial organisations that perform the functions of foreign agents (Article 330.1).[127] Although the Law on Foreign Agents has been recognised as not contradicting the Russian Constitution,[128] the authors endorse the conclusions of Constitutional Court Judge V.G. Yaroslavtsev (as well as other critics of this law[129]) that its provisions are arbitrary and discriminatory and violate the human right to personal dignity. For this reason, criminal prosecution for failure to comply with this law is groundless.

Other "political" Articles of the Criminal Code may also punish behaviour that poses a real danger to society, so the circumstances of each criminal case should be checked for the presence of any political motives for the persecution in order to assess if these Articles are being applied as an act of political repression.

Persecution of opposition leaders and civic activists under "non-political" Articles typically includes bringing unsubstantiated criminal charges against them where there are reasons to believe that the charges are politically motivated. One of the most striking examples of this kind of repression is the conviction of Alexei Navalny and Pyotr Ofitserov in the so-called Kirovles case.[130]

126 See: Антиэкстремизм: Российская правоприменительная практика и европейские гарантии свободы слова. С. 54; *Богуш Г.И., Есаков Г.А., Русинова В.Н.* Op. cit.. p. 44; *Гайнутдивнов Д., Чиков П.* Россия против Истории. Наказание за пересмотр, at: https://www.agora.legal/articles/Doklad-Mezhdunarodnoi-Agory-Rossiya-protiv-Istorii-Nakazanie-za-peresmotr/13 (accessed 20.06.2020).

127 Federal Law No. 121-FZ of 20 July 2012 "On Amendments to Certain Legislative Acts of the Russian Federation with Regard to Regulation of Activities of Non-commercial Organizations Performing the Functions of Foreign Agents."

128 Decision of the Constitutional Court of the Russian Federation No. 10-P of 8 April 2014 "On verification of constitutionality of the provisions of Article 2 § 6 and Article 32 § 7 of the Federal Law "On Non-Commercial Organizations", Article 29 § 6 of the Federal Law "On Public Associations" and Article 19.34 § 1 of the Code of Administrative Offences of the Russian Federation over the complaints of the Commissioner for Human Rights in the Russian Federation, Foundation 'Kostroma Center to Support Public Initiatives', citizens L.G. Kuzmina and S.M. Smirensky and V.P. Yukechev."

129 See, for example: European Commission for Democracy through Law. Opinion on Federal Law no. 121-FZ on non-commercial organizations ("law on foreign agents"), on Federal Laws no. 18-fz and no. 147-fz and on Federal Law no. 190-FZ on making amendments to the criminal code ("law on treason") of the Russian Federation. CDL-AD(2014)025-e, at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2014)025-e (accessed 20.06.2020).

130 Other examples: Не только Крым и Майдан. Политические преследования в России в 2015 и 2016 годах: основные тенденции и уголовные дела. Раздел «Преследование оппозиционных политиков», at: http://reports.ovdinfo.org/2017/pp15-16/#topics/politicians (accessed 20.06.2020).

Case study

The Case of Kirovles (based on the ECtHR judgement[131] and reporting by Kommersant[132])

Opposition politician Alexei Navalny and entrepreneur Pyotr Ofitserov were convicted in the summer of 2013 for causing property damage to the state-owned enterprise Kirovles. This took the form of Navalny – when he was an advisor (on a voluntary basis) to the governor of Kirov Region – allegedly arranging for the sale of Kirovles' products at a reduced price via a company owned by his friend Pyotr Ofitserov. The criminal investigation and trial took place against the backdrop of Navalny's active participation in political struggles, including the Moscow mayoral election.

The ECtHR found that his original conviction in 2013 violated his right to a fair trial, in part because the court that heard the criminal case failed to assess the defendants' arguments about the political motive for the prosecution when there were serious reasons to suggest such a motive. Then the Supreme Court of Russia sent the case for a new hearing, which resulted in a new conviction, identical (including word-for-word agreement) to the original one. Based on the new conviction, Navalny was barred from participating in the presidential election. The Committee of Ministers of the Council of Europe found that the new trial in the Kirovles case did not remedy the violations established by the ECtHR.

The rights of a person convicted on political grounds may be restored through the nullification of the criminal judgment and his/her subsequent acquittal or termination of the criminal prosecution on so-called "rehabilitative" grounds (Articles 133 § 2 § 1 and 133 § 2 § 4 of the Criminal Procedure Code). A conviction that enters into force may be reviewed by cassation or supervisory appeal, or by renewed proceedings based on new or newly discovered circumstances. If a "political" criminal case has not yet been brought to a conclusion by a court verdict, the victim's rights shall be restored through terminating the criminal prosecution (Articles 133 § 2 § 2 and 133 § 2 § 3 of the Criminal Code). A victim of unlawful criminal prosecution has the right to rehabilitation. In order to rehabilitate individuals who have been subjected to politically motivated searches or other measures of procedural coercion, it is necessary to recognise these acts as illegal (which as a rule also requires the vacation of the court decision that sanctioned these measures).

Unlawful acts by investigators and prosecutors involved in politically motivated criminal prosecutions may qualify as crimes if there is sufficient evidence that they knew that the prosecuted individual was innocent (Articles 299 § 1 and 299 § 2 of the Criminal Code). The same applies to judges who have rendered guilty sentences (Article 305 of the Criminal Code). To initiate a criminal case in relation to a judge rendering a wittingly unjust verdict in any case requires the vacation of that verdict.

131 ECtHR. *Navalnyy and Ofitserov v. Russia.* Applications nos. 46632/13 and 28671/14. Judgment of 23 February 2016.

132 «Диссернет» нашёл на большинстве страниц приговора Навальному плагиат // РБК. 2017. 17 February, at: https://www.rbc.ru/rbcfreenews/58a6704a9a7947408f5b9d36 (accessed 20.06.2020).

Investigators and operatives who have fabricated evidence or investigative records shall be liable under Article 303 of the Criminal Code.

Prosecution under the Code of Administrative Offences of the Russian Federation (hereafter, CACP) is widely used as a tool to repress political opponents. There are several reasons for the authorities to prefer **administrative sanctions** over criminal ones. The former are perceived as less dangerous, but in fact, under some "politicised" Articles of the Code, even more severe punishment is envisaged than under criminal ones. For example, citizens who violate the established procedure for conducting public assemblies (Article 20.2 of the CACP) can be sentenced to 30 days of administrative detention, 200 hours of compulsory labour, or 300,000 rubles (4,637 USD in 2019) in fines, while the amount of a fine under the Criminal Code starts from 5,000 rubles (77 USD in 2019). In addition, administrative prosecution limits the scope for defence and brings less publicity than criminal prosecution. At the same time, it has many negative consequences for the accused. These include not only the punishment itself, but also usually detention, the need to appear in court, inclusion in the police database, as well as possible long-term consequences for one's work or studies, increased scrutiny by the police, risk of further prosecution, and in the longer term, marginalisation of one's public and political activities.[133]

OVD-Info's study of administrative repression proposes classifying Articles of the Code of Administrative Offences used for political persecution as follows: "Articles that are inherently politicised, implying restrictions on civil freedoms" and "Articles that are neutral, and under which cases may only be 'politicised' depending on the specific context in which they are applied." In this study, Articles that are initially aimed at political repression cover propaganda of non-traditional sexual relationships among minors (Article 6.21); violating the established procedure for organising or holding a meeting, rally, demonstration, march or picket (Article 20.2); organising mass simultaneous presence or movement of citizens in public places resulting in violation of public order (Article 20.2.2); promoting the attributes or symbols of extremist organisations (Article 20.3); and producing and disseminating extremist materials (Article 20.29). This list was compiled in 2015 and we believe it is now incomplete, partially obsolete, and needs to be amended by adding failure to comply with the requirements for NGOs classified as "foreign agents" (Articles 19.7.5-2 and 19.34); carrying out the activities of "undesirable organisation" in Russia (Article 20.33); sanctions for missionary activity in violation of legal requirements, introduced in 2016 (Article 5.26.4);[134] as well as the newest (2019) repressive invention – indecent expression of disrespect for public authorities (Articles 20.1 § 3 and 20.1 § 4).[135]

A reservation should be made in relation to Articles 20.2 and 20.2.2 that provide for punishment for breaches of the exercise of freedom of assembly. Neither the Russian Constitution nor international law recognise freedom of assembly as unlimited (see the second sentence of Article 21 of the International Covenant on Civil and Political Rights and Article 11 § 2 of the European Convention on Human Rights). Therefore, sanction for breaching the procedure for holding assemblies is justified in principle.

133 See: *Смирнова Н.* Политические репрессии в России в 2011—2014 годах: административные преследования, at: http://reports.ovdinfo.org/2014/adm-report/ (accessed 20.06.2020).

134 *Андреев К.* «Антимиссионерский» закон подлежит отмене как антиконституционный, at: https://www.sova-center.ru/religion/publications/2016/06/d34892/ (accessed 20.06.2020).

135 *Селезнев С.* Вотум неуважения президенту: первое полугодие «закона Клишаса», at: https://meduza.io/static/0001/Agora_Report_Disrespect_For_The_President.pdf (accessed 20.06.2020).

However, liability provided for by these Articles must be assessed in light of two circumstances. Firstly, the rules regulating public rallies in Russia allow for arbitrary refusal of approval, and the law does not provide an effective remedy against such arbitrariness.[136] Secondly, as stated above, sanctions for breaching the procedure for holding public actions are very severe and blatantly disproportionate to the gravity of the offence: The minimum penalty under Article 20.2 is 10,000 rubles (by comparison, prior to the 2012 amendments, this offence was punishable with a fine of no more than 500 rubles). These circumstances allow us to question the constitutionality of Articles 20.2 (except for Part 7, which establishes liability for unauthorised public actions near nuclear facilities) and 20.2.2 of the CAPC, as amended by Federal Law No. 65-FZ of 8 June 2012 with subsequent amendments.

The "non-political" Articles of the Code of Administrative Offences used for suppression of the opposition and civil activists include disobeying a lawful order by a police officer (Article 19.3 § 1 and 19.3 § 6, in particular the application of this Article to individuals detained at unauthorised public rallies), and disorderly conduct (Article 20.1).[137]

Administrative reprisals also include politically motivated covert investigative measures such as surveillance, message screening, wiretapping, and undercover operations.

In order to restore the rights of people affected by this type of political repression, the decision regarding an administrative offence ruling should be annulled or other coercive measures (e.g. detention) should be declared unlawful by a court. Compensation for material and moral damage caused by the reprisals should be recovered from the authorities by filing an action, and fines paid on the basis of the annulled ruling should be refunded upon request.

As repeatedly stated by the ECtHR, there are no effective remedies against politically motivated covert intelligence activities in Russia.[138]

Police and Rosgvardia officers who knowingly detain a citizen unlawfully are liable under Article 301 § 1 of the Criminal Code. The responsibility of judges for issuing a knowingly unlawful ruling on an administrative offence is provided for by Article 305 of the Criminal Code. It appears that, in circumstances where there are large-scale campaigns involving the persecution of participants of peaceful assemblies, the awareness of police officers, Rosgvardia officers, and judges of the unlawfulness of their repressive actions may be proven by using the ECtHR's practice regarding similar

136 On practical issues with approving public actions, see: *Смирнова Н., Шедов Д.* Искусство запрещать: Как устроено несогласование митингов и других протестных акций, at: https://ovdinfo.org/reports/iskusstvo-zapreta#3 (accessed 20.06.2020); Report of the Presidential Council for the Development of Civil Society and Human Rights on Issues Related to the Respect of the Constitutional Rights of Citizens when Conducting Public Events in the Russian Federation, at: http://president-sovet.ru/documents/read/575/ (accessed 20.06.2020). Provisions of the legislation on public events and the practice of its application by courts have been repeatedly considered by the Russian Constitutional Court. See, for example, the Court's Decision No. 24-P of 18 June 2019 "On verification of the constitutionality of provisions of Article 5 § 4.5 and Article 7 § 3.6, of the Federal Law "On meetings, rallies, demonstrations, marches and picketing" over the complaint of citizen V.A. Teterina" On the absence of effective legal remedies, see the following ECtHR judgements: ECtHR. *Lashmankin and Others v. Russia.* Applications nos. 57818/09 and 14 others. Judgment of 7 February 2017. § f342–3-61; *Elvira Dmitriyeva v. Russia.* Applications nos. 60921/17 and 7202/18. Judgment of 30 April 2019. § 57–-65.

137 See: *Смирнова Н.* Op. cit.

138 See: ECtHR. *Shimovolos v. Russia.* Application no. 30194/09. Judgment of 21 June 2011; *Avanesyan v. Russia.* Application no. 41152/06. Judgment of 18 September 2014; *Roman Zakharov v. Russia* [GC]. Application no. 47143/06. Judgment of 4 December 2015.

cases of violations carried out by the Russian government of the freedom of assembly and the right to a fair trial.

Conducting politically motivated intelligence operations that violate personal rights (for example, to privacy of correspondence) can be considered an abuse of power if the officer conducting or ordering the operations has a personal interest in it (Article 285 § 1 of the Criminal Code, in view of the second sentence of Article 42 § 1 of the Criminal Code).

The most severe repression of opposition **involves personal attacks on opposition leaders and activists and interference in their privacy**, including physical violence, surveillance, hacking emails and messaging apps, preventing them from travelling abroad,[139] and other restrictions on personal rights.[140] It is usually unclear to what extent these attacks are associated with the government machinery, yet this could be determined through comprehensive investigation in each individual case. However, in any event, the authorities are responsible for the ineffective investigation of these encroachments.

Case study

Attack on Alexei Navalny in Moscow (based on reporting by online project OVD-Info[141] and RBC online[142])

On 27 April 2017, Navalny was attacked in Moscow. He was splashed with bright green paint on the street. Later it became known that the paint also contained a toxic substance. Navalny's eye was injured. Criminal proceedings were initiated under Article 116 of the Criminal Code (battery), even though the victim himself insisted that it should be qualified as intentional infliction of bodily injury of average gravity (Article 112). Subsequently, the investigation was suspended "due to the failure to identify the perpetrator."

However, a few days later Internet users analysed surveillance camera footage of the attack and identified the attackers as Alexei Kulakov, Alexander Petrunko and Igor Beketov, activists of the radical movement SERB. The investigation on the case included no information about verifying their involvement in the attack.

The category of extra-judicial repressions against politically active citizens also includes acts of violence committed by the police, Rosgvardia, and the FSB that clearly go beyond their official authority, such as beating participants at peaceful rallies.

Politically motivated crimes against human life and health, freedom, honour and dignity should be qualified under the relevant Articles of Chapters 16 and 17 of the Criminal Code. Other applicable clauses include special provisions relating to liability

139 *Торочешникова М.* Новые враги народа // Русская служба Радио Свобода. 2015. 5 June, at: https://www.svoboda.org/a/27055422.html (accessed 20.06.2020).

140 See*: Литинский А.* Политические репрессии в России в 2011—2014 годах: внесудебные преследования, at: http://reports.ovdinfo.org/2014/ej-report/ (accessed 20.06.2020).

141 Независимое расследование: на Навального напал известный активист SERB // ОВД-Инфо. 2017. 1 May, at: https://ovdinfo.org/news/2017/05/01/nezavisimoe-rassledovanie-na-navalnogo-napal-izvestnyy-aktivist-serb (accessed 20.06.2020).

142 Полиция приостановила дело о нападении на Навального с зеленкой // РБК. 2017. 13 July, at: https://www.rbc.ru/rbcfreenews/59675ab89a79477a4acac3ff (accessed 20.06.2020).

for encroaching on the life of a statesman or a public figure (Article 277), as well as for invasion of personal privacy (Article 137) and violation of the secrecy of correspondence, telephone conversations, postal, telegraphic, and other messages (Article 138). Explicitly unlawful violence by representatives of the authorities, as well as other kinds of unlawful interference with personal rights, are usually classified as exceeding official powers (Article 286). It is noteworthy that these crimes may be motivated by political hatred, which, if established by the court, would be considered an aggravating circumstance.

Depending on the circumstances of a specific case, the intentional failure by investigators and inquirers to investigate attacks on opposition leaders and activists, with the goal of preserving the impunity of the perpetrators, could qualify either as abuse of office[143] (where they have a personal interest) or as illegal release from criminal responsibility (Article 300 of the Criminal Code).

The harm suffered by the victims of the attacks should be redressed through criminal proceedings, while the harm caused to society as a whole is, unfortunately, irreparable.

The scale of political repression in Russia can be illustrated through the following statistics: At the end of 2019, there were 314 people on the political prisoners list produced by the Memorial Human Rights Centre.[144] Between 2012 and 2018, 15,529 people were held administratively liable for violating the established procedure for holding public rallies (Article 20.2 of the Code of Administrative Offences), and 987 of them were arrested. The average fine increased from 3,648 rubles in 2012 to 17,246 rubles in 2018.[145] Politician Alexei Navalny was under administrative arrest for a total of 180 days in 2017-2019.[146]

Overall, political repression in Russia in the 2010s can be characterised as the systematic policy of the government covering all domains of state practice, from law-making (laws against NGOs, laws against public protesters, and restrictions on Internet freedom) to violence that lacks any formal justification. In some cases, harassment amounted to a campaign in which all forms of repression were applied simultaneously and on a large scale against representatives of one or more political or social groups, and its intensity and consistency suggested coordination from a single centre. An example of such a campaign of repression is the suppression of protests against the refusal to allow opposition politicians to participate in the Moscow City Duma elections in the summer of 2019.[147]

143 See: Resolution No. 19 of the Plenum of the Supreme Court of the Russian Federation of 16 October 2009 "On Judicial Practice in Cases of Abuse of Office and Abuse of Authority". § 15, 16.

144 «Мемориал» в преддверии наступающего 2020 года публикует обновлённые списки политзэков // Правозащитный центр «Мемориал». 2019. 23 December, at: https://memohrc.org/ru/news_old/memorial-v-preddverii-nastupayushchego-2020-goda-publikuet-obnovlyonnye-spiski-politzekov (accessed 20.06.2020).

145 According to OVD-Info research data, see: Article 20.2 of the Code of Administrative Offences: Application, at: https://data.ovdinfo.org/20_2/ (accessed 20.06.2020). The statistics disregards repeated prosecution of the same individuals.

146 Alexei Navalny's page on Facebook. 2019. 19 December, at: https://www.facebook.com/navalny/photos/a.368739553145134/2910167419002322/?type=3&theater (accessed 20.06.2020).

147 "The facts described in the report give every reason to believe that the observed wave of political violence is not the initiative of any single agency. The involvement of all security agencies and the support of the judiciary, city administration, and political institutions of power for their activities suggest that this is a joint campaign, coordinated to one degree or another from a single center". See: *Бейлинсон Д., Боровикова Е., Смирнова Н., Охотин Г., Шедов Д., Шубин М.* Московский эксперимент. Преследования участников акций в поддержку кандидатов в Мосгордуму, at: https://ovdinfo.org/reports/mgd-2019#1 (accessed 20.06.2020).

Criminal responsibility on the part of the organisers of repressive policies needs to be investigated independently, and we can only limit ourselves to a few remarks. Officials who issued orders relating to the refusal to approve rallies, their dispersal, and the detention and arrest of opposition leaders exceeded their official powers and can be classified as organisers of the respective crimes (in this case – obstructing the organisation of a rally or participation in it, knowingly and illegally detaining someone, knowingly making unjust judicial decisions). The participation of officials in the promotion (lobbying) of certain repressive laws can be qualified as discrimination (Article 136 of the Criminal Code). Finally, the most intensive campaigns of political repression can amount to crimes against humanity.[148]

* * *

This overview of unlawful behaviour aimed at appropriating or retaining power is not meant to be exhaustive. We have focused on those unpunished crimes that are indisputably related to the struggle for power, and have been committed systematically or at least repeatedly. Unfortunately, new cases and forms of political crime, especially repression, are reported almost every day.

3. Assessing the Extent of Impunity

Official crime statistics do not permit even indirect evaluation of the extent of impunity for crimes committed in order to appropriate or retain power. Of the Articles of the Criminal Code that might qualify as violations discussed in this chapter, the Prosecutor General's Office only publishes statistics on abuse of power (Article 285).[149] However, this article covers any abuse of office based on mercenary or other personal interest, and politically motivated acts cannot be separated from acts driven by other motive. We can assume that the crimes under Articles 141-142.1, 144, and 149 of the Criminal Code fully or to a large extent fall under our chosen criterion of appropriation or retention of power. The website of the Judicial Department of the Russian Supreme Court publishes the following data on the number of people convicted under these Articles:[150]

Article	2012	2013	2014	2015	2016	2017	2018	2019 (first 6 months)	Total:
141	2	2	0	1	6	5	3	0	19
141.1	0	0	0	0	0	0	0	0	0
142	20	5	12	3	5	13	9	0	67
142.1	7	9	8	5	11	12	17	6	75
144	0	0	2	2	4	11	1	0	20
149	0	0	0	0	0	0	0	0	0

148 On crimes against humanity, see: *Богуш Г.И., Есаков Г.А., Русинова В.Н.* Op. cit. pp. 154–167.

149 General Prosecutor's Office of the Russian Federation. Portal of legal statistics, at: crimestat.ru (accessed 20.06.2020).

150 Data on the number of persons convicted under all Articles of the Criminal Code from reports of the Judicial Department under the Supreme Court of the Russian Federation (Form 10a). The total numbers of persons convicted under all parts of the relevant Articles (as major and supplementary qualifications), at: http://www.cdep.ru/index.php?id=79 (accessed 20.06.2020).

This data can be compared to the number of reports on the Violations Map generated by the Golos movement.[151] The site provides no overall statistics, but it does provide statistics on violations in individual elections – in particular the 2011–2012 federal elections – as well as regional and local elections conducted at the same time. The table below shows those reported categories that mostly correspond to the specified elements of crime (whereas others also include non-criminal acts).

Reported violation	Elections of 4 December 2011	Elections of 2 March 2012	Qualification under the Criminal Code
Management pressure on voters	1,680	561	141 § 2
Voter bribery	758	102	141 § 2
Coercion of voters on voting days, violation of secrecy of the vote	126	204	141 § 2
Violation of vote-counting procedures; misrepresentation of voting results	491	675	142.1

Of course, not every user of the Violations Map filed an official criminal complaint (the total number of such complaints is unknown). In any case, correlation between this data and statistics on convictions under the relevant Articles of the Criminal Code speaks for itself.

The level of impunity for criminal and administrative political repressions is approximately equal to the level of the repressions themselves, since we aren't aware of any cases where law enforcement officers or judges have been prosecuted for their involvement in political repressions.

151 Map of Election Violations. A project by the Golos movement, at: http://www.kartanarusheniy.org/ (accessed 20.06.2020).

Chapter 3. Corruption Offences

1. General Characteristics of Corruption Offences

1.1 General Assessment of Corruption in the Russian Federation

According to the Corruption Perceptions Index (CPI), published by Transparency International since 1995,[152] Russia has consistently recorded poor results. In 1998, Russia ranked 76 out of 86 countries, scoring 2.4 (on a scale of 0 to 10, where 0 signifies a country perceived as almost totally corrupt and 10 a country perceived as virtually corruption-free). In 2000, it fell to position 82 out of 90, with a score of 2.1. In the years where it experienced economic growth, Russia witnessed a decline in corruption, attaining a rank of 90 out of 145 in 2004, after which its CPI ranking declined again. In 2008, the country dropped to position 147 out of 180, with a score of 2.1, ranking on a par with Syria and Kenya.

Recognising this deplorable situation, the Russian authorities prioritised the issue of corruption. At the end of 2008, Russia adopted its main anti-corruption law (Federal Law No 273-FZ "On Combatting Corruption" dated 28 December 2008) and the first National Anti-Corruption Plan. Nevertheless, in 2009, Russia was rated joint 146 out of 180 countries, and in 2010 it declined as low as joint 154 out of 178.

In 2012 and 2013, Russia scored 28 (according to the revised CPI scoring methodology introduced in 2012, based on a scale of 0 to 100). In 2014, it lost a point, ranking joint 136 out of 175, alongside Nigeria, Lebanon, Kyrgyzstan, Iran, and Cameroon. In 2015, Russia scored 29, ranking joint 119 out of 168, along with Azerbaijan, Guyana, and Sierra Leone, while in 2018, it scored 28 points and was rated 146 out of 180.[153]

According to official statistics, in 2008, the average value of a bribe was 9,000 rubles, increasing to 23,000 rubles in 2009,[154] 61,000 rubles in 2010, 236,000 rubles in 2011, and 609,000 rubles (9700 USD) in 2018.[155] Thus, the average amount of bribes increased 67-fold over 10 years, significantly exceeding the inflation rate over the same period.

In 2010, Konstantin Chuychenko, chief of the Presidential Administration's Control Department, reported on the enormous scale of embezzlement in the government procurement system, causing the state budget to lose a trillion rubles a year.[156]

According to Sergey Aleksashenko, former deputy chairman of the Russian Central Bank, the minimum kickback for government contracts was 20%, sometimes reaching 60% or even 70%.[157]

152 Transparency International – Russia, CPI, at: https://transparency.org.ru/research/indeks-vospriyatiya-korruptsii (accessed 30.06.2020).
153 Transparency International. Russia, at: https://www.transparency.org/country/RUS (accessed 30.06.2020).
154 Средний размер взятки вырос в 5 раз // Public.ru, at: http://public.ru/corruption_2011 (accessed 30.06.2020).
155 *Дубов Г., Серков Д.* Генпрокуратура рассчитала средний размер взятки в России в 2018 году // РБК. 2018. 18 декабря, at: https://www.rbc.ru/society/18/12/2018/5c18cf2e9a79471a4d084c63 (accessed 30.06.2020).
156 На госзакупках ворую триллион в год // НТВ. 2010. 29 октября, at: http://www.ntv.ru/video/209164/ (accessed 30.06.2020).
157 "When they first asked the president about that, he got everything that could fall – falling, and everything that couldn't fall – trembling; he did not believe that" // УРА.РУ. 6 November 2012, at: https://ura.news/articles/1036258608 (accessed 30.06.2020).

In 2011, the Global Financial Integrity NGO ranked Russia third in the world for illicit financial flows, losing an estimated $427 billion in the decade from 2000 to 2009 – behind only China ($2.5 trillion) and Mexico ($453 billion).[158]

As estimated by V. Volkov, a researcher from St. Petersburg, Russia prosecutes approximately 5,000 to 6,000 entrepreneurs annually for economic crimes (usually for corruption or other unlawful acts) (data for 2009-2013).[159]

Russia's CPI score has not changed much in recent years, staying at 29 between 2015 and 2017, losing a point in 2018, and remaining the same in 2019. There have been more significant changes in Russia's position in the rankings, however: dropping from 119 (2015) to 131 (2016), 135 (2017), and then 138 (2018). The fluctuations were due not only to changes in the rankings of other countries and the inclusion or exclusion of some countries from the CPI, but also because systemic anti-corruption efforts have been replaced by isolated criminal prosecutions; existing anti-corruption instruments have not improved; and the Convention on Civil Liability for Corruption has still not been ratified by Russia.[160]

1.2. The Criteria for Corruption Offences for Transitional Justice

There is no general definition of the crime of corruption in Russian criminal law.[161] For the purposes of this report, we define corruption as the use of official authority for personal purposes, including the accumulation of wealth. This definition is generally consistent with the UN Convention Against Corruption and with Article 1 of the Federal Law "On Combatting Corruption in the Russian Federation." Such acts are classified as crimes against state power or against the interests of service in commercial and other organisations, as covered respectively by Chapters 30 and 23 of the Criminal Code of the Russian Federation.[162]

International organisations find a strong link between corruption and grave violations of human rights. In his foreword to the UN Convention against Corruption, UN Secretary General Kofi Annan pointed out that "[c]orruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life, and allows organised crime, terrorism, and other threats to human security to flourish."[163]

158 *Kar D., Freitas S.* Illicit Financial Flows from Developing Countries over the Decade Ending 2009. 2011. P. 12, at:https://secureservercdn.net/45.40.149.159/34n.8bd.myftpupload.com/wp-content/uploads/2014/05/HIGHRES-Illicit_Financial_Flows_from_Developing_Countries_over_the_Decade_Ending_2009.pdf?time=1593631777 (accessed 30.06.2020).

159 *Волков В.В.* Силовое предпринимательство: XXI век, экономико-социологический анализ / 4-е изд., испр. и доп. СПб.: Изд-во Европейского университета в Санкт-Петербурге, 2020. pp. 340–346.

160 Russia in CPI – 2019: 28 points and the 137th place//TI-Russia. 23 January 2020, at: https://transparency.org.ru/research/indeks-vospriyatiya-korruptsii/rossiya-v-indekse-vospriyatiya-korruptsii-2019-28-ballov-i-137-mesto.html (accessed 30.06.2020).

161 An open list of such crimes is given in the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 24 of 9 July 2013 "On judicial practice in cases of bribery and other corruption offences."

162 See, for example, the definition of corruption in Article 1.1 of the Federal Law "On Combating Corruption" of 25 December 2008 (No. 273-FZ) and Decree of the Prosecutor General and the Ministry of Internal Affairs of Russia No. 35/11/1 of 24 January 2020 "On the introduction of lists of articles of the Criminal Code of the Russian Federation used in the formation of statistical reporting."

163 *Annan K.A.* Foreword // United Nations Convention Against Corruption. 2004. P. iii, at: https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf (accessed 30.06.2020).

In 2013, UN High Commissioner for Human Rights Navi Pillay noted: "Corruption is an enormous obstacle to the realisation of all human rights – civil, political, economic, social, and cultural, as well as the right to development. Corruption violates the core human rights principles of transparency, accountability, non-discrimination, and meaningful participation in every aspect of life of the community."[164]

Studies in the United States show that abuse of office and high-level corruption are more costly and socially dangerous than traditional crime, and that corruption offences have more serious consequences than theft, robbery, or burglary.[165]

Transitional justice researchers have noted that economic liberalisation policies in non-democratic regimes often morph into an economy that is state-controlled and known as *crony capitalism*. Rulers' family members and close associates benefit from the privatisation of public services and state companies in key sectors such as communications, mining, and banking. Under such conditions, it becomes virtually impossible for businessmen to do business without being affiliated with state structures or government circles. Moreover, corrupt ties and the system of repression are interconnected.[166]

The concept of *grand corruption* is well suited to describe this phenomenon. According to Transparency International, grand corruption occurs when:

"A public official or other person

deprives a particular social group or substantial part of the population of a State of a **fundamental right**; or

causes the State or any of its people a loss greater than 100 times the **annual minimum subsistence income** of its people;

as a result of

bribery, embezzlement or other corruption offence."[167]

Grand corruption is a crime that violates human rights and deserves adjudication and punishment accordingly. It ranges from stealing from public budgets used to build hospitals and schools, to constructing facilities that become dangerous as the result of underfunding caused by corrupt actors.[168]

164 Opening Statement by Navi Pillay, High Commissioner for Human Rights: Panel on "The Negative Impact of Corruption on Human Rights" // Office of the High Commissioner for Human Rights. 2013. March 13, at: https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13131&LangID=e (accessed 30.06.2020).

165 См.: *Бембетов А.П.* Теория и практика борьбы с налоговой преступностью за рубежом // Международное публичное и частное право. 2005. № 1 (22). pp. 51–56.

166 *Nassar H.* Transitional Justice in the Wake of the Arab Uprisings: Between Complexity and Standardization // Transitional Justice and the Arab Spring / ed. by K.J. Fisher, R. Stewart. London: Routledge, 2014. pp. 54–75.

167 See: UN Office on Drugs and Crime. Grand Corruption Definition with Explanation. 2016, at: https://www.unodc.org/documents/NGO/Grand_Corruption_definition_with_explanation_19_August_2016_002_1.pdf (accessed 30.06.2020).

168 What is Grand Corruption and How Can We Stop It // Transparency International. 2016. 21 September, at: https://www.transparency.org/news/feature/what_is_grand_corruption_and_how_can_we_stop_it (accessed 30.06.2020).

Researchers point out that one of the key causes of grand corruption is a culture of impunity that develops in the affected state.[169] In the case of Russia, there are no official statistics on impunity for corruption. However, the fact that the competent authorities ignore reports of corruption, as illustrated below, reveals a lack of political will to investigate many serious corruption offences, even when well substantiated.

Moreover, in Russia, people reporting corruption offences are the ones who are punished. Sergey Magnitsky, who exposed a scheme to steal the equivalent of $230 million from the Russian budget, was arrested on tax evasion charges and put in a pretrial detention centre. He died after being denied necessary medical treatment (see section 2.8 of this chapter).[170] Politician and anti-corruption activist Alexey Navalny was prosecuted and convicted on corruption charges after he published information about massive abuses in state procurement and malpractice by senior officials, even though the case against him and his brother Oleg had previously been dropped twice at the preliminary investigation stage for lack of evidence (see section 2.6 of Chapter 2).[171]

The case of Oboronservis[172] (related to wide-scale embezzlement in the Russian Defence Ministry) received considerable publicity, yet its principal defendants, including Defence Minister Anatoly Serdyukov, either received minor sentences or were acquitted and assigned to new positions in the public sector.[173]

Another high-profile example of an anti-corruption effort that was followed by retaliation is the criminal case against Denis Sugrobov, head of the Main Directorate for Economic Security and Combating Corruption at the Interior Ministry,[174] and some of his officers.[175] According to the investigative documents and sentence, after officers of Main Directorate brought a series of high-profile anti-corruption cases against high-ranking government officials, they found themselves accused of entrapment and received long prison sentences.[176] The initial reason for the charges was the attempted detention of an FSB officer in the act of taking a bribe. Denis Sugrobov's deputy Boris Kolesnikov fell to his death out of a window in an Investigative Committee building where he was being interrogated. Notably, Colonel Dmitry Zakharchenko of the Main Directorate, who was promoted after Sugrobov and Kolesnikov's arrest, was later accused of bribery and abuse of power after approximately a billion rubles in cash were found in his apartment.[177]

169 *Wolf M.L*. We Need an International Court to Stamp Out Corruption // The Washington Post. 2014. 22 July, at: https://www.washingtonpost.com/opinions/mark-l-wolf-we-need-an-international-court-to-stamp-out-corruption/2014/07/22/a15ecc38-10ff-11e4-9285-4243a40ddc97_story.html (accessed 30.06.2020).

170 Сергей Магницкий // Лента.Ру, at: https://lenta.ru/lib/14202380/ (accessed 30.06.2020).

171 For more details, see: ECtHR. *Navalnye v. Russia.* Application no. 101/15. Judgment of 17 October 2017.

172 Дело Евгении Васильевой: досье // ТАСС. 2014. 1 июля, at: http://tass.ru/info/1290333 (accessed 30.06.2020).

173 Новое назначение получил бывший министр обороны Анатолий Сердюков // Эхо Москвы. 2017. 5 июля, at: https://echo.msk.ru/news/2012828-echo.html (accessed 30.06.2020).

174 Main Directorate for Economic Security and Combating Corruption (hereafter the Main Directorate).

175 Верховный суд на 10 лет смягчил приговор экс-главе антикоррупционного главка МВД Сугробову // Новая газета. 2017. 19 декабря, at: https://novayagazeta.ru/news/2017/12/19/138041-verhovnyy-sud-na-10-let-smyagchil-prigovor-eks-glave-antikorruptsionnogo-glavka-mvd-sugrobovu (accessed 30.06.2020).

176 The criminal case was examined by the court behind closed doors, but the case files were published several times by the Novaya Gazeta. См. также: Дело Сугробова // Лубянская Федерация: Как ФСБ определяет политику и экономику России. Доклад Центра «Досье», at: https://fsb.dossier.center/sugrobov/ (accessed 30.06.2020).

177 Дело Дмитрия Захарченко: последне новости // Коммерсантъ, at:: https://www.kommersant.ru/theme/2619 (accessed 30.06.2020).

Finally, indirect evidence of grand corruption in Russia is that, during Vladimir Putin's presidency and premiership, a number of businessmen whom Putin has publicly called his friends[178] have gone from being middle-class functionaries and entrepreneurs to dollar multimillionaires and billionaires. At least five of these were on Forbes' list of the richest people in Russia in 2020, namely: Gennady Timchenko ($14.4 billion, 6th place), Arkady Rotenberg ($2.8 billion, 36th place), Yuri Kovalchuk ($1.8 billion, 53rd place), Boris Rotenberg ($1.2 billion, 81st place), Kirill Shamalov (son of Nikolai Shamalov, Putin's alleged former son-in-law, $0.8 billion, 123rd place).[179]

Common sense suggests that the chances of this being a coincidence is extremely small.

2. The Main Patterns and Legal Classification of Offence

2.1. Grand Corruption in the Privatisation Process

Description of Offence (the case of loan-for-shares auctions)

Based on an RBC article[180]:

In 1995, about a year before the presidential election, the government decided to privatise some of the largest state assets through loans-for-share auctions to get key banking groups to help raise funds for Boris Yeltsin's re-election. The scheme worked as follows: the government received credit from private companies, with state enterprises used as collateral; if the state defaulted on its loan payments, the creditor could seize the collateral. The idea was that the business would get the property today, but keep it tomorrow only in the event of the Communists' defeat in the elections.

The "loan-for-shares" scheme was presented to the government in March 1995 by three bankers: Vladimir Potanin of ONEXIM Bank, Mikhail Khodorkovsky of Bank Menatep, and Alexander Smolensky of Stolichny Savings Bank.

In December 1995, 45% of Yukos shares were sold at auction. The winner was the Laguna private company, whose guarantors were Bank Menatep, Tokobank, and Stolichny Savings Bank. The same three banks were also guarantors of Laguna's only rival, the Reagent private company. With a starting price of $150 million, Reagent offered $150.1 million, while Laguna offered $159 million. A year later, after the state failed to repay its loan, Laguna sold its stake in Yukos to Montblanc, which was also affiliated with Menatep.

178 См.: Путин назвал россиян из черного списка ЕС друзьями, за которых не стыдно // НТВ. 2014. 17 апреля, at: http://www.ntv.ru/novosti/911256/ (accessed 30.06.2020); Путин прокомментировал публикации о бизнесе своего друга Сергея Ролдугина // РБК. 2016. 7 апреля, at: http://www.rbc.ru/politics/07/04/2016/57064f939a79473880ca3443 (accessed 30.06.2020).

179 200 богатейших бизнесменов России – 2020 // Forbes. 2020, at: https://www.forbes.ru/rating/397799-200-bogateyshih-biznesmenov-rossii-2020-reyting-forbes (accessed 30.06.2020).

180 20 лет спустя: зачем Россия доказывает незаконность приватизации ЮКОСа // РБК. 2016. 26 марта, at: http://www.rbc.ru/economics/27/03/2016/56f55d7f9a79470cb7b25cdf (accessed 30.06.2020).

> The consortium of Alfa Bank, Rossiyskiy Kredit Bank, and Inkombank tried to compete with them, but was not allowed to participate in the auction for formal reasons: Part of the required collateral that they brought to the auction was in the form of government short-term bonds, which did not suit the organisers. The day before the auction, the consortium's members held a press conference and objected to the "unequal conditions created for the participants." In particular, they pointed out that Menatep not only actually intended to take part in the auction but was also one of its organisers, and that it was going to use the resources of the Ministry of Finance (the government had deposited $120 million with the bank). However, their attempts to challenge the auction results in court failed.
>
> Other auctions were also rigged. For example, during his trial in London in 2011, Roman Abramovich admitted that Sibneft's auction was fictitious and that it had been predetermined that a structure controlled by him and Boris Berezovsky was to win. Moreover, Abramovich said he had obtained most of the amount necessary to purchase Sibneft from the company's own enterprises, which had borrowed against future oil supplies.[181]

The Russian Accounts Chamber published its "Analysis of the State Property Privatisation Processes in the Russian Federation in 1993-2003"[182] in 2004. It noted that, "as a result of loan-for-shares auctions, federal property was taken over at significantly understated prices and the competition was factually faked." The Chamber cited several violations to prove the above:

- "[M]ost of the auctions involved no competition. Only in four out of twelve auctions did the amount of the loan substantially exceed the starting price."
- "[B]anks actually 'lent' the state the state's own money. The Russian Ministry of Finance provisionally deposited funds almost equivalent to the loan at the banks participating in the consortium. Subsequently, the banks lent this money to the Russian Government as collateral for shares in the most attractive enterprises. That allowed the 'lending' banks to acquire the pledged blocks of shares of state-owned enterprises directly or through affiliated persons."
- "Contrary to auction rules... banks did not transfer loan funds to the Central Bank account <...>, the funds remained in the same commercial banks, but in special accounts."

According to the report, in late 1995, the Accounts Chamber warned the Russian Government about the inefficiency of the loan-for-shares auctions and the need to abandon them. In particular, it noted that the amount of loans received from pledging federal property was equivalent to the amount of temporarily available foreign currency in the federal budget that had been deposited by the Ministry of Finance in the accounts of commercial banks that later won in the auctions.

181 For more details, see: High Court of England and Wales. *Berezovsky v. Abramovich* (Rev 1) [2012] EWHC 2463 (Comm). Judgment of 31 August 2012. §§ 223-225, 229- 230

182 Анализ процессов приватизации государственной собственности в Российской Федерации за период 1993–2003 годы (экспертно-аналитическое мероприятие). М.: Изд-во «Олита», 2004.

Anatoly Chubais, former chairman of the State Property Committee and former deputy prime minister, notes: "At the time, I did not quite understand the price we would have to pay. I underestimated the deep feeling of injustice that [these operations] arose in people."[183]

Sergey Vasiliyev, former head of the Working Centre for Economic Reform under the Russian Government and former deputy minister of economy, believes that "privatisation was perceived as unfair" because of "cynical loan-for-shares auctions with pre-determined winners" and "voucher investment funds."[184]

In 1995, the loan-for-shares auctions resulted in the privatisation of a number of major Russian enterprises, including Norilsk Nickel, Mechel, Lukoil, Sidanco (later TNK-BP, absorbed by Rosneft), Novolipetsk Steel, Murmansk Shipping Company, YUKOS (now Rosneft), Sibneft (now Gazpromneft), Novorossiysk Shipping Company, Surgutneftegas, Nafta-Moskva, and North-West Shipping Company.[185]

Legal Classification

As V.I. Dobrenkov and N.R. Ispravnikova write in *Pyramids of Missed Opportunities*: "From a civil law perspective, the loan-for-shares auctions have all the signs of a sham transaction that has been carried out by a group of commercial bankers, acting in collusion with interested Russian government officials. They have acted with the goal of taking over, de facto for free, Russian state federal property in the form of controlling interests in the country's best enterprises worth about $40 billion. From a criminal law perspective, we are dealing with embezzlement of federal property by means of criminal conspiracy, not merely on an especially large scale, but on a scale that is unprecedented. The value of the six most expensive and strategically important auctions alone in 1995 was deliberately understated twenty-fold – as low as $1,867 million. Just a year and a half later, the shares of these companies on the free market were already worth $39,713 million."[186]

In its report, the Accounts Chamber concludes that "lending to the Russian Federation with shares in state enterprises as collateral may be considered a sham transaction."[187]

The corruption offences described in this chapter can be grouped into the following types of unlawful acts:

- The development of a privatisation scheme based on loan-for-shares auctions, in violation of the privatisation laws;
- The organisation of mock auctions with predetermined winners;
- The allocation of funds by the Central Bank for participation in the loan-for-shares auctions;
- The resale (laundering) of property obtained through illegal privatisation.

183 *Островский А.* Преступление и наказание Чубайса // Российская газета. 2004. 19 ноября, at: https://rg.ru/2004/11/19/chubajs.html (accessed 30.06.2020).

184 *Орехин П.* «Перестройку могла спасти либерализация цен» // Газета.Ru, at: https://www.gazeta.ru/business/2015/04/23/reformy_gorbacheva.shtml (accessed 30.06.2020).

185 Итоги залоговых аукционов // Коммерсантъ. 1995. 14 декабря, at: http://www.kommersant.ru/doc/123675 (accessed 30.06.2020).

186 *Добреньков В.И., Исправникова Н.Р.* Пирамиды упущенных возможностей (российская версия «капитализма для своих») / 2-е изд., испр. и доп. М. : Университетская книга, 2014. p. 17.

187 Анализ процессов приватизации государственной собственности в Российской Федерации за период 1993–2003 годы (экспертно-аналитическое мероприятие). М.: Изд-во «Олита», 2004.

These acts may qualify as crimes under Articles 147 (Fraud) and 170 (Abuse of Authority or Official Position) of the Russian Soviet Federative Socialist Republic Criminal Code and Article 175 (Acquisition or Sale of Property Knowingly Acquired through Crime) of the Criminal Code of the Russian Federation.[188]

2.2. Grand Corruption in Transactions by State Companies

2.2.1. Acquisition or Sale of Assets at Artificially High/ Low Prices

Description of Offence (the case of Sibneft's acquisition by Gazprom)

In September 2005, Gazprom acquired 75% of shares in Russia's fifth largest oil company, Sibneft,[189] through a transaction valued at around $13 billion.[190] As reported by the media, the value of Sibneft's shares had been inflated before the sale.[191] Prior to the transaction, Sibneft was a private company owned by Millhouse Capital and, according to media reports,[192] Roman Abramovich[193] – who served as Governor of the Chukotka Autonomous District from 2001 to 2008 – is a beneficiary of Millhouse Capital.

Description of Offence (the case of Gazprom's sale of SOGAZ)

In August 2004, Gazprom sold its 49.98% stake in the SOGAZ insurance company to an unknown buyer, through the stock section of the Moscow Interbank Currency Exchange (hereinafter referred to as MICEX). According to informed sources, the stake was acquired by three buyers, namely Eurofinance Mosnarbank, Severstal Group, and Rossiya Bank. Gazprom retained 50% plus 2 shares in SOGAZ.[194] Subsequently, another 26% and 12% of SOGAZ shares were sold through MICEX to unknown buyers.

After the sales in January 2005, it became clear that the SOGAZ shares belonged to the ABROS Investment Company, Lirus, and Aktsept. All three companies were registered in St. Petersburg and were associated with Rossiya Bank, which de facto took control of SOGAZ.[195]

According to SOGAZ's statements for the first quarter of 2005, 51% of its shares were later re-sold to ABROS – a wholly owned subsidiary of the St. Petersburg-based Rossiya Bank. Another 12.5% ended up under the control of Aktsept, which owned a 3.93% stake in the bank.

Rossiya Bank was founded in 1990, and its main depositor was the Administration of the Leningrad Regional Committee of the Communist Party of the Soviet Union (CPSU). Russian media reported that the bank's largest shareholder was its CEO, Yury Kovalchuk, who has known President Putin since his work in St. Petersburg.

188 The Criminal Code in force since 1 January 1997.

189 Fitch: Покупка «Сибнефти» выгодна «Газпрому» // Росбалт. 2005. 19 августа, at: http://www.rosbalt.ru/main/2005/08/19/222247.html (accessed 30.06.2020).

190 «Газпром» купил «Сибнефть» // Лента.Ру. 2005. 28 сентября, at: https://lenta.ru/news/2005/09/28/gazprom/ (accessed 30.06.2020).

191 *Егорова Т., Дербилова Е., Мязина Е.* «Сибнефть» разогрели // Ведомости. 2005. 27 сентября, at: http://www.vedomosti.ru/newspaper/articles/2005/09/28/sibneft-razogreli (accessed 30.06.2020).

192 *Волкова О., Яковенко Д.* Роман и ребята: как работает команда миллиардера Романа Абромовича // Forbes. 2018. 15 февраля, at: https://www.forbes.ru/milliardery/357245-roman-i-rebyata-kak-rabotaet-komanda-milliardera-abramovicha (accessed 30.06.2020).

193 In 2005-2007, he was number one in Forbes' rating of Russia's richest businessmen, see: URL: https://www.forbes.ru/profile/roman-abramovich. On the circumstances of Sibneft acquisition by Abramovich, see section 2.1.

194 *Резник И., Миледин П., Кудинов В., Мязина Е.* «Газпром» продал акции «СОГАЗа» на $ 58 млн // Ведомости. 2004. 29 июля, at: https://www.vedomosti.ru/newspaper/articles/2004/07/30/gazprom-prodal-akcii-sogaza-na-58-mln (accessed 30.06.2020).

195 *Миледин П., Петрова С., Щербакова А.* «Согаз» продали в Питер // Ведомости. 2005. 20 января, at: https://www.vedomosti.ru/newspaper/articles/2005/01/21/sogaz-prodali-v-piter (accessed 30.06.2020).

According to the reports, Aktsept was 99.99% owned by Mikhail Shelomov, the son of Vladimir Putin's cousin.[196]

Thus, Gazprom, majority-owned by the state, sold its largest insurance company, SOGAZ, to legal entities affiliated to the President's acquaintances and relatives.

Significantly, the asset was sold for 1.7 billion rubles (about $60 million),[197] and over the next three years, the company netted 10.8 billion rubles for the new shareholders – more than six times the purchase price.[198]

Description of Offence (the case of Gazprombank funding the acquisition of SIBUR)
In 2005, Gazprom obtained full control over SIBUR, becoming the owner of a 100% stake in Sibur Holding. In 2005, Gazprom ceded 75% of its shares to Gazprombank, while in 2008, it exchanged the remaining 25% with Gazfond and its managing company, Leader, for their stake in Mosenergo.

In 2010, Sibur Holding was sold to partners from NOVATEK – Leonid Mikhelson and Gennady Timchenko, a friend of President Putin. They became the beneficiaries of 95% of Sibur Holding shares.[199] The value of the deal remained confidential. It is known that Gazprombank partially financed the deal against the security of other assets, thus providing the bulk of the funds.[200]

Based on a Vedomosti article[201] (abridged):

> In 2014, Gennady Timchenko sold a 17% stake in Sibur to Kirill Shamalov, the alleged son-in-law of President Putin. The stake acquisition was financed by Gazprombank. In 2017, Shamalov sold the stake to Leonid Mikhelson. Shamalov would earn about $100 million from the purchase and sale of this stake. According to Ilya Shumanov, deputy general director of Transparency International Russia, the deal most certainly contributed to the growing wealth of the President's family. At 26, Shamalov became vice-president of Sibur, bought the 17% stake from another friend of the President, and sold it to one of Russia's richest men. "Such deals involving influential political figures, and Shamalov Jr. certainly is one of them, raises [sic] the question of how the status of a presidential relative influences one's chances of getting lucrative sale-and-purchase offers regarding one's assets," Shumanov emphasises.

196 *Шлейнов Р.* Личный миллионер президента // OCCRP. 2017. 24 октября, at: https://www.occrp.org/ru/putinandtheproxies/relative-wealth-in-russia/ (accessed 30.06.2020); У родственника Путина нашли миллионы. Что о нем известно? // Русская служба Би-би-си. 2017. 2 ноября, at: https://www.bbc.com/russian/features-41843615 (accessed 30.06.2020).

197 Газпром после продажи 49,9 % СОГАЗа на ММВБ продал еще 25,9 %, выручив дополнительно 800 млн. руб. и снизив свою долю в капитале страховщика до 24,01 % // Страхование сегодня. 2004. 20 сентября, at: https://www.insur-info.ru/press/6829/ (accessed 30.06.2020).

198 See SOGAZ reports for 2005-2007. Reporting according to international standards // SOGAZ, at: https://www.sogaz.ru/investor/finance/ (accessed 30.06.2020).

199 *Малкова И.* «Сибур»: путешествие из частной собственности в государственную и обратно // Forbes. 2011. 24 ноября, at: http://www.forbes.ru/sobytiya/kompanii/76792-kak-sibur-sovershil-puteshestvie-iz-chastnoi-sobstvennosti-v-gosudarstvennuy (accessed 30.06.2020).

200 *Мордюшенко О.* Леонид Михельсон сделал химию // Коммерсантъ. 2010. 24 декабря, at: http://www.kommersant.ru/doc/1562980 (accessed 30.06.2020).

201 *Терентьева А.* Кирилл Шамалов продал 17 % «Сибура» // Ведомости. 2017. 1 мая, at: https://www.vedomosti.ru/business/articles/2017/05/02/688236-shamalov-prodal (accessed 30.06.2020).

2.2.2. Grand Corruption in Government Procurements and Purchases by State Companies

Description of Offence (the case of Russian Railways)

The distribution of government contracts to companies controlled by officials or their close associates is a widespread form of corruption in Russia. Thus, the "The Kings of State Contracts" ranking by Forbes in 2016 was topped by the aforementioned people from President Putin's "inner circle": the brothers Arkady and Boris Rotenberg, Gennady Timchenko, and Kirill Shamalov, whose companies annually win state contracts worth hundreds of billions of rubles.[202]

Procurement malpractice by the state-owned Russian Railways has attracted a degree of publicity. According to Reuters,[203] between 2010 and 2013, two companies alone – MPCenter ZhAT and Transservisavtomatika – participated in 43 tenders worth more than $340 million, held by Russian Railways. Both companies were registered on the same day by the same person acting on behalf of anonymous owners. They also opened accounts with the same bank and once even applied for participation in a tender announced by Russian Railways one minute apart. These circumstances create reasonable doubts about the fairness of the tender procedures.

Another typical attribute of Russian Railways' procurement activities was a system of several "intermediaries" operating between the state purchasing company and the seller. For example, Setstroyenergo, one of the major winners of Russian Railways' tenders, which earned almost $1 billion from the state monopoly between 2007 and 2013, passed most of the funds down to little-known companies. One of the companies – Legatta, with an annual income of $3,800 – received $115 million from Stroymontazh.

According to the online magazine Slon.Ru, almost one-third of Russian Railways' contracts went to companies controlled by a group most likely associated with Andrei Krapivin, an adviser to Russian Railways President Vladimir Yakunin. In 2012-2013, they won tenders worth over 200 billion rubles.[204]

In 2014, the Anti-Corruption Foundation (hereafter referred to as FBK) discovered that Universal Financial System (hereafter referred to as UFS), a company selling e-tickets for Russian Railways, belonged to Andrei Yakunin. UFS was officially owned by a Cypriot shell company Am Ebookers, yet FBK's investigators revealed that its shares were divided between two other Cypriot structures: Atlant Services and Verlys Nominees. These, in turn, were owned by Cypriot citizens Vera Lissiotis and her father Renos Lissiotis. The investigators believed that the Lissiotis were lawyers acting as nominee shareholders in favour of Andrei Yakunin's son. This version was corroborated by the fact that the Lissotis family also owned the investment company Viy Management and its numerous development projects, including the hotel chain RGS, built on the territory of Russian Railways' stations. Viy Management's website mentioned Andrei Yakunin as its founder and managing director, which made the investigators suspect that Russian Railways had actually outsourced the sale of

202 Короли госзаказа – 2016: рейтинг Forbes // Forbes. 2016. 25 февраля, at: http://www.forbes.ru/rating-photogallery/313039-koroli-goszakaza-2016-reiting-forbes (accessed 30.06.2020).

203 *Басвайн Д., Грей С., Анин Р, Оджа Х.* РЖД заплатили миллиарды подставным частным компаниям // Reuters. 2014. 23 мая, at: http://ru.reuters.com/article/topNews/idRUKBN0E31RT20140523 (accessed 30.06.2020).

204 Телегина Н., Голунов И., Тагаева Л. Как освоить 200 млрд рублей РЖД: история поколений // Slon.Ru (позднее – Republic), at: https://republic.ru/specials/rzhd/. On the date of access, the publication was unavailable, but a copy dated 14 June 2017, has been preserved by Internet Archive Wayback Machine, see: URL: http://web.archive.org/web/20170614045531/https://republic.ru/specials/rzhd/ (accessed 30.06.2020).

e-tickets to partner websites of the company, which was de facto controlled by Vladimir Yakunin's family.[205]

Legal Classification
Most of the above actors held positions in companies that were state-owned but, at least formally, commercial enterprises. Therefore, if duly proven, all of the described acts could qualify as crimes under the following Articles of the Criminal Code: 160 (Embezzlement); 178 (Restricting Competition); 201 (Abuse of Authority); 204 (Commercial Bribery); 204.1 (Mediation in Commercial Bribery); and 289 (Illegal Participation in Business Activities).

2.3. Illegal Take-Over of Businesses Involving State-Owned Companies or Other Businesses Close to the Government

Description of Offence (the case of the acquisition of VSMPO-AVISMA Corporation by Rostekh managers)
Founded in 1933, VSMPO-AVISMA is currently the world's largest titanium producer, holding 30% of global titanium market share and exporting 70% of its product. The company provides more than 60% of the titanium needed by Europe's Airbus, 40% of that needed by America's Boeing, and 100% of that needed by Brazil's Embraer.[206]

> **Based on Forbes' investigative report[207] (abridged):**
>
> In late February 2006, both owners of VSMPO-AVISMA, Vladislav Tetyukhin and Vyacheslav Brecht, were invited to Rosoboronexport for a conversation. Their acquaintances say that several people, including the FSB chief, a presidential aide, a deputy minister of internal affairs, and Rostec Corporation CEO Sergey Chemezov, sat in the room, "reading out the terms of surrender." The decision has been made, Chemezov allegedly said. Brecht, supposedly because he used to work in the KGB himself, responded immediately that he understood the "significance of the moment" and agreed with everything. He only asked where and when to send lawyers to draw up the papers. The next day, Brecht packed his bags and left for Germany.
>
> Then, according to the investigation, two of Sergey Chemezov's closest associates, Rosoboronexport Deputy Head Aleksey Aleshin and Oboronimpex Head Mikhail Shelkov, arrived in Frankfurt. The conversation was allegedly heated, with both sides exchanging threats. "Brecht hired lawyers and promised to make the scandal public, which won't be good for Russia's image after the YUKOS case," said Brecht's acquaintance. Brecht had no further meetings with the management; Renaissance Capital acted as an intermediary in the deal after the scandalous conversation.

205 *Королёв И.* Навальный: Семейный офшор Якунина контролирует продажи э-билетов РЖД на миллиарды рублей // CNews. 2014. 29 апреля, at: http://www.cnews.ru/news/top/navalnyj_semejnyj_ofshor_yakunina_kontroliruet (accessed 30.06.2020).

206 Consolidated Financial Statements for the Year Ended 31 December 2014 and Auditor's Report // OAO VSMPO-AVISMA Corporation, at: http://www.vsmpo.ru/doc_e/kons_otchet/vsmpo-ifrs-fs-vsmpo-signed-2014-rus.pdf (accessed 30.06.2020).

207 *Иваницкая Н., Седаков П.* Как друг Путина взял под контроль и приватизировал титанового монополиста // Forbes. 2013. 20 мая, at: http://www.forbes.ru/kompanii/tyazhelaya-promyshlennost/239263-zavhoz-iz-drezdena-kak-chemezov-vzyal-pod-kontrol-i-privat?page=0,1 (accessed 30.06.2020).

> In autumn, Rosoboronexport closed the deal. At that time, it owned 66% of VSMPO-AVISMA shares (about 4% were left with Tetyukhin and the rest were pledged by the new owners). Mikhail Shelkov and Mikhail Voyevodin, representatives of Rosoboronexport's subsidiary Oboronimpex, joined the board of directors, and Chemezov became its chairman.
>
> On 27 November [2012], it was announced that VSMPO-AVISMA's controlling stake would be bought out by management. On closer examination, the deal turned out to be structured in favour of Rostec managers, because instead of paying with their own money, they assumed Rostec's obligations to Sberbank – a debt that had been contracted to buy out Tetyukhin and Brecht's shares (worth $495 million). For this deal, VSMPO-AVISMA managers created a joint venture with Gazprombank, holding 75% plus one share and 25% minus one share respectively. The joint venture paid Rostec $180 million directly in cash. Another $300 million was used to repay the state corporation's debt to VTB, which was one of the creditors in the previous deal with VSMPO-AVISMA.
>
> Who are the five managers who competed with Alcoa? Mikhail Shelkov, head of Prominvest's subsidiary Rostec, is in charge of strategy and external relations; Mikhail Voevodin is responsible for operational management; Alexei Mindlin works as deputy general director for economics; Dmitry Sannikov is chief accountant; and Artem Kislichenko is a lawyer. According to a Forbes source close to VSMPO-AVISMA, the accountant, the lawyer, and the deputy director in charge of economics were mere dummies, each holding a maximum 5% of shares. Forbes' source names Mikhail Shelkov, head of Prominvest, as the main beneficiary of the deal.
>
> According to a top manager of Prominvest's subsidiary, Shelkov is one of the key players in Chemezov's team.

Legal Classification

If duly proven, unlawful acts aimed at seizing enterprises against the will of their owners and (or) managers, including with the use of official position, may qualify as crimes under the following Articles of the Criminal Code: 163 (Extortion); 170.1 (Falsifying the Unified State Register of Legal Entities, Register of Securities Owners or Depositary Record Keeping System); 179 (Compulsion to Enter or to Refrain from Entering into a Transaction); 183 (Illegal Acquisition and Disclosure of Information Classified as a Commercial, Tax or Banking Secret); 185.4 (Impeding or Unlawfully Limiting the Exercise of Rights by Securities Owners); 185.5 (Falsifying Decisions of the General Meeting of Shareholders (Stakeholders) or the Board of Directors (Supervisory Board) of a Company); 289 (Illegal Participation in Business Activity); 290 (Bribe-Taking, Including through Extortion); 305 (Rendering a Knowingly Unjust Verdict, Decision or Other Judicial Act); 327 (Forgery, Manufacture or Sale of Falsified Documents, Government Awards, Stamps, Seals, and Forms); and 330 (Arbitrariness).[208]

208 For more details, see, in particular: Паршиков В.И. Криминалистическое обеспечение защиты предпринимательской деятельности от внешних угроз // Криминалистическое обеспечение безопасности предпринимательской деятельности: научно-практическое пособие / под ред. Е.П. Ищенко. М.: «Проспект», 2018. С. 227–288.

2.4. Patronage of Business by Governmental Officials

Description of Offence (illustrated by Megafon's ties with Leonid Reiman, federal minister (1999 – 2008) and adviser to the Russian President (2008 – 2010))

Based on Forbes' investigative report[209] **(abridged):**

In 1994, state-owned shares of St. Petersburg telecommunications companies were merged into Telecom Invest holding, and Peterstar happened to be among them. More importantly, the holding became the owner of a real gem – the cellular company North-Western GSM, which later grew into Megafon, one of Russia's 'Big Three' mobile operators. In the mid-1990s, the holding issued additional shares, after which the controlling block was transferred to an unknown First National Holding (FNH), a Luxembourg company. In the mid-2000s, Jeffrey Galmond, a Danish lawyer and a good acquaintance of Reiman, declared he was the owner of FNH.

Galmond registered FNH and Telecom Invest at Commerzbank, entering into secret trust agreements under which the bank became the formal owner of the Luxembourg company until 2002, but had to return its shares on demand.

The trust agreements between Galmond and Commerzbank became one of the episodes investigated by Germany. In 2008, a Frankfurt district court judge held the bank liable for violating the law and fined it €7.3 million. "The trust structure was designed taking into account the client relationship with Reiman," reads the court ruling, available to Forbes. The court ruled that Reiman was the true beneficiary of Danco Finans, which Galmond claimed to own and that was used to conclude the trust agreements with Commerzbank.

Complus Holding – another "shell" company through which such agreements were made – could also be related to Reiman. At one time, a spy cam video went viral on the Internet, featuring two men – Galmond and James Hutt, director of a company co-owning Peterstar – chatting animatedly in London's Ritz Hotel: "You said then that Complus belonged to people with interests in the telecoms in Northwest Russia, that is Leonid, Yashin and Pevtsov, because so it was." "Leonid" mentioned in this quote is clearly Reiman; "Yashin" is Valery Yashin, former director of Leningrad State Telephone Network (LGTS), later general director of Svyazinvest; and "Pevtsov" is Nikolai Pevtsov, director of one of the LGTS companies.

Legal Classification

If duly proven, the above acts may qualify as crimes under the following Articles of the Criminal Code: 178 (Restriction of Competition); 201 (Abuse of Authority); 204 (Commercial Bribery); 204.1 (Mediation in Commercial Bribery); 285 (Abuse of Official Powers); and 289 (Illegal Participation in Business Activity).

209 *Дзядко Т.* Леонид Рейман: связист, министр, подозреваемый // Forbes. 2012. 17 февраля, at: http://www.forbes.ru/sobytiya/lyudi/79318-leonid-reiman-dose-svyazista (accessed 30.06.2020).

2.5. Bribery

Description of Offence (the case of Vladimir Putin)

Based on an article in *Vedomosti*[210] (abridged):

A letter informing President Medvedev about the construction of a "vacation complex" for Vladimir Putin on the Black Sea coast worth $1 billion was published on corruptionfreerussia.com (in Russian and English). The letter was authored by Sergey Kolesnikov who was, judging by the text, a long-time business partner of Vladimir Putin's acquaintances Nikolai Shamalov and Dmitri Gorelov. The former, just like Putin, is co-founder of the famous Ozero cooperative, while Gorelov is a shareholder of Rossiya Bank, just like the prime minister's friend, Yury Kovalchuk.

In the letter, the businessman asserts that construction started in 2006 and that the facility is intended "for the personal use of the Russian prime minister." Both the complex and the vineyard, planted in 2007 to produce sophisticated wines, are located near the village of Praskoveyevka (Gelendzhik district). Kolesnikov refers to all the facilities as "Project South" and notes that its value reached $1 billion, "judging by the reports and estimates" that he checked in October 2009. Formally, the property belongs to Shamalov's company, but Kolesnikov is certain that it is intended for Putin. "If this is Shamalov's palace, then why is the state spending its money to build a road and a power line to it?" Kolesnikov wonders in a conversation with Vedomosti.

Kolesnikov's cooperation with Shamalov began 10 years ago, and he mentioned this in his letter to Medvedev as well. The letter states that, in the early 2000s, Nikolai Shamalov, then Siemens' representative for Northwest Russia, approached Petromed on behalf of Putin for "allocating funds under a number of large contracts in the field of public healthcare." "We knew that Shamalov was a close friend of Putin," Kolesnikov writes. The contracts would allegedly be financed by oligarchs willing to donate to support the new president on condition that Petromed would transfer 33% of the contract value to foreign accounts, Kolesnikov notes.

He further writes that the first instalment of $203 million came in 2001 from Roman Abramovich via the Polyus Nadezhdy foundation, and $14.9 million was provided by Alexei Mordashov's Severstal.

Petromed, a St. Petersburg holding company controlled by Kolesnikov and Gorelov, imported medical equipment to Russia, including that made by Siemens. At that time, Nikolai Shamalov worked in the North-Western subdivision of Siemens Medical Solutions, and his son

210 *Шлейнов Р.* Предприниматель Сергей Колесников рассказал о дворце для Путина за $ 1 млрд // Ведомости. 2010. 29 декабря, at: https://www.vedomosti.ru/politics/articles/2010/12/29/sor_iz_dvorca (accessed 30.06.2020).

Yury was commercial project coordinator of Siemens LLC and a deputy sales manager of Siemens from 1997 to 2003.[211]

See also Description of Offence (Roldugin's foundations) in section 2.6 below.

Legal Classification
If duly proven, the above acts may qualify as crimes under the following Articles of the Criminal Code: 289 (Illegal Participation in Business Activity); 290 (Bribe-Taking); 291 (Bribe-Giving); and 291.1 (Mediation in Bribery).

2.6. Processing of Criminal Proceeds

Description of Offence (illustrated by Sergey Roldugin)

Based on reports by Novaya Gazeta and the International Consortium of Investigative Journalists[212] (abridged):

Musician Sergey Roldugin, a childhood friend of Vladimir Putin, owned Sonnette Overseas, based in the British Virgin Islands, and International Media Overseas (IMO), based in Panama. Oleg Gordin and Alexander Plekhov, businessmen from St. Petersburg (both affiliated with Rossiya Bank), represented the president's friend in these companies and in turn held shares in Sandalwood Continental and Sunbarn Ltd.

Judging by the transactions traced by the journalists, each of these offshore companies played its own role. Some received hundreds of millions of dollars without any collateral from a Cyprus-based RCB Bank (a significant share of which was controlled by the state-owned VTB), and then distributed the money to other companies for various needs. Others were used to control large packages of shares in Russian companies, while the rest acted as technical firms for funnelling money or writing off debts. Together they can be considered part of the same scheme, as the same employees handled business on their behalf; their documents were sent in one package; many deals were made and signed on the same day; and the companies were managed from the same place – Rossiya Bank.

According to documents from Mossack Fonseca database, the total turnover of Sandalwood Continental's bank accounts alone reached $2 billion, and based on reports for 2009, its assets were worth 18 billion rubles. As far as we can judge from the available documents, other companies in the scheme had a smaller turnover, yet these still amounted to hundreds of millions of dollars as well.

211 A Munich court estimated the bribes given by Siemens executives to high-ranking employees of Russian telecommunications companies in 2001-2004 at €1.87 million. См: *Арсентьев А.* «Дело Siemens»: размеры взяток российским менеджерам // CNews. 2007. 16 ноября, at: https://cnews.ru/news/top/delo_siemens_razmery_vzyatok_rossijskim (accessed 30.06.2020).

212 Золото партитуры // Новая газета. 2016. 3 апреля, at: http://krug.novayagazeta.ru/12-zoloto-partituri (accessed 30.06.2020).

The funding sources for the group of offshore companies associated with Roldugin can be roughly divided into three groups:

a) Dubious over-the-counter deals with shares of Russia's largest state-owned companies: Rosneft and Gazprom;
b) "Donations" from major Russian businessmen;
c) Preferential loans from the Cyprus-based RCB Bank.

For example, in 2010, Roldugin's company IMO was supposed to make a deal to buy Rosneft shares from another offshore structure. There are two contracts in the MF database: one for purchasing the shares and the other for terminating that contract. Roldugin's company immediately received $750,000 as compensation for the breach of contract.

We have found many similar deals with other companies associated with Sergey Roldugin that allowed for the creation of millions of dollars out of thin air (curiously, the same method – failure to execute share purchase agreements – was used by the fraudsters in the Magnitsky case to create fictitious obligations and then steal income tax from the budget).

The contracts were indeed fulfilled in some cases, but nevertheless, the musician was incredibly and consistently lucky. His companies bought shares in Russian enterprises and the next day sold them back to the same companies from which they had bought them the day before, but at a considerable profit, allowing them to earn $400,000-500,000 on each deal. Roldugin's counterparties in these transactions inevitably lost. Initially, these were companies associated with the Troika Dialog investment fund, and then with Sberbank (after the latter bought Troika). Troika and Sberbank declined to comment on the transactions.

It was as if Roldugin's managers knew in advance how the market would behave and how the stock price would change. But there was no magic there. The interviewed experts believe that, in reality, those transactions might not have been made at all and merely served to document payments received from other sources. This version is also supported by the fact that some contracts were closed post-factum when market fluctuations were already known.

Reporters from the Swiss newspaper SonntagsZeitung showed documents related to these transactions to Mark Pieth, a professor of criminal law and criminology at the University of Basel and a former member of the Financial Action Task Force (FATF). "These transactions are very suspicious. They should have raised a red flag with the bank," the expert said.

Why didn't the banks react to those transactions? In Sergey Roldugin's case, the explanation was simple. The musician's companies kept money in foreign "subsidiaries" of Russian banks, which, judging by the documents, did not follow customer verification procedures all that strictly.

For example, when IMO opened an account with the Swiss branch of Gazprombank in 2014, Sergey Roldugin as a beneficiary had to indicate whether he was a PEP (politically exposed person) or knew another PEP. In both cases, the Russian cellist answered "no" – even though information about his friendship with Vladimir Putin was public at the time.

In 2011, Sandalwood Continental, a company connected to Roldugin, issued about 200 million rubles in two loans to the Russian firm Ozon on "friendly" terms: one of the loans was for 10 years, the other for 20, and both were at 1% per annum.

In 2012, Ozon became the owner of a large land plot in the Priozersky District of Leningrad Oblast, where the Igora ski resort is located. Last year, Reuters reported that the president's daughter had allegedly celebrated her wedding party there in February 2013.

In 2011, Sandalwood Continental lent 40 million rubles to Laguna on the same friendly terms. Laguna has the same address as the Igora ski resort and owns a yacht club on the shore of Lake Ladoga.

The company, associated with Sergey Roldugin, gave a preferential loan of about 50 million rubles to the Russian company Nord House, which owned land and a hotel complex in Sortavala, Republic of Karelia. According to the Russian Federal Service for State Registration, Cadastre and Cartography (Rosreestr), today, this property is owned by Dacha Vintera Ltd. A premium class hotel with the same name – Dacha Vintera – is located in this picturesque area on Lake Ladoga amidst the coniferous forest.

All these Russian companies are in one way or another related to Rossiya Bank and its co-owner, Yuri Kovalchuk.

Offshore companies associated with Sergey Roldugin also controlled stakes in the country's largest enterprises in different sectors, from truck manufacturing to TV advertising sales.

When Novaya Gazeta asked someone from the cellist's team to characterise him briefly, the respondent said instantly: "You can call him a 'custodian.' That would be accurate."

Description of Offence (the case of the Taganskaya organised crime group)

Based on Bloomberg's report[213] **(abridged):**

Alexander Torshin instructed members of the Moscow-based Taganskaya organised crime group on how to launder ill-gotten gains through banks and properties in Spain while he was a deputy speaker of the upper house of parliament, the Spanish Civil Guard said in a confidential report that has been seen by Bloomberg.

The allegations related to Torshin in the Civil Guard report are based on recordings made of phone conversations he had with Romanov in 2012 and 2013, as well as documents seized during a raid on a villa on the island of Mallorca that Romanov owned at the time.

"Within the hierarchical structure of the organisation, it's known that Russian politician Alexander Porfiriyevich Torshin stands above Romanov, who calls him 'godfather' or 'boss"' and conducts "activities and investments" on his behalf, investigators concluded in the report.

A senior Spanish official said on condition of anonymity that prosecuting Torshin isn't worth the effort because Russia doesn't cooperate in cases involving high-ranking officials. Sergey Aleksashenko, former First Deputy Governor of the Central Bank, said Torshin may have returned to his old post at the behest of the FSB. At the time he left parliament, Torshin was part of a powerful state body – the National Anti-Terrorism Committee. He is probably best known in Russia for leading the official inquiry into the 2004 Beslan school siege.

In 2001, Alexander Torshin became a member of the Federation Council and later held the positions of deputy speaker and first deputy speaker in the upper house of the Russian parliament. In 2011, Torshin was Acting Head of the Federation Council for several months. In January 2015, he was appointed State Secretary and Deputy Chairman of the Bank of Russia, and his supervised areas included interaction with the chambers of the Federal Assembly, the executive bodies of state power at the federal and regional levels.

Legal Classification

If duly proven, the above acts related to money laundering may qualify as crimes under the following Articles of the Criminal Code: 174 (Legalisation (Laundering) of Funds and Other Property Acquired by Other Persons through Crime); 174.1 (Legalisation (Laundering) of Money or Other Property Acquired by a Person through Crime Committed by This Person); and 175 (Acquisition or Sale of Property Knowingly Acquired through Crime). Acts described in the case of Sergey Roldugin may also qualify as crimes set forth in section 2.5 of this chapter (Bribery).

213 *Duarte E., Meyer H.* Mobster or Central Banker? Spanish Cops Allege This Russian Both // Bloomberg. 2016. 9 August, at: https://www.bloomberg.com/news/articles/2016-08-09/mobster-or-central-banker-spanish-cops-allege-this-russian-both (accessed 30.06.2020).

2.7. Financial Market Manipulation and Insider Dealing

Description of Offence (illustrated by the case of Igor Shuvalov)

> **Based on the Financial Times report**[214]**:**
>
> In its article "Kremlin mired in Gazprom deal," the Financial Times explains how Deputy Prime Minister Igor Shuvalov profited from an insider deal involving shares in the gas monopoly, brokered by Suleiman Kerimov.
>
> According to the newspaper, in 2004, when Igor Shuvalov was an economic advisor to President Putin, the offshore company Sevenkey, owned by his wife Olga Shuvalova, acquired $18 million worth of shares in Gazprom. The deal was brokered by Suleiman Kerimov's Nafta Moskva, according to documents reportedly obtained by the Financial Times. When trading in Gazprom shares was liberalised in December 2005, the value of the stake increased more than tenfold within two years. In 2008, the shares were sold at a profit of more than $100 million. The stock was worth $1.9 at the time of purchase and $14.57 in December 2007.[215]

Legal Classification

If duly proven, the above acts may qualify as crimes under the following Articles of the Criminal Code: 185.3 (Market Manipulation); 185.6 (Misuse of Insider Information); and 289 (Illegal Participation in Business Activity). It should be noted that Article 185.3 was added to the Criminal Code on October 30, 2009, and Article 185.6 on 27 July 2010, so they do not apply to the above actions.

2.8. Illegal Tax Refund

Description of Offence (illustrated by the case of Sergey Magnitsky)

> **Excerpt from the ECtHR judgement**[216]**:**
> Sergey Magnitsky was the head of the tax department at the Moscow legal and audit firm Firestone Duncan, which provided legal, accounting, and tax advice to foreign investors in Russia. His clients included Russian subsidiaries of Hermitage Capital, which, at the time, was the largest foreign investment fund in Russia, headed by William Browder.
>
> In 2006, three Russian subsidiaries of Hermitage – Parfenion Limited, Rilend Limited, and Makhaon Limited – generated substantial revenue and, as a result, paid taxes in the amount of 5.4 billion rubles (approximately $230 million). Firestone Duncan provided legal and accounting services to these three companies.

214 Kremlin mired in Gazprom deal // 2012. 27 March, at: https://www.ft.com/content/ec7257ea-7808-11e1-b237-00144feab49a (accessed 30.06.2020).
215 See above: section 2.5, Offence Description (the case of Igor Shuvalov).
216 ECtHR. *Magnitsky and Others v. Russia.* Applications nos. 32631/09 and 53799/12. Judgment of 27 August 2019.

In May 2007, the Department for Tax Crimes of the Ministry of the Interior in Moscow opened a criminal case into tax evasion allegedly committed by the head of Kameya Limited, also a former client of Hermitage.

On 4 June 2007, during the investigation into Kameya's activities, several officers from the Department for Tax Crimes, including officer K., searched the Moscow offices of Firestone Duncan and those of Hermitage's advisers, Hermitage Capital Management. Among other items of evidence, they seized corporate documents and the seals of company not connected to Kameya.

On 13 June 2007, Major Ka. from the Investigative Unit of the Ministry of the Interior was appointed as the chief investigator of the case.

On 16 October 2007, Hermitage's subsidiaries received letters from a joint-stock company called Logos Plus informing them that, on 30 July 2007, a commercial court had transferred the ownership of the three subsidiaries to another company and that Logos Plus had lodged claims against them for billions of rubles. According to Magnitsky, he had searched the Russian Unified State Register of Legal Entities and discovered that, pursuant to the judgement of 30 July 2007 and without Hermitage's knowledge, the three subsidiaries had been registered in the name of the new owner, Pluton Limited.

Lawyers acting on behalf of the subsidiaries complained to the chair of the Investigative Committee of the Prosecutor General's Office, the Prosecutor General, and the head of the Department of Internal Security of the Ministry of the Interior. The complaints contained accusations against police officers, in particular officer K. and Major Ka., who had seized the documents and seals and had allegedly used them to perpetrate the fraud. They asked the authorities to open a criminal investigation into the misappropriation of the three subsidiaries. However, the Prosecutor General's Office declined to open any such investigation.

In December 2007, the newly-appointed managers of the three subsidiaries applied for a series of tax refunds, arguing that the three companies had made no profits in 2006. The sum of 5.4 billion rubles was transferred from the Russian Treasury to the subsidiaries' recently opened bank accounts at Universal Savings Bank (USB) and later were distributed from its accounts to the accounts of third parties in various banks in Moscow. Shortly thereafter, USB initiated the procedure for its voluntary liquidation. All its records were destroyed when, according to the Ministry of the Interior, a van transporting them crashed and exploded.

On 5 February 2008, a special investigator from the Investigative Committee of the Prosecutor General's Office opened a criminal investigation into the allegations made by Hermitage concerning the theft of the three subsidiaries. In June 2008, Hermitage's lawyers obtained the full details of the tax rebate granted in December 2007. Sergey Magnitsky concluded that the subsidiaries had been stolen in

order to embezzle taxes paid in 2006. As a consequence of that discovery, Hermitage and the legal representatives of the three subsidiaries lodged further complaints with the authorities, naming those they claimed were responsible for the embezzlement.

On 5 June 2008, in an interview with the special investigator, Magnitsky accused officer K. and Major Ka. of abuse of office.

On 24 November 2008, Magnitsky was arrested and placed in police custody on charges of tax evasion committed in conspiracy with Mr. Browder. On 16 November 2009, Magnitsky died while still in police custody.

In 2019, the ECtHR concluded that Magnitsky had suffered ill-treatment in custody and that the Russian Federation had violated its obligations to investigate the circumstances of his ill-treatment and death.

Legal Classification

If duly proven, the above acts may qualify as crimes under the following Articles of the Criminal Code: 199 (Tax Evasion); 159 (Swindling); 289 (Illegal Participation in Business Activity); and 201 (Abuse of Authority). In addition, the described actions may contain *corpus delicti* under the following Articles of the Criminal Code: 294 (Obstruction of Justice and Preliminary Investigation); 299 (Knowingly Bringing an Innocent Person to Criminal Liability); 300 (Illegal Release from Criminal Liability); 301 (Illegal Detention, Taking to or Keeping in Custody); 302 (Compulsion to Testify); 303 (Falsification of Evidence and the Results of Operational and Investigative Activities); 305 (Rendering a Knowingly Unjust Verdict, Decision or Other Judicial Act); 307 (Knowingly False Testimony, Expert or Specialist Opinion, or Incorrect Translation); and 309 (Bribery or Compulsion to Testify, to Refrain from Testifying or to Translate Incorrectly).

3. Reparations and Other Kinds of Legal Response

3.1. Compensation for Harm

Harm caused by corruption offences can be compensated in a number of ways.

Convictions under several Articles of the Criminal Code (including Articles 174, 174.1, Article 204 § 5-8, and Article 290) may result in the confiscation of the convicted person's property acquired through crime. According to Article 81 § 3.4 of the Criminal Procedure Code, if recognised as material evidence in a criminal case, "money, valuables and other property obtained through crime, as well as proceeds from the above, shall be returned to the legal owner." This allows the latter to regain such money, valuables, and other property even if they were seized not from the accused, but from third parties. It should be noted that this measure may apply even if the criminal case is terminated for reasons other than exoneration (such as, for example, the expiration of criminal liability).[217]

217 Such a conclusion – as applied to the confiscation of tools, equipment, or other instruments of crime – was drawn by the Constitutional Court of the Russian Federation in Ruling No. 5-P of 7 March 2017 "On checking the constitutionality of Article 81 § 3.1 of the Criminal Procedure Code of the Russian Federation following a complaint by citizen A.E. Pevzner." At the same time, disputes over the ownership of demonstrative evidence shall be resolved through civil proceedings (Article 81 § 3.6 of the Criminal Procedure Code).

An obvious legal response to corruption offences is the recognition of corrupt transactions as void, made in violation of the law, contrary to the foundations of law and order, and sham and fraudulent pursuant to Articles 168, 169, 170 and 174 § 2 of the Civil Code of the Russian Federation (hereafter, Civil Code). This is also required by Article 8 of the 1999 Council of Europe Civil Law Convention on Corruption.[218] However, it should be noted that restitution under such deals may be impossible, or at least very difficult, given that the property and parts thereof repeatedly changed owners – which included innocent individuals – were split up and merged, or changed their form and composition. However, under Article 167 § 2 of the Civil Code, if a party fails to return in kind all it has received from another party (including when the deal involved the use of property, work performed or services rendered), it shall compensate for the value thereof.

Moreover, civil actions may be brought for the recovery of property from another person's unlawful possession (Article 301 of the Civil Code); for compensation for harm caused by unlawful actions (Article 1064 of the Civil Code); and for obligations due to unjust enrichment (Article 1102 of the Civil Code). Depending on whose rights were infringed by the corrupt practices, the above actions can be brought by the Russian Federation (represented by the Federal Property Management Agency or the Prosecutor General's Office) acting on behalf of all Russian citizens; by other public legal entities (subjects of the Russian Federation and municipalities); and by private individuals affected by corruption offences.

In accordance with the Civil Law Convention on Corruption, in its internal law, each party shall provide for the following conditions to be fulfilled in order for the damage to be compensated:

I. The defendant has committed or authorised the act of corruption, or failed to take reasonable steps to prevent the act of corruption;
II. The plaintiff has suffered damage; and
III. There is a causal link between the act of corruption and the damage.

These principles appear to apply to obligations due to damage caused by corruption offences. The proper defendant in such a case would be the perpetrator of the offence. Such an action would be most effective if the perpetrator and the beneficiary of the corruption offence were one and the same person. The aforementioned provision of the Civil Code on unjust enrichment (Article 1102) provides even broader opportunities for the return of illegally acquired property, including in cases where the property is no longer owned by the perpetrator, but ends up in the hands of, for example, a dishonest buyer who benefited from transactions with the property.

In addition to the aforementioned remedies, the state has another dedicated instrument based on the Federal Law: "On the Control of Conformity of Expenses of Persons Occupying State Positions and Other Persons to Their Income," adopted in 2012 (hereafter – Law on the Control of Expenses).[219] Article 17 of this law authorises prosecutors to request the court to seize real estate, vehicles, securities, stocks or shares of officials who cannot demonstrate that they are the legal source of the means used to

218 Russia is not a party to this international treaty.
219 Federal Law No. 230-FZ of 3 December 2012 "On the Control of Conformity of Expenses of Persons Occupying State Positions and Other Persons to Their Income."

acquire the mentioned assets. [220] Alternatively, an amount of money equivalent to the value of the property can also be seized. In practice, this provision is used to seize property not only from the officials, but also from their family members and friends who have been charged with holding assets for the benefit of the officials. Furthermore, even assets acquired long before the adoption of the Law on the Control of Expenses can be seized on this basis.[221] These tendencies cannot but raise doubts about the conformity of this instrument with the principle of legal certainty and the constitutional prohibition on the retrospective effect of laws aggravating responsibility (Article 54 § 1 of the Russian Constitution).[222] Nevertheless, we consider the Law on the Control of Expenses as one of the possible ways of remedying the consequences of unpunished corruption within the framework of transitional justice, provided it is not applied retroactively.

3.2. Asset Recovery

Proceeds from corruption are often carefully hidden in "anonymous" bank accounts, funds, blind trusts, and third-party proxies, including (and typically) those overseas. Therefore, significant efforts may be required to locate and recover the assets. It is important to note that the success of such efforts depends on the willingness of foreign governments to cooperate. The UN Convention against Corruption (2003) provides the legal framework for this kind of cooperation.[223]

3.3. Arguments Against "Revising" Privatisation Deals

A common argument against "revising" privatisation deals is usually the one about the need to ensure the security of private property rights, regardless of their origin. The authors of this report question this idea for the following reasons.

First, the idea is based on the false assumption that the privatisation of major state enterprises is impossible in principle without violating the law. However, many other privatisation deals in Russia were carried out without violating the law, or with minor violations thereof. These privatisation deals are therefore not subject to review in the context of this concept. At the same time, deals involving grand corruption should be revised as prescribed by the law.

Second, being a political rather than a legal argument, the principle of stability of property rights irrespective of the legality by which such property has been acquired has no clear boundaries, and its extensive application may totally undermine the law upon which private property should be based and protected.

220 The most notable examples are the seizure of property from the relatives and entourage of Colonel Dmitry Zakharchenko of the Russian Interior Ministry's Main Directorate for Economic Security and Colonel Kirill Cherkalin of the FSB. См.: *Сенаторов Ю., Сергеев Н.* Все, что конфисковано непосильным трудом // Коммерсантъ. 2017. 2 декабря, at: https://www.kommersant.ru/doc/3486091 (дата обращения: 30.06.2020); *Соковнин А., Сергеев Н.* Полковник Черкалин сдал на шесть миллиардов // Коммерсантъ. 2019. 9 ноября, at: https://www.kommersant.ru/doc/4154373 (дата обращения: 30.06.2020).

221 See, for example, the appellate ruling of the Moscow City Court of 12 April 2019 in case No. 33-8799/19 on the seizure of property from A.V. Kuznetsov, the former minister of finance of the Moscow region.

222 However, the Constitutional Court of Russia refused to take these arguments into account. See: Ruling of the Constitutional Court of the Russian Federation No. 2656-O of 2 October 2019 "On the refusal to consider the complaint of citizen Irina Razgonova concerning violation of her constitutional rights by provisions of federal laws 'On the Control of Conformity of Expenses of Persons Occupying State Positions and Other Persons to Their Income,' 'On Combatting Corruption,' and 'On State Civil Service of the Russian Federation.'"

223 For more details see: *Корзун О.Р., Примаков Д.Я., Щигрева М.М.* Проблема возврата незаконно нажитых активов: опыт России, Украины и зарубежных стран. М.: Инфотропик Медиа, 2015.

Third, impunity for serious corruption offences inevitably leads to their recurrence in the future. As soon as corrupt officials in power get another "historic chance" of enriching themselves at the expense of national wealth and third parties, they will certainly jump at it, recalling the "amnesty" for past privatisation crimes.

Finally, there are arguments disproving the idea that the application of this approach contributes to the goal of securing property rights. In particular, Forbes' Chief Editor Paul Khlebnikov[224] commented on the privatisation of Yukos that Khodorkovsky acquired through loan-for-shares auctions: "Buying assets from the state through such a backroom deal and at such a low price, you face a risk that your rights to the newly acquired property will never be effectively protected. Your fellow citizens will consider you a fraud and the state will view you as a custodian rather than the true owner of the assets."[225]

Joseph E. Stiglitz, a Nobel laureate in economics shares this opinion: "Ultimately, security of property rights – and the growth it enables – depends primarily on the legitimacy with which those rights are viewed by society. If those who hold wealth are seen as having obtained it in ways that lack legitimacy, no legal system can make property secure. If property is not secure – or even is not perceived as secure – incentives are distorted. Those in control of Russian businesses will thus continue to strip assets and convert them into forms of wealth that can be easily taken out of the country."[226]

3.4. Evaluation of the "Reprivatisation" of Yukos and Bashneft

The cases of the "reprivatisation" of the oil companies Yukos (2004) and Bashneft (2014) are interesting in two ways. On the one hand, they represent a hostile takeover of businesses in the interests of the authorities and their associates, and on the other hand, they reflect an attempt to "overcome impunity" for previously corrupt privatisation practices.

In our opinion, the de facto "reprivatisation" of these assets can be seen as an attempt to achieve a noble purpose through improper means, which undermines confidence in the entire process and its outcomes.

As stated above, as part of transitional justice, we also suggest remedying violations committed during the privatisation of state property, including by restoration of state ownership over the misappropriated assets or, where this is not possible, by compensation for their value (see above). However, in the case of Yukos and Bashneft, reprivatisation, in our opinion, was achieved through gross violations of substantive and procedural law and through the use of criminal justice to force the owners to cede control of their companies.

In particular, as the ECtHR stated in its judgement, tax sanctions were imposed on Yukos after the statutory three-year limitation period had expired and, in addition, it was unlawfully charged a maximum enforcement fee (7% of the claimed amount).[227]

224 Khlebnikov was murdered in Moscow in 2004; the crime is still unsolved.

225 *Хлебников П.* Дело «ЮКОСА»: Веха на пути к законности // Ведомости. 2003. 17 ноября, at: https://www.vedomosti.ru/newspaper/articles/2003/11/18/delo-yukosa-veha-na-puti-k-zakonnosti (accessed 30.06.2020).

226 *Stiglitz J.* Tax the Oligarchs // Project Syndicate. 2003. 7 December, at: https://www.project-syndicate.org/commentary/tax-the-oligarchs/ (accessed 30.06.2020).

227 ECtHR. *OAO Neftyanaya Kompaniya YUKOS v. Russia.* Application no. 14902/04. Judgment of 20 September 2011.

The Bashneft privatisation deal was challenged more than two decades after it had been completed. The Russian Federation pretended to be unaware of its rights being violated throughout this period. A characteristic feature of the Bashneft case was the house arrest of the company's main owner, Vladimir Evtushenkov, which lasted until he dropped his appeal against the court decision to seize Bashneft shares on behalf of the state. After that, he was released, and the criminal case was dismissed.[228]

It is noteworthy that Russian courts (in particular, the Constitutional Court in the Yukos case[229] and the Arbitration Court of Moscow in the Bashneft case[230]) argued for non-application of the statutes of limitations by referring to the "bad faith" of asset owners and even to the "principle of justice," while the direct legal connection between bad faith conduct and non-application of the statutes of limitations on liability and actions was never (and could never be) established because the law in force at the time did not envisage such grounds. As a result, "justice" was restored at the expense of violations of substantive and procedural norms and serious damage to Russian law enforcement practices.

228 Дело «Башнефти»: кто такой Евтушенков и в чем его обвиняли // Русская служба Би-би-си. 2016. 14 января, at: http://www.bbc.com/russian/business/2016/01/160114_evtushenkov_bashneft_case (accessed 30.06.2020).

229 Ruling of the Constitutional Court of the Russian Federation No. 9-P of 14 July 2005 "On checking the constitutionality of the provisions of Article 113 of the Tax Code of the Russian Federation following a complaint by citizen G.A. Polyakova and the request of the Arbitration Court of the Moscow Region.

230 См.: *Занина А.* Для «Башнефти» нет срока давности // Коммерсантъ. 2014. 10 ноября, at: https://www.kommersant.ru/doc/2607232 (accessed 30.06.2020).

Chapter 4. Crimes Committed During Armed Conflict

1. Introductory Remarks

This chapter covers a wide range of patterns of criminal behaviour that share a common feature: They are all associated with armed conflicts, both internal and international.

This contextual framework is very broad, and violations of law committed within this framework can be highly diverse in terms of their types (criminal offenses, internationally wrongful acts, violations of the Russian Constitution), targets, alleged perpetrators, purposes, motives, methods, etc. The main feature that these violations have in common is that they all fall within the scope of international law. Even events of internal armed conflicts, seemingly isolated from the international context, are regulated by international humanitarian law, grave violations of which constitute international crimes – war crimes and, under certain conditions, crimes against humanity. Thus, seemingly unrelated events – for example, the murder of civilians by the military in a mop-up operation in a Chechen village and the adoption of a law on the annexation of Crimea[231] by the State Duma – have a common legal denominator.

All this suggests at least one important conclusion: The majority of the violations in question are criminalized under both Russian and international law, as well as under the laws of states whose nationals or interests are potentially affected by them. Hence, for all such crimes we generally observe a situation of jurisdictional competition, in which Russian courts and (if there are certain grounds, which is often the case) international judicial bodies, as well as national courts of other countries, are entitled to prosecute alleged perpetrators.

Thus, the violations addressed in this chapter are of a specific legal nature; their commission raises serious jurisdictional issues; and their prosecution cannot be regarded solely as an "internal affair" of the Russian Federation.

2. Crimes Committed During Armed Conflict in the Chechen Republic and Adjacent Regions

2.1. Brief Overview of the Conflict

Armed conflict in Chechnya has a long history. In 1859, Chechnya was annexed to the Russian Empire after a long and bloody war. After the October Revolution of 1917, the Mountainous Republic of the Northern Caucasus was formed on the territory of Chechnya, which joined the Russian Soviet Federative Socialist Republic (RSFSR) on conditions of broad autonomy in 1921. The Soviet government violated these terms of autonomy, sparking a series of violent insurgencies and leading to the emergence of a guerrilla movement that was active in Chechnya between the 1920s

231 Federal Constitutional Law No. 6-FKZ of 21 March 2014 "On admission of the Republic of Crimea to the Russian Federation and the establishment of new entities within the Russian Federation – the Republic of Crimea and the Sevastopol City of Federal Significance."

and 1940s. In 1944, on Stalin's orders, all Chechens and the related Ingush people were deported from their homeland in the North Caucasus to Kazakhstan and other Central Asian republics, where many of them perished. After Stalin's death, Chechen-Ingush autonomy was restored.

In 1991, Chechnya unilaterally declared independence, and the Russian authorities de facto lost sovereignty over its territory. In December 1994, the Russian Federation made a violent attempt to restore its state sovereignty over Chechnya, causing an armed conflict that lasted until August 1996 and ended with the withdrawal of Russian troops from the republic and the signing of a peace treaty. At the same time, the legal status of the Chechen Republic remained undefined, and scheduled negotiations to clarify it were thwarted. In August 1999, armed conflict resumed. In the summer of 2000, the Russian Federation established control over the majority of Chechen territory and set up its authorities there. However, a guerrilla war of varying intensity continued in the following years. By that time, the initially secular slogans of the independence supporters were replaced by the ideology of Islamic jihad, and low-intensity conflict spread to neighbouring regions, primarily Dagestan, Ingushetia, and Kabardino-Balkaria. In the late 2000s, Chechnya fell under the tight dictatorship of the Kremlin-backed President Ramzan Kadyrov, supported by loyalist armed formations incorporated into the republic's Interior Ministry.[232]

The described events were marked by gross and massive violations of international humanitarian law and international human rights law by all parties to the conflict. Representatives of the state have committed and continue to commit crimes in a climate of almost total impunity.[233]

The so-called Chechen wars have been the largest and most destructive armed conflict in the post-Soviet space, comparable in scale and tragedy to the conflicts that ravaged the republics of the former Yugoslavia in the 1990s. According to various estimates, the number of killed and missing during the clashes in 1994-1996 and 1999-2008 ranged from several tens of thousands to more than a hundred thousand, with the large majority being civilians.[234]

232 The Parliamentary Assembly of the Council of Europe, Recommendation No. 1922 (2010) "Legal Remedies for Human Rights Violations in the North Caucasus Region", 22 June 2010: "In the Chechen Republic, the current authorities continue to nurture a climate of pervading fear despite the undeniable successes in the sphere of reconstruction and the appreciable improvement of infrastructures in this region torn by two cruel and devastating wars. The human rights situation, like the functioning of justice and the democratic institutions, nonetheless continues to arouse the keenest anxieties: recurrent disappearances of government opponents and defenders of human rights still remain widely unpunished and are not elucidated with due diligence, reprisals are taken against the families of persons suspected of belonging to illegal armed factions (their homes are set on fire; close relatives of the suspect or suspects are abducted or receive serious threats, etc.), a climate of continuous intimidation reigns over the media and civil society, and the judicial organs plainly do nothing about the misdeeds of the security forces. All this occurs in an atmosphere of personalisation of power which, given its disproportion, appears disgraceful in a democracy. […] The suffering of the close relatives of thousands of missing persons in the region and their inability to grieve properly constitute a major obstacle to true reconciliation and lasting peace." Ten years later, these assessments still remain relevant. See.: "Human Rights in the Chechen Republic". O. Orlov's speech in the PACE, 28 January 2020. Memorial Human Rights Centre. 6 March 2020: https://memohrc.org/en/publicationstypes/report/human-rights-chechen-republic-o-orlovs-speech-parliamentary-assembly (accessed on 08.07.2020).

233 The issue of impunity in connection with this armed conflict was specifically addressed at the 13th session of the Parliamentary Assembly of the Council of Europe. The PACE Resolution No. 1323 § 10.3 (2003), adopted on 2 April 2003, states in particular: "To ensure that those responsible for abuses are brought to justice, the Assembly […] considers that, if the efforts to bring to justice those responsible for human rights abuses are not intensified, and the climate of impunity in the Chechen Republic prevails, the international community should consider setting up an ad hoc tribunal to try war crimes and crimes against humanity committed in the Chechen Republic."

234 Потери гражданского населения в чеченских войнах // ПЦ «Мемориал». 2004. 4 декабря, at: http://old.memo.ru/hr/hotpoints/caucas1/msg/2004/12/m28922.htm (accessed on 10.01.2020, the content is currently available only to authorised users).

Thus, over the last twenty-five years Chechnya has remained an area of extensive and systematic human rights abuses. National and international human rights organisations have documented the murder and enforced disappearance of several thousand civilians, perpetrated by state agents of the Russian Federation, but the actual number is much higher. To date, the Russian Federation's refusal or failure to effectively investigate these crimes has been confirmed by more than three hundred effective judgments of the European Court of Human Rights (see section 2.4 of this chapter).

The types, timeline and qualification of violations committed during the armed conflict in Chechnya were described in detail in the collective monograph *International Tribunal for Chechnya: Prospects of Bringing to Justice Individuals Suspected of War Crimes and Crimes Against Humanity During the Armed Conflict in the Chechen Republic* (thereafter, *International Tribunal for Chechnya*)[235]. This section is an extract from the monograph in question.

Although all parties to the armed conflict were involved in violations of international humanitarian law, in this chapter we focus only on the actions perpetrated by the Russian state agents.

2.2. Main Patterns of Criminal Behaviour

International Tribunal for Chechnya, mainly based on evidence from the second armed conflict that began in 1999, has identified and analysed the main patterns of criminal behaviour, including those typical of state agents of the Russian Federation. The following is a brief review of the most important of those patterns.

2.2.1. The Series of Terrorist Attacks in Autumn 1999[236]

One of the gravest crimes associated with the armed conflict (and at the same time the main *casus belli* of renewed conflict in 1999) is undoubtedly the series of explosions of residential buildings that took place in 1999 in the Russian city of Buynaksk on 4 September (64 people killed and approximately 100 injured); on Guryanova Street in Moscow on 9 September (94 killed and 164 injured); on Kashirskoye Highway in Moscow on 13 September (121 killed and 9 injured); and in Volgodonsk on 16 September (18 people killed and 310 injured). We are currently unable to consider the responsibility of any of the parties to the conflict for these terrorist acts, since available information does not allow us to speak beyond reasonable doubt about their involvement.

There are two main versions of events. According to the official version of the Russian government, the explosions were organised by Chechen terrorist groups with the knowledge or connivance of the government of the self-proclaimed Chechen Republic of Ichkeria (hereafter ChRI). This version was reportedly later corroborated during the trials of individual perpetrators and accomplices of these crimes. However, the trials

235 See: *Дмитриевский С.М., Гварели Б.И., Челышева О.А.* Международный трибунал для Чечни: правовые перспективы привлечения к индивидуальной уголовной ответственности лиц, подозреваемых в совершении военных преступлений и преступлений против человечности в ходе вооруженного конфликта в Чеченской Республике: колл. монография / под общ. ред. С.М. Дмитриевского. В 2-х томах. Нижний Новгород, 2009 (Dmitrievsky S.M., Gvareli B.I., Chelysheva O.A., *International Tribunal for Chechnya: Prospects of Bringing to Justice Individuals Suspected of War Crimes and Crimes Against Humanity During the Armed Conflict in the Chechen Republic).*

236 This section is an extract of section 39.2 of the monograph "International Tribunal for Chechnya...". See: *Дмитриевский С.М., Гварели Б.И., Челышева О.А.* Op. cit., vol. 2, pp. 278-291.

were held behind closed doors, and their verdicts – and even more so the case files – are unavailable for examination. The conclusions about Chechen involvement in the organisation of the attacks were reportedly based on confessions by the defendants. Given the systematic practice of torture during investigations in the Russian Federation, documented by international organisations,[237] the authors reserve the right to doubt the credibility of the circumstances established by the court, most of which are known only from media reports.

The second version is that the explosions were masterminded by the Russian secret services on the eve of the upcoming presidential elections. This was allegedly done in order to spread terror and mobilise society around the idea of a "strong hand," with the aim of bringing Boris Yeltsin's successor Vladimir Putin to power through a "small victorious war." This version is based on the fact that, on 22 September 1999, local residents and the police prevented an explosion at an apartment building in Ryazan, where a powerful explosive device similar to the ones that had been used in the terrorist attacks in Moscow was found in the basement of the building and quickly defused. Between 22 and 24 September, all Russian officials, including Prime Minister Putin and Interior Minister Rushailo, told the media that the authorities had successfully thwarted a terrorist attack. However, on 24 September, officers of the Ryazan department of the Federal Security Service (FSB) discovered safe houses, where the terrorists were hiding and began preparations for their arrest. At that point, the central FSB administration reported that the entire incident was a "counter-terrorist training" and ordered the cancellation of the planned arrests. The official investigation into the episode became classified. A public commission comprising prominent politicians and human rights activists, set up to investigate those events, never completed its work; some of those who directly participated in the Commission's work or provided significant assistance to it were murdered or died in mysterious circumstances.

We believe that both versions have some factual bases, but neither of them can be confirmed beyond reasonable doubt at this moment. Therefore, a thorough, independent and impartial investigation is necessary to identify those responsible for these terrorist attacks. The significance of this investigation undoubtedly goes far beyond the context of the armed conflict in Chechnya, and can shed light on fundamental problems of the genesis of the authoritarian regime in Russia.

2.2.2. Punitive Operations

We use the term "punitive operation" to refer to operations by military and police forces in populated areas of Chechnya, during which the civilian population was subjected to widespread terrorisation. As a rule, the effect of terrorising (spreading terror, horror) was achieved through a combination of diverse criminal acts: murders; enforced disappearances; mass detentions (often based on gender and age); pillage; devastation not justified by military necessity; and various types of ill-treatment, including torture. The crimes committed during each operation, as a rule, were closely

237 For example, in November 2006 the UN Committee against Torture, having considered the report of the Russian Federation under Article 19 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, expressed its concern at: "(a) The particularly numerous, ongoing and consistent allegations of acts of torture and other cruel, inhuman or degrading treatment or punishment committed by law enforcement personnel, including in police custody; (b) The law enforcement promotion system based on the number of crimes solved, which appears to create conditions that promote the use of torture and ill-treatment with a view to obtaining confessions." See: Committee against Torture. Thirty-seventh session. 6-24 November 2006 Conclusions and Recommendations of the Committee against Torture. Russian Federation. Document CAT/C/RUS/CO/4. 6 February 2007 § 9.

related to each other and were perpetrated by members of the same groups within a limited period of time in or near a certain populated area. The definition of "punitive" in relation to similar actions carried out by federal forces in Chechnya was first used by Judge Anatoly Kononov of the Constitutional Court of the Russian Federation in his dissenting opinion on a case concerning the verification of the constitutionality of the decrees of Russian President Boris Yeltsin that formed the legal basis for the operation of the Russian forces in Chechnya during the first armed conflict.[238]

These actions, usually called "mop-up operations" ("zachistka") in military jargon, were officially called "special operations," "operations to locate and eliminate members of illegal armed groups," or "passport check operations." Of course, not all of the thousands of mop-up operations carried out in Chechnya amounted to punitive operations. In defining a mop-up as a punitive operation, we primarily took into account its indiscriminate and massive character, i.e. the fact that such operations targeted not specific individuals, but rather the entire civilian population or a large group of civilians (e.g. men of fighting age, young people, residents of particular districts, streets, etc.).

The authors of *International Tribunal for Chechnya* analysed 136 mop-up operations amounting to serious punitive operations, carried out by federal forces between 1999 and 2005 on territory already occupied and controlled by them. Each punitive operation was a combination of several (but not necessarily all) of the following elements:

- Restriction of civilian movement;
- Breaking into and searching households and dwellings;
- Unlawful detention (deprivation of liberty) of civilians;
- Use of "filtration points" – illegal temporary detention facilities;
- Crimes related to ill-treatment (torture, inhuman treatment, outrages upon human dignity);
- Enforced disappearances;
- Killings;
- Intended injuries, serious bodily or mental injuries, caused intentionally;
- Pillaging;
- Destruction of property;
- Assaults on religious, educational, cultural, scientific or charitable facilities, historic monuments, and hospitals.

Two basic patterns of criminal behaviour can be distinguished in punitive operations:

Massacre. The main element in this pattern is the murder of civilians amid intended pillage and destruction of property, including the burning of houses. In punitive operations of this kind, murder is a goal in itself. It can be said that the perpetrators sensed absolute impunity and generally killed or gave orders to kill willingly, openly

238 The dissenting opinion of Judge A.L. Kononov of the Constitutional Court of the Russian Federation regarding the Constitutional Court's Decision No. 10-P of 31 July 1995 "In the case concerning verification of constitutionality of the Presidential Decree No. 2137 of 30 November 1994 'On Measures to Restore Constitutional Law and Order in Chechnya', Presidential Decree No. 2166 of 9 December 1994 'On Measures to Suppress Activity of Illegal Armed Units in the Chechen Republic and in the Zone of the Ossetian-Ingush Conflict', Government Decree No. 1360 of 9 December 1994 'On Ensuring State Security and Territorial Integrity of the Russian Federation, Law, Civil Rights and Freedoms, Disarmament of Illegal Armed Units in the Chechen Republic and Adjacent Regions of the North Caucasus', and Presidential Decree No. 1833 of 2 November 1993 'On Basic Provisions of the Military Doctrine of the Russian Federation.'"

and demonstratively. This pattern of behaviour is often referred to as a "massacre." This is how the ECtHR described the mass murder of civilians in Novye Aldy suburb of Grozny on 5 February 2000.[239]

The alleged perpetrators of the Novye Aldy massacre were riot police units from the city of St. Petersburg and the Leningrad Oblast and members of the 245th regiment of the Russian Defence Ministry. In just a few hours, Russian forces summarily executed at least 46 civilians in Novye Aldy. Five civilians were shot dead in Podolskaia Street, about ten minutes' walk from central Aldy, and at least five more were killed in Chernorechie, a neighbourhood adjacent to Aldy. There are reasons to believe that all these crimes were committed by members of the same units.

The killings were accompanied by systematic pillaging and the burning of houses and outer buildings together with food supplies, livestock, human corpses, and sometimes even living persons. In a number of cases, the military forced their victims to collect the required amount of "ransom" from their neighbours; this, however, did not always save them from being executed. Thus, Zina Abulmezhidova, born in 1940, and Khussein Abulmezhidov, born in 1953, were shot outside their house along with Akhmed Abdulkhanov, born in 1929, who was led there at gunpoint by several soldiers. The group commander ordered one of the soldiers to kill a witness to this event, Malika Labazanova, saying that the order was to kill everyone. After pillaging, the military set fire to the house and outbuildings. Aindi Azuyev, born in 1927; Aymani Gadayeva, born in 1958; Koka Gerikhanova (Bisultanova), aged 46; and Alvi Khadzhimuradov, born in 1941, were shot near 127 Mazayev Street. The military emptied their pockets of money and put their passports on their faces. Azuyev's mouth was torn open and his gold dental crowns were removed. Avalu Arsamuzoyev, born in 1946, and Suleiman Arsamuziyev, born in 1961, were shot dead outside 170 Mazayev Street, when they came out of the house on order of the military. Suleiman Arsamuzoyev managed to use his body to cover the trap door to the cellar, where his younger brother Bilial and Bakar, Avalu's son, were hiding. Rakat Akhmadova, born in 1929, was wounded near at the corner of Mazayev and Khoperskaya streets and, despite her pleas for mercy, was shot dead by a soldier at point blank range. Issa (Munek) Akhmadov, born in 1965; Sultan Temirov, born in 1951; and Rizvan Umkayev, born in 1933, were shot in the yard of Temirov's house. Temirov was decapitated and torn apart by multiple bullet wounds going up his spine. Isa Akhmatov, born in 1959, and Lema (Kazbek) Akhtayev were detained in the latter's house and burnt alive in the cellar of building 1 in 4th Tsimlyanskaya Lane. Shamkhan Baigirayev, born in 1967, was detained in the presence of his mother, taken away and then shot and burnt in the basement of the Sulipov house in Voronezhskaya Street. Said (Doga) Vakhidov, born in 1954, and Tuta Khaniyev, born in 1954, were shot at close range with a submachine gun in the yard of 112 Mazayev Street. Magomed (Shogri) Gaitayev, born in 1929, was shot in the back of his head at the gate of 140 Mazayev Street. The Ganevs – father Alvi, born in 1938, and his two sons, Aslanbek, born in 1965, and Sulumbek, born in 1969 – were killed next to the Musayevs and Khakimovs, who had already been executed, on the corner of Voronezhskaya and Khoperskay Streets. Sultan Dzhabrailov, born in 1947; Vakha Dzhambekov, born in 1947; and Abdurakhman (Sultan) Tasuyev were fixing the roof of a house when soldiers rushed into the yard and demanded money and gold from them. Dzhabrailov was killed on the spot. The commander ordered the two others to

239 ECtHR. *Musayev and Others v. Russia.* Applications nos. 57941/00, 58699/00 and 60403/00. Judgment of 7 July 2007. § 54.

go home and collect valuables. Tasuyev's brother Shamkhan collected 5,140 rubles from his neighbours; then they took Tasuyev to the commander again and shot him in the mouth near building 56 in 2nd Tsimlyanskaya Lane. The soldiers took Dzhambekov to three addresses and demanded gold and money from local residents. Then they brought him back to the yard of building 39 in 2nd Tsimlyanskaya Lane and shot him dead. The list of victims and circumstances of the murders can be continued. The quintessential example of this bloody bacchanalia was the execution of a mother in front of her small child in 152 Mazayev Street. It is important to note that in a number of cases the soldiers claimed they had been ordered to kill and had been threatened with death for disobeying the order. In addition, there were reports of at least six women being raped in the course of this punitive operation.

The circumstances of this tragedy are described in detail in special reports from the Memorial Human Rights Center[240] and Human Rights Watch,[241] as well as in the judgement of the ECtHR in *Musayev and Others v. Russia*, finding the Russian Federation liable for violating Article 2 of the ECHR (Right to Life).[242]

The criminal investigation into events in Novye Aldy was opened a month after the crime occurred and was closed and reopened multiple times. To date, none of the perpetrators have been held criminally responsible. In the opinion of the ECtHR, the "astonishing ineffectiveness" of the investigation by the Russian Federation's prosecutors into this "cold-blooded execution […] can only be qualified as acquiescence in the events."[243]

Round-up (oblava). The main component of this model of punitive operations is the arbitrary deprivation of liberty of civilians. The classic scenario includes closing off a settlement or a large part of it, massively detaining men of fighting age, taking them to a filtration centre, and subjecting them to torture or ill-treatment. Most of these operations were accompanied by pillage and destruction of property, while a significant number involved murder and enforced disappearance of protected persons. The operations could last from a day to a week or more. Some punitive operations were perpetrated simultaneously in a number of neighbouring locations. Such operations were thoroughly organised and planned and require enormous human and material resources, including thousands of soldiers, armoured vehicles, and transport. They are characterised by the systematic repetition of the same patterns of criminal behaviour, and the frequent presence on the ground of senior commanders, including the commander of the United Group of Forces for Counter-Terrorist Operations in the North Caucasus Region of the Russian Federation (hereafter, OGV[244]), his deputies and operational commanders. During the second armed conflict such relatively localised "round-ups" evolved into "total mop-ups" that covered large populated areas and lasted for days. It should be noted that, in contrast to massacres, in the round-up operations the perpetrators acted selectively, targeting most of their crimes of illegal detention, torture, ill-treatment, murder, and enforced disappearance at men of fighting age.

240 See.: *Байсаев У., Орлов О., Черкасов А., Эстемирова Н.* «Зачистка». Поселок Новые Алды, 5 февраля 2000 года. Преднамеренные преступления против мирного населения // ПЦ «Мемориал». 2001. 1 марта, at: https://memohrc.org/ru/reports/zachistka-poselok-novye-aldy-5-fevralya-2000g (accessed on 08.07.2020).

241 See: February 5: A Day of Slaughter in Novye Aldi // Human Rights Watch. 16 June 2000: http://www.hrw.org/russian/reports/russia/2000/june/ (accessed on 08.07.2020).

242 ECtHR. *Musayev and Others v. Russia.*

243 Ibid. § 164.

244 Established by Presidential Decree No. 1255c of 23 September 1999.

Total mop-ups, involving closing off villages, capturing and "filtering" practically all men, were first introduced in August 2000. Ever since, they have been held more frequently and organised and planned much better to include setting of special filtration points and headquarters, from where generals and sometimes even the OGV commander handle troops. Finally, between 2001 and 2002, a special force was formed to carry out punitive operations. It moved from village to village, terrorising the civilians and leaving behind the mutilated corpses of the victims of extrajudicial executions, devastated relatives of those who disappeared during another round-up, looted and burned homes, and hundreds of victims of torture. At the core of this group were the Internal Troops, in particular, the 46th Separate Operational Brigade, tasked to conduct "special operations and targeted measures." From early 2001 to September 2002, the group carried out a series of the most massive, systematic and brutal punitive operations, including illegal detentions of non-combatants. From March 2003 onwards, such operations became less frequent and caused far fewer casualties, and after the summer of 2005 they ceased altogether.

A classic example of a punitive operation of this kind was the mop-up operations in the villages of Assinovskaya and Sernovodsk, conducted in early July 2001. The unprecedented number of illegally detained people (about a thousand civilians were detained over three days); the massive atrocities and torture (at least seven hundred people became the victims of these crimes); and widespread pillaging made locals flee to Ingushetia, sparking public outcry both inside and outside Russia. Both operations were carried out in response to actions of enemy combatants and were presented as "reprisals" against "enemy" civilians.

On 1 July, a police vehicle was blown up on a landmine in the village of Sernovodsk, killing five officers. Shortly afterwards, the military arrived at the scene and detained two young men, who were grazing cattle nearby. They were about to be shot on the spot, when a local police officer intervened; however, the soldiers took the herdsmen away, and since then their fate has been unknown. Early in the morning of 2 July, federal troops entered Sernovodsk and started a mop-up operation. They broke into yards; drove people out of their homes; threw grenades into attics and cellars; took whatever they wanted; broke and cut up furniture; killed chickens, turkeys, and sheep; even picked potatoes; and then put everything in their armoured vehicles. In the centre of the village, soldiers fired at private and state-owned vehicles if the owners failed to pay a ransom on time. Although no one in the village put up any resistance, the soldiers threw grenades at several residential buildings. They disarmed and detained all local police and traffic police and captured all males aged 14 to 60 in all households, although some of them managed to escape by paying bribes. About seven hundred men, who could not pay the ransom, were taken to a field between the villages of Sernovodsk and Samashki. The soldiers ordered them to lie down and pulled their shirts over their heads. They beat them on the heads with gun butts for the slightest movement. They robbed the detainees of their money, rings, and watches, and damaged their identification documents. They took the men to a tent erected on the spot for interrogation. Those interrogated were brutally beaten, especially if they had any scars on their bodies, even those received in childhood. Some were tortured with electric shocks, with metal rings and wires attached to their fingers, and were set upon by service dogs. By 2 a.m. of the following day, most of the detainees were released, but more than a hundred were taken to the Temporary Department of Internal Affairs of Achkhoi-Martan. Two detainees have "disappeared."

On 3 July, an armoured vehicle blew up on a landmine in the outskirts of Assinovskaya village. A policeman was wounded. The mop-up began on the same day and lasted until 5 July. Around 300 people were detained and taken to a field at the edge of the village for interrogation, during which they were beaten. Among them was Nazarbek Terkhoyev, the head of the Assinovskaya administration, and four women, two of whom were also tortured. On 3 July, most of the detainees from Assinovskaya and some of the residents of Sernovodsk who were brought to Achkhoi-Martan were taken to a forest near Chemulga and released. They spent about 24 hours there, because it was equally dangerous for them to walk through the forest or along the roads blocked by the federal troops. It was not until 5 July that those people, risking their lives, reached the village of Chemulga, from where they were able to go back to their homes or to Ingushetia.[245]

2.2.3. Crimes Involving Illegal Deprivation of Liberty Outside the Context of Punitive Operations[246]

This category includes illegal deprivation of liberty, as well as other serious violations of humanitarian law and the human rights of detainees, such as crimes related to ill-treatment (torture, inhuman treatment, outrages upon human dignity), murders, and enforced disappearances. The particular gravity of these acts is associated with the fact that they deliberately target persons being under the complete control of the perpetrators.

The statistical analysis of this kind of crime as reported in *International Tribunal for Chechnya* shows that, in 2000-2005, at least two people were illegally detained every day and two to three people were killed or disappeared every three days in the small North Caucasian republic – excluding those who were detained, killed, or disappeared during punitive operations.

In the early years of the second armed conflict, federal forces committed most of their crimes openly, without bothering to destroy any evidence. After a number of high-profile scandals, they started to cover up their crimes more carefully. The most notorious case took place in 2001, when a dumping ground for the remains of the victims of summary executions was uncovered in the village of Zdorovye, near the main military base of federal forces in Khankala. From 2003 onwards, the percentage of those who were "disappeared" exceeded that of those who were killed by federal forces. This simply means that the bodies of those killed were found less frequently; however, fragments of unidentified bodies – destroyed by explosion, half-burnt or burnt – were found more often.[247] There is no doubt that at least some of the unidentified remains found in Chechnya belonged to people who disappeared after being detained by the security forces.

The first reason for an increase in the crimes committed by "unidentified persons" was that the perpetrators took precautions to avoid identification: An increasing number of illegal arrests were carried out by "unidentified persons wearing masks" and driving cars without license plates. The second reason was the formation of pro-Moscow

245 Зачистки Серноводска и Ассиновской — карательная акция // ПЦ «Мемориал». 2001. 9 июля, at: http://old.memo.ru/hr/hotpoints/n-caucas/misc/sernovod.htm (accessed on 30.12.2019, the content is currently available only to authorised users).

246 This section is an extract of chapters 31-32 of the monograph "International Tribunal for Chechnya…". See: *Дмитриевский С.М., Гварели Б.И., Челышева О.А.* Op. cit., vol. 2, pp. 108-185.

247 See: *Калинина Ю.* Расстрел со «сникерсом» // Московский комсомолец. 2008. 23 апреля, at: https://www.mk.ru/social/article/2008/04/23/43798-rasstrel-so-snikersom.html (accessed on 08.07.2020).

security forces in Chechnya comprised of ethnic Chechens in 2003. This led to an increase in unreported crime, which assumed its extreme form under Kadyrov's rule. Having been released, intimidated victims increasingly refused to talk to human rights activists and journalists, to contact law enforcement agencies, and to report where and by whom they had been held. Thus, it should be acknowledged that an overwhelming number of crimes committed by "unidentified perpetrators" are likely to be on the conscience of representatives of the federal authorities. Although it is quite possible that some of these episodes were perpetrated by armed separatists, the number of such cases is unlikely to be large. It is hard to believe that "militants" could kidnap more and more people every year as the federal forces strengthened their control over Chechnya. Although it is quite possible that armed separatists were behind some of these episodes, the number of such cases is unlikely to be large.

The increase in the number of people charged with crimes after detention in 2005 is also due to the "Chechenisation" of the conflict: While previously detainees had been coerced into confession by torture and then simply executed, since then they have been prosecuted for involvement in illegal armed groups.

A telling example of the organised nature of crimes committed against persons illegally deprived of their liberty are the torture and enforced disappearances (murders) that were systematically practiced in the Temporary Department of Internal Affairs (VOVD) of the Oktyabrsky district of Grozny. According to a large amount of evidence collected by human rights organisations and confirmed by the verdict of the Oktyabrsky District Court of Grozny on 29 March 2005, and by decisions of the ECtHR in the cases of *Yusupov and Zaurbekov v. Russia*[248] and *Magomadov and Magomadov v. Russia*,[249] detainees were systematically subjected to severe torture in the Oktyabrsky VOVD, and many of them disappeared without trace. Most of the known crimes were committed by members of the special police force (OMON) of the Khanty-Mansiysk Autonomous Okrug assigned to the VOVD in 2000-2001.[250]

On 17 October 2000, Abdulkasim Zaurbekov, who was born in 1951 and had been working as a crane operator in the Oktyabrsky VOVD for two months, arrived at work in a car with his son to receive his salary. His son waited for him at the entrance of the VOVD for about seven hours and then was told that his father had already left. Zaurbekov disappeared without a trace. Having considered the complaint of the victim's relatives, the ECtHR found the Russian Federation liable for violating the right to life, the prohibition of torture, the right to a fair trial, and the right to effective legal remedy.

On 2 January 2001, 26-year-old resident of Grozny Zelimkhan Murdalov was detained and taken to the Oktyabrsky VOVD and then disappeared without trace. The officers of the VOVD, including its head Colonel Kondakov, claimed that Murdalov had been released and left the department on his own. However, during the criminal investigation, it turned out that the release documents had been forged, that Murdalov had been interrogated by a police operative from Nizhnevartovsk, Sergei Lapin (aka "Kadet"), and that he had been seriously injured during the interrogation. A large part of the case files disappeared in unclear circumstances. As a result, only Lapin was held criminally responsible. He was arrested only after he threatened journalist Anna

248 ECtHR. *Yusupova and Zaurbekov v. Russia.* Application no. 22057/02. Judgment of 9 October 2008.
249 ECtHR. *Magomadov and Magomadov v. Russia.* Application no. 68004/01. Judgment of 12 July 2007.
250 See: Незаконная тюрьма в Октябрьском районе г. Грозный работала до мая 2006 года // ПЦ «Мемориал». 2016. 5 июня, at: http://old.memo.ru/2006/06/05/oktayabrs2006.htm (accessed on 08.07.2020).

Politkovskaya, who had published an article about his crimes in Novaya Gazeta. On 29 March 2005, the Oktyabrsky district court found Lapin guilty of crimes under Article 286 § 3a and § 3b (abuse of power, resulting in a substantial violation of the rights and freedoms of a person, committed with the use of violence or threat of violence), Article 111 § 3 (intentional infliction of a grave injury, endangering human life, committed by a group of persons by prior agreement), and Article 292 (forgery by an official) of the Criminal Code of the Russian Federation. It sentenced him to 11 years in a high-security prison. Zelimkhan Murdalov's fate remains unknown; his body has not been found. In December 2005, the Prosecutor's Office of the Chechen Republic opened criminal proceedings against Lieutenant Colonel Valery Minin, commander of the Khanty-Mansiysk OMON, and Major Alexander Prilepin, head of the VOVD. The investigation suggested that they were directly involved in Murdalov's disappearance. However, both officers escaped and were put on a wanted list. They were detained only in December 2015. However, a few months later, the criminal case was dropped for lack of evidence of their involvement in the crime.[251]

2.2.4. Crimes against Those Who Disengaged from Hostilities and Were Captured by the Adversary[252]

This category includes only those persons who were captured in the course of hostilities. The right of a party to a conflict to take and hold captive enemy combatants is not in doubt. Since we are dealing with an internal conflict, the state's right to hold such persons criminally liable for the mere fact of participation in hostilities is also beyond doubt. Humanitarian law only imposes an obligation to ensure that such persons are treated humanely and receive a fair trial. The main types of crimes committed against prisoners of war are the same as those committed against other persons detained in connection with the armed conflict: ill-treatment, torture, murder (extrajudicial execution) and enforced disappearance.

The fate of 237 Chechen combatants who surrendered and were captured by the Russian side in the course of the second armed conflict was analysed using open sources. It is known that 15 of them were pardoned and that relatives of 13 combatants had to pay bribes to get them released. At least 35 of those who surrendered were subjected to extrajudicial execution and at least 13 to enforced disappearances. At least 138 were subjected to torture or ill-treatment and at least 35 died in detention due to inhumane living conditions of prisons or due to a lack of necessary medical care. At least 22 people were sentenced to various terms of imprisonment by Russian courts. There is no reliable information about the fate of the remaining 117 people.

The most telling example of the tragic fate of the captured Chechen combatants is the story of those who voluntarily laid down their arms during the battle for the village of Komsomolskoye (Goy-Chu) in March 2000.

The battle for Komsomolskoye, which began on March 4 and lasted more than two weeks, was perhaps the bloodiest battle of the second Chechen campaign. It ended with the defeat of a large group of armed formations of the ChRI under the command

251 For more on this, see: *Туманов Г.* Правозащитники просят привлечь сослуживцев Кадета. Страсбургскому суду напомнили о недостаточном расследовании дела ханты-мансийских милиционеров // Коммерсантъ. 2016. 27 июня; at: https://www.kommersant.ru/doc/3023581 (accessed on 08.07.2020).

252 This section is an extract of chapter 34 of the monograph "International Tribunal for Chechnya...". See: *Дмитриевский С.М., Гварели Б.И.,* Челышева О.А. Op. cit., vol. 2, pp. 207-213.

of field commander Ruslan Gelayev. On March 20, a group of Chechen fighters stopped their resistance here, blockaded in destroyed houses on the outskirts of the village. They were given a security guarantee on behalf of the command of the federal forces.

There are three videos that feature the surrender of Chechen combatants. The first two, shot at the outskirts of Komsomolskoye,[253] clearly show men, exhausted by two-weeks of fighting, coming one by one from under a ruined building and approaching Russian positions. They are searched, their personal information is recorded, and they are then told to lie down on a hillside, where many of them fall asleep. Some find the strength to pray. Two women come out along with the men. One man is unable to walk, so they carry him out of the ruins lying on a blanket.

According to the videos, at least a hundred people (according to other reports, about 150) surrendered that day and at least twelve of them were killed by the Russian military. Their fellow combatants witnessed the execution and were forced to dig graves for them. The bodies of the dead were later found by local residents.

Some of the surrendered combatants were taken to the military commandant's office of Urus-Martan district and disappeared.

Only 73 of them were taken to the Khankala military base. There is a list of 61 of them, signed by Major of Justice T.A. Bushmanova, investigator of the Interior Ministry's mobile unit. There is a footnote on the list reading: "Twelve unidentified bodies and bodies of those who died upon arrival to Khankala have been handed over to the Ministry of Emergency Situations of the Chechen Republic for burial."

On the territory of the main Russian military base, all the detainees were beaten with gun butts, truncheons, and feet; they were tortured, including with electric shocks. At least two people had their ears cut off while still alive. A third video, [254] obtained by human rights activists, was made by officers of the Main Department for Corrections at the Chervlyonaya station. The video shows a man with his right ear almost completely cut off and hanging down by the skin.

In Khankala, the prisoners were kept in GAZ-53 and Ural trucks made into prison vans, one of which had the inscription "Ministry of Justice of the Russian Federation" on it. Officers took prisoners out of the vans in order to torture them, and then jammed them back in the vans, where there was not enough space for them to sit or lie. People suffered from thirst and hunger and received no medical assistance. But the worst thing was that the prisoners were crammed tightly in the vans without any access of fresh air, as a result of which at least ten of them died. On 25 March, the survivors, together with the dead, were taken in the same vans to the Shelkovo district and put on a train near the Chervlennaya station, far away from prying eyes. The corpses of the dead were piled on the embankment.

253 См.: *Байсаев У., Грушкин Д.* Здесь живут люди. Чечня: хроника насилия. Часть 3. Апрель-июнь 2003 года. М.: «Мемориал" — «Звенья», 2006. p. 92.

254 According to the Memorial Human Rights Center, the third footage was purchased from the Department for Corrections officers, who guarded and transported the combatants captured during the battle for Goy-Chu. Thanks to Anna Politkovskaya's efforts, the footage became known outside Chechnya, see: *Политковская А.С.* Амнистия до полного уничтожения помилованных // Новая газета. 12–14 апреля 2004 г. № 25 (955).

From Chervlennaya the survivors were transported to Taganrog and Novocherkassk. It is likely that others died on the way. According to available information, only 48 people were placed in detention facilities in these cities. The beating of the prisoners continued until mid-June 2000, when at the request of their relatives they were visited by members of the International Committee of the Red Cross.

Twelve people were released from the Taganrog detention centre under an act of amnesty. However, according to their relatives, they had to pay large bribes for their release. At least one of those released, Vakhid Timayev, was subsequently detained again and disappeared without a trace.[255]

There are many more examples of this kind.

2.2.5. Assaults on Civilians and Civilian Objects in the Form of Fire Attacks[256]

This section describes crimes related to artillery and air strikes against civilians and civilian targets in the course of hostilities.

According to the type of weapon used, the attacks are divided into air strikes and ground-based attacks and, within each of these types, the type of weapon used was specified where possible, i.e. missiles, artillery, bombs (for air strikes), small arms, and other weapons. In many attacks several different weapons were used simultaneously.

Depending on their nature, fire attacks are divided into direct and indiscriminate ones. A direct attack is one that targets exclusively or predominantly the civilian population, individual civilians and/or civilian objects. Indiscriminate attacks are those:

- Which are not directed at a specific military objective;
- Which employ a method or means of combat which cannot be directed at a specific military objective;
- Which employ a method or means of combat, the effects of which cannot be limited as required by international humanitarian law; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction (area bombardment).[257]

This category mainly covers cases where, prima facie, perpetrators targeted individuals not because of their personal qualities, but because they were civilians. In these cases, the perpetrators perceived the victims simply as a mass of people whom they wished to harm.

The analysed sources contain information about 326 episodes of fire attacks on civilians, carried out by the Russian side of the conflict. The reported casualties include at least 1,386 killed and at least 1,119 wounded, of whom at least 55 subsequently died of their wounds.

255 See: *Байсаев У., Грушкин Д. Op.cit.* pp. 89–99.

256 This section is an extract of chapter 35 of the monograph "International Tribunal for Chechnya…". See: *Дмитриевский С.М., Гварели Б.И., Челышева О.А.* Op. cit., vol. 2, pp. 215-254.

257 See: Обычное международное гуманитарное право / под ред. Ж.-М. Хенкертса, Л. Досвальд-Бек. Т. 1. М. : МККК, 2006. Vol. 1, pp. 52-58.

Out of the analysed attacks, 255 episodes were direct attacks on the civilian population, individuals or civilian objects, and 11 were indiscriminate attacks (attacks on mixed targets). The type of another sixty attacks is unclear due to the lack of relevant information.

It is known that in air strikes, air bombs were used in 69 cases; air-to-ground missiles in 37 cases; and airborne artillery and machine guns in 26 cases. Often these types of weapons were used in combination. In ground-based attacks surface-to-surface ballistic missiles were used in 12 cases; artillery in 78 cases; multiple rocket launchers on 10 occasions; mortars in 27 cases; rocket-propelled grenades in eight; and small arms in 83 cases. In many episodes, different types of weapons were used in combination.

According to the sources, during the phase of direct confrontation (which ended by late March 2000), massive airstrikes were most frequently directed at populated areas, individual civilians and civilian convoys. From the very first days of the conflict, Russian military aviation systematically bombarded towns and villages throughout the republic, both within and outside the operations zone. In both cases, attacks were primarily directed at residential areas and often at educational and health care facilities.

In many cases, area bombardment or carpet bombing with overlapping impact zones were used, often against unprotected settlements with no military targets. When there were some military targets there, the strikes were not directed at them, but rather covered the entire town, village or blocks of buildings.

In a significant number of cases, indiscriminate weapons that could not be directed against any specific object were used against densely populated areas, i.e. against all people and objects within the area, or a substantial part of it.

Thus, staying in populated areas of Chechnya could be fatal for any civilian, irrespective of gender or age. This caused, first, a mass exodus of civilians from Chechnya to escape the indiscriminate use of weapons, and second, waves of internal migration within Chechnya to areas that seemed safer at that time.

Given this situation, the Russian side systematically attacked all vehicles moving on the roads in Chechnya, including individual vehicles with people seeking safety from the lethal weapons and entire convoys of refugees (displaced persons).

The OGV command took effective measures to prevent, and when this became impossible, to maximally restrict the departure of the civilian population from Chechnya. Moreover, as far as is known, the Russian side never gave any advance warning of attacks that could affect civilians,[258] except for the ultimatum delivered to the residents of Grozny on 6 December 1999; this was not a warning, but rather a threat that all of them would be killed.

As evidenced by the facts, attacks against civilians and indiscriminate attacks were not a set of isolated episodes, but rather part of the general strategy of the Russian military operation in Chechnya. It is reasonable to assume that the primary goal of this

258 Under customary international humanitarian law, each party to the conflict must give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit. See: *op. cit.* J.-M. Henckaerts, L. Doswald-Beck. pp. 83–86.

strategy was to terrorise the civilian population. The ultimate military and political goal was to spread terror and panic, and to provoke a humanitarian crisis in order to break the will of the leadership, the armed forces and the population of the unrecognised ChRI to fight, and make them unable to resist the federal forces, thus facilitating Russia's military victory and the restoration of its sovereignty over the Chechen Republic.

Moreover, the systematic attacks and the hindered evacuation of civilians from affected areas suggest the intentional creation of conditions for the partial destruction of the civilian population, which can be qualified as a crime against humanity in the form of extermination.

2.2.6. Murders Committed Outside the Context of Punitive Operations, Detentions, and Fire Attacks[259]

This section summarises data on the murder of protected persons committed during the armed conflict on the territory of the Chechen Republic outside the context of punitive operations, detentions, and fire attacks. This category of crimes is considered separately from other acts of violence against civilians for purely informative purposes.

Murders of this type were committed by representatives of both sides of the armed conflict. Sources have recorded 154 criminal episodes perpetrated by representatives of federal forces, in which 254 people were killed and 17 were wounded. They hold the Chechen side responsible for 20 episodes, in which 31 people were killed and one was wounded. Finally, 61 criminal acts with 83 people killed and six wounded were attributed to "unidentified perpetrators." As with illegal detentions, this means that we do not have enough facts to determine *prima facie* which side was the perpetrator. In this case, all that is known is that the crimes were committed against protected persons and were associated with the armed conflict.

It is difficult to clearly classify all murders included into this section. Most of the episodes studied by the authors can be subdivided into situations, where:

- The murder of a particular person appears to have been planned or ordered by superior officers and was evidently the main goal of the perpetrators;
- Civilians were shot at or arbitrarily executed for violating the so-called curfew (which was established in violation of domestic law);
- The murders appear to have been committed spontaneously (in particular the murders of civilians on roads) or as part of other crimes, such as robbery or sexual violence.

The first category includes the murders of persons who did not participate or ceased to participate in hostilities during "special operations," including so-called "targeted operations." A significant number of such episodes can be accounted for by actions of so-called "death squads" – groups whose primary goal was the "liquidation" (extrajudicial execution) of certain people. Here are several examples of such episodes.

259 This sections is an extract of a chapter from the monograph "International Tribunal for Chechnya…". See: *Дмитриевский С.М., Гварели Б.И., Челышева О.А.* Op. cit., vol. 2, pp. 256-268.

On 17 September 2000, at about 2 a.m., in the village of Starye Atagi, Groznensky (Rural) District, unknown armed men wearing masks, who communicated with each other only in Russian, broke into the home of 70-year-old Salavdi Zubairayev. They took the old man along, telling his wife and daughters that he would be back soon. In the morning Zubairayev's body was found on the outskirts of the village. He reportedly died from a gunshot wound. His neighbours said that at night they saw unmasked Russian soldiers in the street. On the same night, four more people were killed in Starye Atagi. Seventy-year-old Musa Abubakarov was shot dead a hundred meters from his house. Abubakar Demilkhanov, born in 1981, was killed in his own house. Father and son Elmurzayev were killed in Sheripov Street. In the morning, the body of Vakha Elmurzayev, born in 1934, was found under the windows of Demilkhanov's house. His 33-year-old son, Issa Elmurzayev, who lost his leg during the first war, was shot dead in his room. Then, at about 3 a.m., unknown persons in camouflage uniforms and masks led Magomed Chikuyev, born in 1954, out into the courtyard and shot him dead. Shortly before the events, Russian armoured personnel carriers had been spotted in the outskirts of Starye Atagi.

On 17 September 2000, a criminal case was opened to investigate the murders of Chikuyev, Zubairayev, Abubakarov, father and son Elmurzayev, and Demilkhanov. Yet, shortly afterwards, a car with officers from the military and regional prosecutor's offices, who were being guarded by members of the commandant's office, was attacked by unknown persons in the outskirts of Starye Atagi, after which the investigation was apparently abandoned.[260]

On 2 April 2000, Said-Magomed Khasuev, born in 1974, was killed by Russian soldiers on the outskirts of his home village of Tolstoy-Yurt. They justified their actions by saying that the young man violated a special restriction on movement during hours of darkness. According to local people, the killed man drove home before 8 p.m., i.e. even before the curfew.[261]

This category of murders also includes cases when victims were killed while trying to flee from the military.

Thus, in late March 2001, Vakhid Dzhanayev, born in 1979, was killed during a "targeted special operation" in Shali. The young man, who was mentally retarded, was sitting in front of his house when Russian soldiers appeared in the street. He got scared and ran across the yard to the garden, but was shot in the back. According to eyewitnesses, the soldiers did not try to stop him either by shouting or firing in the air. Having made sure that Dzhanayev was dead, the soldiers put a grenade in his hand and took a picture of him.[262]

It can be summarised that the killings of civilians by federal forces were widespread and organised. The latter at least concerns the killings perpetrated by the so-called "death squads." They should be regarded together with enforced disappearances and extrajudicial executions of detained persons as forms of the same pattern of criminal behaviour.

260 *Байсаев У., Грушкин Д.* Здесь живут люди. Чечня: Хроника насилия. Часть 1. Июль-декабрь 2000 года. М.: «Мемориал" — «Звенья», 2003. p. 261.

261 *Байсаев У., Грушкин Д.* Здесь живут люди. Чечня: хроника насилия. Часть 3. Апрель-июнь 2003 года. М.: «Мемориал" — «Звенья», 2006. p 346.

262 *Байсаев У., Грушкин Д.* Здесь живут люди. Чечня: хроника насилия. Часть 2. Январь-март 2001 года. М.: «Мемориал" — «Звенья», 2006. p. 430.

2.2.7. Pillage and Destruction of Property

The analysed sources contain information on numerous instances of the pillage and destruction of civilian property, committed during the armed conflict by representatives of the Russian side.

In practice, these crimes were often committed simultaneously. A typical example of such criminal behaviour was pillage followed by the burning of houses. In other cases, the removal of the most valuable and small items by perpetrators was accompanied by the destruction of other property – furniture, carpets, kitchenware, and other household appliances.

Pillage was particularly widespread in the early years of the conflict. Among the most memorable cases were the large-scale pillaging of Alkhan-Yurt (1-17 December 1999) and Novye Aldy (5 February 2000), accompanied by the massacre of civilians. In general, pillage took place during the vast majority of punitive operations and smaller "mop-ups" of populated areas. The same applies to the destruction of property, especially in such barbaric forms as torching or blowing up homes.

In most cases pillage was accompanied by other crimes: murders, illegal detentions, torture, and ill-treatment. Sometimes pillage was "incidental" to the main purpose of the perpetrators, for example, unlawful detention or killing of a civilian. At other times, by contrast, pillage was the main purpose of the crime: Perpetrators tortured victims to extort money and valuables or killed them as unwanted witnesses.

2.3. Summarised Data on Documented Crimes: Key Contexts and the Number of Victims

The *International Tribunal for Chechnya* summarises data on the number of the main types of crimes and their victims. It does not include the total number of victims of the Chechen armed conflict, but only to the number of victims of specific criminal acts, as mentioned by the analysed sources. The number of victims is calculated in accordance with the presumption of least harm, whereby lack of specificity in the source regarding the number of victims is interpreted in favour of the alleged perpetrators.

Summarised data on victims of crimes committed by representatives of the Russian side of the armed conflict are as follows:

Year	Number of victims intentionally murdered							
	In air and artillery strikes	In detention	In other circumstances	Number of victims of manslaughter due to torture, ill-treatment, denial of medical care	Number of victims of enforced disappearances	Number of victims of torture and ill-treatment	Number of victims of serious bodily harm or damage to mental health	Number of victims of unlawful detention
1999	751	3	19	0	8	3	603	11
2000	522	151	197	35	208	687	449	1,586
2001	83	144	164	0	420	6,277	307	10,091
2002	5	129	30	0	287	2,675	99	6,868
2003	8	14	42	0	264	161	96	526
2004	12	24	1	0	168	115	36	450
2005	5	19	12	0	121	386	42	702
Sum	1,386	484	465	0				
Total	2,335			35	1,476	10,304	1,632	20,234

2.4 Degree of Impunity[263]

The state's involvement in crimes committed by its agents against civilians in Chechnya manifested itself also in its refusal to effectively investigate the overwhelming majority of crimes, including particularly atrocious ones. It was not a question of mere inability, but rather of unwillingness to investigate, as the state had the necessary resources, tools, and mechanisms to identify those responsible, but failed to use of them, apparently due to a lack of political will.

The same applies to commanders' reluctance to punish the perpetrators of crimes. The analysed sources contain no evidence of cases where military commanders, fulfilling their obligations under international and national law and using the authority conferred upon them by Russian law, on their own initiative or on orders from their high commanders, initiated criminal proceedings against subordinates who had committed crimes against civilians, or took other measures to investigate those crimes. The sole exception was the case of Colonel Yuri Budanov – who abducted and strangled a Chechen girl and was arrested on the initiative of Major General Valery Gerasimov, acting commander of the West Allied Group of Forces.

Until the first half of 2001, citizens' reports of crimes committed by representatives of the federal forces against the Chechens were usually left unanswered. In some cases, human rights organisations were able to open criminal cases only after lengthy correspondence with members of the State Duma. In the first half of 2001, yielding to pressure from international organisations (primarily the Council of Europe, the

263 This section is an extract of section 44.7.3.6 of the monograph "International Tribunal for Chechnya...". See: *Дмитриевский С.М., Гварели Б.И., Челышева О.А.* Указ. соч. Vol. 2, pp. 365-377.

Organization for Security and Cooperation in Europe, and the UN), prosecutors began opening criminal cases. However, this measure was only intended to stem the tide of criticism from the international community. The initiation of criminal proceedings did not mean that crimes would be investigated and perpetrators would be punished.[264] The Russian authorities reported that thousands of criminal cases had been initiated, but most of them did not involve even basic investigative activities.

The scathing assessment of the investigation of crimes committed by representatives of the Russian side against civilians in Chechnya is illustrated by ECtHR case law on the "Chechen cases." In preparing this report, we analysed 324 judgments of the ECtHR concerning human rights violations committed in the context of the armed conflict in question.[265] In almost all cases, the Court found a violation of Russia's positive obligations, manifesting itself in a failure to effectively investigate crimes.[266] Thus, the Court found the Russian Federation guilty of violation of Article 2 (Right to Life) with respect to 446 victims of murder (of which 179 were killed during high-intensity military operations, 144 during special operations, and the rest under other circumstances, including detentions in connection with the armed conflict) and 654 victims of enforced disappearance. Furthermore, the Court stated that 206 victims of violation of Article 3 had been subjected to some form of torture, inhuman or degrading treatment. In respect of another 1,058 applicants, the Court found a violation of Article 3 arising from Russia's failure to effectively investigate the crimes committed against their murdered or disappeared relatives. Finally, with regard to 1,576 individuals, the Court found violations of the right to an effective remedy. The Court's rulings establish that in none of the cases examined did the investigation conducted by the Russian Federation lead to the identification and punishment of the perpetrators. Moreover, even after these rulings, the situation remained unchanged: None of the perpetrators were identified and prosecuted. At the time of writing this report, more than three hundred such rulings had been issued.

None of the acts of extraordinary atrocities has been investigated by the competent Russian authorities. The organisers and perpetrators of mass murders, extrajudicial executions and fire attacks on civilians remain unpunished to this day. Criminal proceedings initiated in some of these episodes, were either repeatedly suspended "due to the inability to identify the persons to be charged" or dismissed for "lack of *corpus delicti.*"

Thus, in the case of the bombing of the unprotected village of Elistanzhi on 7 October 1999, in which 48 civilians (including children) were killed or died of wounds, and several dozen civilians were wounded, the criminal case files have been lost.

The military prosecutor's office refused to launch a criminal investigation into an attack on four civilian targets (the central market, the maternity hospital, the main post office, and the mosque) in Grozny on 21 October 1999, during which 140 civilians (including women in labour and new-born babies) were killed and over 200 were wounded.

264 See.: Условное правосудие: о ситуации с расследованием преступлений против гражданских лиц, совершенных представителями федеральных сил на территории Чеченской Республики в ходе военных действий 1999–2003 годов (по состоянию на май 2003 года). М.: ПЦ «Мемориал», 2003.

265 The analysis was conducted using the electronic database of the Natalya Estemirova Information Center (Norway).

266 The only exception we have identified is the decision concerning misappropriation of property. See: ECtHR. *Khamidov v. Russia.* Application no. 72118/01. Judgment of 15 November 2007, in which the ECtHR found that the applicant had been denied access to a court.

In the case of the raid of Russian aviation on a civilian convoy and a Red Cross convoy near the village of Shaami Yurt on 29 October 1999, in which 25 civilians were killed and 75 were wounded, the criminal investigation (murder of two or more persons, committed by a generally dangerous method) was opened six months after the event. Yet, on 5 May 2004 the investigation was abandoned for "lack of *corpus delicti*" in the pilots' actions. Although the ECtHR held the Russian Federation responsible for the deaths of the victims of this raid, Russia did not reopen the investigation and nobody was prosecuted for this crime.

Several isolated criminal cases were opened long after events in the Staropromyslovsky district of Grozny, where at least 70 civilians had been killed in late December 1999-January 2000. The cases were repeatedly suspended and renewed; however, no perpetrators have been either identified or punished.

A criminal case (murder of two or more people, committed by a generally dangerous method), opened on 6 September 2000 in connection with the bomb attack on the village of Katyr-Yurt on 4 February 2000 – which, according to several testimonies, was an act of collective punishment of the villagers[267] and resulted in the death of at least 167 civilians and injuries to at least 53 others – was dropped on 13 March 2002 for lack of *corpus delicti*. Although the ECtHR held the Russian Federation responsible for the deaths of the complainants' relatives, who were among the victims of this attack, no one has been held criminally liable.[268]

A criminal case, initiated in February 2001 in connection with the discovery of a mass grave with more than 50 victims of extrajudicial executions near the Khankala military base, and other criminal cases opened earlier over the illegal detention of people whose bodies were found in the grave, did not result in any criminal charges against the perpetrators.

The criminal investigation into the Novye Aldy massacre was suspended and resumed ten times,[269] with no one held criminally liable.

The practice of the Russian public prosecution bodies and the Investigative Committee demonstrates a refusal to investigate "systemic crimes," i.e. crimes committed on a large scale mainly to support the military effort at the request or at least with the support or indulgence of authorities.

An important element of the system of impunity is the refusal to effectively investigate commanders' involvement in crimes. We know of only one decision in which the national court of the Russian Federation appears to have adequately established the participation of a superior officer in the crimes committed against civilians in Chechnya. This was the 14 June 2007 sentence of the North-Caucasus Military District Court, involving the case of the execution of six civilians by a special forces unit of the Main Intelligence Directorate under the command of Captain Eduard Ulman. However, there are certain reasons to believe that even in this case the preliminary investigation organs and the court did not establish the entire chain of decision-making and passage of orders, limiting themselves to identifying only its lowest links. In other court decisions for this type of crime, only the direct perpetrators were held liable.

267 ECtHR. *Issayeva v. Russia.* Application no. 57950/00. Judgment of 24 February 2005. § 220.
268 ECtHR. *Issayeva v. Russia; Abuyeva and Others v. Russia.* Application no. 27065/05. Judgment of 2 December 2010.
269 ECtHR. *Musayev and Others v. Russia.* § 110.

The same can be said about the preliminary investigative organs: In all the cases we know of (primarily thanks to documents submitted by Russia to the ECtHR), the prosecutors, even if they really tried to identify the perpetrators, were focused only on those who directly "pulled the trigger" and were not interested in the organisers of the crimes.

There is a unique document which allows to compare the number of documented crimes and their victims with the absolute number of sentences and convictions for the same period. This is the response of the Russian Prosecutor General's Office (signed by Deputy Prosecutor General Sergey Fridinsky) dated 25 April 2003 to the inquiry of State Duma Deputy Sergey Kovalyov. It contains exhaustive information "on the results of the court's review of criminal cases involving crimes committed by servicemen and other representatives of the security services against civilians during the anti-terrorist operation"[270] at the time of its preparation.

As emerges from the comparison of information on crime collected by human rights organizations with data contained in the response of the Prosecutor General's Office, as of April 2003 the detection rate of crimes committed by representatives of the state against civilians in Chechnya in 1999-2002 did not exceed 2.5 %.

Since then, prosecutors have never published a list of verdicts for this category of crimes. However, virtually all guilty verdicts relating to serious crimes against civilians, although few, attracted the attention of the media and human rights organisations. Given that, in 2003-2005, crimes against civilians continued on a massive scale in Chechnya, it can hardly be assumed that their actual detection rate ever exceeded the level of April 2003.

The failure of the Russian authorities to identify those responsible for the mentioned crimes should be attributed to the activities of the public prosecution bodies and the Investigative Committee, which are responsible for the preliminary investigation, rather than to the performance of the judiciary. With very few exceptions, these bodies either refused to initiate criminal proceedings at all, or investigated them with the obvious goal of protecting the perpetrators from criminal liability.

In a number of its decisions, the ECtHR, usually rather reserved in its statements, was scathing about the investigation of crimes. Thus, in evaluating the investigation of the Novye Aldy massacre of 5 February 2000, the Court qualified the actions of the prosecuting authorities as acquiescence in the events. [271] In this case, as in the overwhelming majority of Chechen cases, the ECtHR found that the authorities failed to carry out an effective criminal investigation.[272]

In the light of the foregoing, the Court found that the Russian authorities failed to take necessary, reasonable, and sufficient measures to provide organisational, material and law-enforcement support for effective investigation of crimes against civilians in the Chechen Republic.

270 Ответ заместителя Генерального прокурора РФ С.Н. Фридинского на запрос депутата Государственной Думы С.А. Ковалева о приговорах, вынесенных судами по уголовным делам по фактам преступлений против жителей Чеченской Республики, совершенных представителями федеральных сил // Условное правосудие: о ситуации с расследованием преступлений против гражданских лиц, совершенных представителями федеральных сил на территории Чеченской Республики в ходе военных действий 1999–2003 годов (по состоянию на май 2003 года). М: ПЦ «Мемориал», 2003.pp. 31-39.

271 ECTHR. *Musayev and Others v. Russia.* § 164.

272 Ibid. § 158–163.

2.5. Violations Committed by Representatives of the Russian Side considered War Crimes[273]

From the facts analysed by the authors of *International Tribunal for Chechnya,* it is clear that the overwhelming majority of violations committed by representatives of the Russian side of the armed conflict in Chechnya during 1999-2005 amounted to war crimes.

The objective element (*actus reus*). In these cases, the unlawful acts constituted a violation of customary and/or applicable treaty norms of international humanitarian law. The violations consisted of an objective element of at least the following crimes: murder; torture; ill-treatment and outrages upon human dignity; rape; enforced disappearance; attacking civilians; indiscriminate and disproportionate attacks; striking objects or persons displaying the distinctive emblems of the Geneva Conventions; striking protected objects or otherwise attacking protected objects; pillage; destruction of civilian property; using human shields; and collective punishment. All of these acts constitute the objective element war crimes, regardless of whether they are committed in the context of an armed conflict of an international or non-international character.

The object of crime. In all cases, the objects of the crimes were persons and objects protected by international humanitarian law, including by the common Article 3 of the Geneva Conventions, the Additional Protocol II to the Geneva Conventions, and the applicable rules of customary humanitarian law of the internal conflict. Thus, the objects of the crimes were:

- Persons who did not take a direct part or who had ceased to take part in the hostilities;
- Persons deprived of liberty for reasons related to the armed conflict;
- Wounded and sick persons, regardless of whether they took part in the armed conflict;
- Medical personnel;
- Civilian population and individual civilians;
- Civilian objects, including medical facilities, formations and ambulances, historical monuments, places of worship, educational facilities, and other non-military objects.

Contextual circumstances. In all cases, the crimes were committed in the context of the non-international armed conflict that was taking place on the territory of the Chechen Republic during the given period, and they all had an obvious link with that conflict. In a number of cases the crimes were committed directly in support of the war effort. These include indiscriminate and disproportionate artillery and air strikes on civilians and civilian objects; torture to obtain information about the enemy; extrajudicial executions and enforced disappearances of persons suspected of being members of the armed resistance; punitive operations, including "mop-ups"; and so on. In other cases, even if the crimes were personally motivated, the armed conflict had a significant impact on the perpetrator's ability to commit the crime and on the manner in which it was committed. This includes, for example, pillage and related crimes against the life, health, and personal integrity of protected persons, including instances of massacres. Thus, the actions of the perpetrators either contributed to the ultimate military objective of the party to the conflict or were committed using the environment of armed conflict. Accordingly, the factual circumstances indicate the existence of a necessary connection between the criminal acts (omissions) and the armed conflict.

273 This section is an extract of chapter 42 of the monograph "International Tribunal for Chechnya…". See: *Дмитриевский С.М., Гварели Б.И., Челышева О.А.* Указ. соч. Vol. 2. pp. 339-341.

The subjective element (*mens rea*). The factual circumstances contained in the analysed sources indicate that all or the absolute majority of the acts analysed were committed with the necessary degree of guilt, namely either intentionally and knowingly, or with indirect intent, or (in a few cases) with an element of extreme criminal negligence. In all or in the vast majority of cases, the perpetrators, firstly, could not have been unaware that an armed conflict actually existed (they could not have been unaware of the factual circumstances determining the existence of an armed conflict) and, secondly, could not have been unaware of the factual circumstances indicating that the victims had the status of protected persons.

The subject of crime. The subjects of the crimes in all cases were persons who directly participated in the armed conflict: servicemen, officers of law enforcement agencies and special services, as well as participants of pro-Russian paramilitary formations, i.e. combatants in the technical meaning of the term.

Thus, the described and analysed criminal acts committed by representatives of the Russian side of the armed conflict taking place in the Chechen Republic fully satisfy all the necessary legal elements (qualifying signs) of war crimes.

2.6. Violations Committed by Representatives of the Russian Side as Crimes against Humanity[274]

The analysed circumstances indicate that a significant portion of the crimes committed by representatives of the Russian side of the armed conflict fully satisfy the necessary elements of crimes against humanity, as described in sources of current international law.

The objective element. The actions of the perpetrators of the crimes correspond to the material elements of crimes against humanity, at least in the form of murder; unlawful deprivation of physical liberty; torture; enforced disappearances of people; and other inhumane acts of a similar nature, consisting of intentionally causing great suffering, serious bodily harm or serious damage to mental or physical health.

Attacks on the civilian population. The described criminal acts correspond to the term "attacks on the civilian population," with the object of the attacks being the civilian population of the Chechen Republic as such, as well as its individual groups, selected by the perpetrators, depending on the circumstances, by territory, gender, age and other identifying characteristics.

The nature of the attacks. The attacks had a large-scale (widespread) character, which follows from the large number of victims, the almost daily frequency, and the wide geographical coverage of the committed crimes. At the same time, the large scale of the attacks was achieved both by the cumulative effect of a number of inhumane acts, and by individual inhumane acts that were extraordinary in their magnitude and consequences.

Participation of the state. The attacks were committed with the participation of the state, which, on the one hand, can be considered an independent element of a crime against humanity, and on the other hand, is a crucial indicator of the systemic nature of the crimes. The participation of the Russian Federation in the attacks was expressed

274 This section is an extract of chapter 44 of the monograph "International Tribunal for Chechnya...". See *Дмитриевский С.М., Гварели Б.И., Челышева О.А.* Op. cit., vol. 2, pp. 344-378.

both in acts and omissions in circumstances where the state was obligated under international law to take some form of action.

The responsibility of the Russian Federation for the attacks on the civilians in the Chechen Republic, expressed in a gross violation of their fundamental rights – in particular the right to life, liberty, and security of person, as well as the violation of the prohibition of torture and cruel treatment – has been established in more than four hundred decisions of the ECtHR. [275]

In addition, the participation of the state, expressed in the form of actions, is signalled by the most important indicators.

The attacks were carried out in all cases *de facto* and in the vast majority of cases *de jure* by state agents, who generally acted either in an official capacity or by using their official position and the opportunities presented by state service.

Some of the crimes of mass illegal deprivation of the liberty of civilians were part of an officially adopted state policy, as evidenced by the orders and instructions of the Interior Ministry and the statement of the Russian Government on the creation of so-called "filtration points." The latter were places of detention that were not envisaged by law, which automatically entailed a violation of the most important procedural guarantees provided to detainees by international law.

The attacks were guided, i.e. the state had the ability to suspend and resume the commission of crimes and used this ability to achieve certain goals.

Thus, in 2003, for the first time during the second armed conflict, there was a unique situation in which representatives of the federal side stopped committing crimes. The undeclared "moratorium" lasted for a week before and a week after the referendum on the adoption of the Constitution of the Chechen Republic, announced by the Russian leadership on 23 March 2003. On 16 March 2003, Russian President Vladimir Putin addressed the residents of the Chechen Republic on television. Calling to vote for a pro-Russian constitution, he said:

> "The referendum is a major step in the struggle against devastation. And a stride towards order. … And we must get it ensured that the citizens of Russia – inhabitants of Chechnya – cease to live in fear. Cease to fear a knock at the door in the night and to hide themselves from so-called mop-up operations. The people of Chechnya must have a worthy human life. … You know: the reduction of roadblocks has begun. And where they still remain, they must engage not in extortions from the civilian population but perform a completely different function – the function of combating crime. … And now in your hands is the future of your children and grandchildren. The future of the Chechen land itself. And, therefore, I call upon you to take part in the referendum and to make the right choice."[276]

275 A search on the Stichting Justice Initiative's unofficial database of violations in Chechnya established by the ECtHR (bombing, extrajudicial execution, ill-treatment, disappearance, torture, murder) yields a result in the form of 450 Court judgments. However, the search tools do not allow us to separate violations related to the armed conflict from those committed outside its context.: https://www.srji.org/legal/cases/ (accessed on 08.07.2020).

276 Обращение Президента Росссийской Федерации к жителям Чеченской Республики 16 марта 2003 г., at: http://www.kremlin.ru/events/president/transcripts/21939 (accessed on: 27.06.2023).

Putin thus publicly demonstrated his awareness of the methods of terrorising civilians, which the residents of the Chechen Republic "fear" and "hide" from and hinted quite clearly that the continuation or termination of these practices depended on the "right choice" in the upcoming referendum.

After these words, crimes suddenly ceased. This situation continued until the end of the month, when the official results of the referendum were summarised and published and the attention of the Russian and foreign media was drawn to Chechnya. But from 2 April, the acts of violence resumed and were recorded almost on a daily basis.

The subjective element. All or an absolute majority of the relevant crimes meet the requirements defined by international criminal law on the subjective element of a crime against humanity. The crimes were committed with the necessary degree of guilt: either intentionally and knowingly, or with an element of indirect intent (recklessness), or (in a small number of cases) with an element of extreme criminal negligence. At the same time the criminals were aware of the existence of a widespread and systematic attack on the civilian population of the Chechen Republic, they knew that their actions were objectively part of such an attack and that their victims were civilians.

Thus, most of the grave crimes committed by representatives of the Russian party to the armed conflict against civilians in the Chechen Republic between 1999 and 2005 can be characterised as crimes against humanity.

3. Violations Committed During the Georgian-Russian Armed Conflict

The armed conflict of 2008 between the armed forces of the Russian Federation and the unrecognised Republic of South Ossetia on the one hand, and the Georgian armed forces on the other hand, lasted only a week, but during this clash all the parties committed violations of international humanitarian law, *prima facie* constituting war crimes and crimes against humanity. On 23 January 2009, Human Rights Watch published a special report, *Up in Flames: Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*[277] In our opinion, to date, this document contains the most complete and impartial analysis of the situation with respect to compliance with international humanitarian law in the conflict zone. In addition, on 27 January 2016, the Pre-Trial Chamber of the International Criminal Court authorised the commencement of an investigation into the crimes committed in South Ossetia from 1 July 2008 to 10 October 2008.[278] The following text is mainly an extract of the aforementioned report, which is supplemented by documents of the International Criminal Court and some other sources.

3.1. Background of the Conflict

Georgia is a state with three thousand years of history, located in the western part of Transcaucasia on the east coast of the Black Sea, bordered by Russia to the east and north. From 1921 to 1991, the Georgian Soviet Socialist Republic (SSR) was part of the USSR. The process of restoring Georgia's independence in the late 1980s and in

277 Up in Flames: Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia // Human Rights Watch. 23 January 2009; at: https://www.hrw.org/ru/report/2009/01/23/255840 (accessed on 08.07.2020).

278 Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following judicial authorization to commence an investigation into the Situation in Georgia. 27 January 2016: https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-27-01-2016-georgia (accessed on 08.07.2020).

the 1990s was accompanied by acute interethnic conflicts. One of the hot spots was South Ossetia (former South Ossetian Autonomous District of the Georgian SSR), which unilaterally declared its independence from Georgia, as part of the USSR, on 20 September 1990.[279] In response, the Georgian government abolished South Ossetian autonomy. From January 1991 to July 1992, there was a bloody Georgian-Ossetian armed conflict with occasional Russian participation *de facto* on the Ossetian side, which ended in the withdrawal of Georgian troops, the exodus of large numbers of refugees (both Georgians and Ossetians) and the *de facto* secession of the self-proclaimed Republic of South Ossetia (with Tskhinvali as its capital) from Georgia[280].

On 24 June 1992, in Sochi, the presidents of Russia and Georgia signed an agreement on the principles of conflict resolution. The Sochi Agreement established the Joint Control Commission composed of Georgian, Russian, North Ossetian, and South Ossetian representatives, and the Joint Peacekeeping Forces, a trilateral peacekeeping force with Georgian, Russian, and Ossetian units.[281]

In January 2004, after the victory of the Rose Revolution, Mikheil Saakashvili was elected President of Georgia. He made the restoration of Georgia's territorial integrity one of his top priorities. Tbilisi's initial approach to recovering South Ossetia was to simultaneously launch a large-scale anti-smuggling operation, aimed at undermining the major source of income for the *de facto* South Ossetian leadership, as well as a humanitarian aid "offensive" in an attempt to win the loyalty of Ossetians. This led to a deterioration of the situation and a resumption of sporadic fighting. An increasingly strained relationship between Georgia and Russia compounded rising tensions between Tskhinvali and Tbilisi. The relationship between Moscow and Tbilisi was completely severed in September 2006 when Russia, in response to Georgia's detention of four alleged Russian spies, halted all air, land, and sea traffic with the country, and began a widespread crackdown on ethnic Georgians. During this time, more than 2,300 Georgians were deported from Russia.[282] By April 2008, Russia, angered by Georgia's continued efforts to join NATO, moved to deepen its cooperation with the breakaway administrations in Abkhazia and South Ossetia. Georgia responded by blocking further negotiations over Russia's accession to the World Trade Organization.[283]

Over the next few months, tensions in South Ossetia escalated further amid clashes between Georgian and South Ossetian forces, casualties, and mutual accusations. Late in the evening of 7 August, Georgian forces initiated a massive shelling of Tskhinvali and surrounding villages. The Georgian government says its forces launched the attack to suppress the firing positions from which the South Ossetian militia was attacking Georgian peacekeeping forces and Georgian villages. Georgian authorities also claim that they had received information that Russian forces were moving south through the Roki tunnel in the early morning of 7 August, and that they had launched the attack

279 Declaration of the state sovereignty of the South Ossetian Soviet Democratic Republic, 20 September 1990, at: https://cominf.org/node/1166481174 (accessed on 20.06.2023).

280 For more on this, see: История противостояния Грузии и Южной Осетии. РБК. 2008. 8 августа, at: https://web.archive.org/web/20081231201916/http://top.rbc.ru/society/08/08/2008/216916.shtml (accessed on 20.06.2023).

281 Agreement on the principles of settlement of the conflict between Georgia and South Ossetia, Sochi, 24 June 1992.

282 In 2014, the ECtHR found violations of several Articles of the European Convention on human rights by Russia in the course of the deportation. See: ECtHR. *Georgia v. Russia (I)* [GC]. Application no. 13255/07. Judgment of 3 July 2014.

283 Южная Осетия: предисловие к войне (Хроника событий за период с мая 2004 года по июль 2008 года) — Кавказский узел, at: https://www.kavkaz-uzel.eu/articles/96581 (accessed on 20.06.2023).

to prevent a full-scale Russian invasion of their country. Russian authorities, however, contend that the movements at the Roki tunnel were part of a normal rotation of Russian peacekeeping troops stationed in South Ossetia, and that the Georgian attack on Tskhinvali was an act of aggression against Russian peacekeeping forces and the civilian population.[284]

Throughout the night between 7 and 8 August, Georgian forces shelled Tskhinvali using, among other weapons, the "Grad" multiple rocket launcher system. On the morning of 8 August, Georgian ground forces entered Tskhinvali and several villages. During the day on 8 August, regular Russian ground forces moved through the Roki tunnel toward Tskhinvali while Russian artillery and aircraft subjected Georgian ground forces to heavy shelling and bombardment. Georgian forces bombed and shelled Russian military targets as Russian forces moved toward Tskhinvali. By the evening of 8 August, units of the 58th Army were deployed in the outskirts of Tskhinvali and suppressed Georgian firing positions. Russian aircraft also attacked several targets on undisputed Georgian territory beginning on August 8. Starting from around 9:30 a.m. on 8 August, Russian aircraft attacked targets in several villages in the Gori district, Gori city, and, in the afternoon, Georgian military airports near Tbilisi. Over the next two days, Russian forces continued to move into South Ossetia. Georgian armed forces persisted with attempts to take Tskhinvali but were forced back. Early in the morning of 10 August, the Georgian Defence Minister ordered his troops to withdraw from Tskhinvali and fall back to the city of Gori.[285]

Russian armed forces crossed the South Ossetian administrative border on 12 August and moved toward Gori. In a separate operation, moving through Abkhazia, Russian forces occupied the strategically important cities of Poti, Zugdidi, and Senaki, establishing checkpoints and roadblocks there.[286]

By 16 August, Presidents Mikheil Saakashvili and Dmitry Medvedev signed a ceasefire agreement brokered by French President Nikolas Sarkozy.[287]

Beginning on 15 August, the Russian authorities started a gradual pull-back of Russian forces from undisputed Georgian territory. Russian troops finally withdrew to South Ossetia in early October, although Russian forces still occupy several villages on the border. On 26 August, the Russian authorities recognised the independence of Abkhazia and South Ossetia in a move widely criticised by the EU, the Council of Europe, NATO, and the OSCE.[288]

3.2. Violations by the Russian and South Ossetian Sides

Based on the results of its work in the conflict zone, Human Rights Watch considers the following circumstances to be established.

284 Южная Осетия: пятидневная война и мир — Кавказский узел, at: https://www.kavkaz-uzel.eu/articles/143907 (accessed on 20.06.2023).
285 Ibid.
286 Ibid.
287 Statement to the press and questions and answers session following the meeting with the President of France Nicolas Sarkozy. 12 August 2008, Moscow, Kremlin, at: https://web.archive.org/web/20080909210925/http://www.kremlin.ru/appears/2008/08/12/2004_type63374type63377type63380type82634_205199.shtml (accessed on 20.06.2023).
288 Южная Осетия: пятидневная война и мир — Кавказский узел, at: https://www.kavkaz-uzel.eu/articles/143907 (accessed on 20.06.2023).

In several instances, the Russian forces committed violations of international humanitarian law by indiscriminately attacking areas in undisputed Georgian territory and in South Ossetia with aerial, artillery, and tank strikes, and killing and injuring civilians. Russian forces used cluster munitions, causing civilian deaths and putting more civilians at risk by leaving behind unexploded bomblets.

Russia failed overwhelmingly in its duty as an occupying power to ensure, as far as possible, public order and safety in the areas under its effective control in South Ossetia. This allowed South Ossetian forces to engage in wanton and wide-scale pillage and the burning of Georgian homes, and to kill, beat, rape, and threaten civilians.

Beginning just after the withdrawal of Georgian troops from South Ossetia on 10 August, South Ossetian forces, including volunteer militias, embarked on a campaign of deliberate and systematic destruction of the villages that had been administered by Tbilisi before the conflict. This involved widespread and systematic pillage, beatings, threats, and arrests of civilians. Several civilians were killed on the basis of their ethnic and imputed political affiliations. All this was done with the express purpose of forcing those who remained to leave and ensuring that no former residents would return. Based on this, Human Rights Watch concluded that the South Ossetian forces sought to ethnically cleanse this set of Georgian villages. At the time the Human Rights Watch report was written, some 22,000 people could not return to their homes; most of them had left South Ossetia before the conflict.[289]

During the period when Russian forces occupied Georgian territory south of the South Ossetian administrative border, Ossetian militias looted, destroyed, and burned homes on a wide scale, deliberately killed at least nine civilians, and raped at least two. Russian forces were at times involved in the looting and destruction, either as passive bystanders, active participants, or by providing militias with transport into villages.[290]

After the withdrawal of Georgian forces from South Ossetia, South Ossetian forces, at times together with Russian forces, arbitrarily detained at least 159 ethnic Georgians. At least one detainee was killed and nearly all of them were subjected to inhuman and degrading treatment. Also at least four Georgian prisoners of war were tortured and at least three were executed.

The Prosecutor of the International Criminal Court estimates the number of civilian casualties on the Georgian side of the conflict to be as follows: "The attack against the civilian population resulted in between 51 and 113 cases of deliberate killings of ethnic Georgians and the displacement of between 13,400 and 18,500 ethnic Georgian inhabitants from villages and cities in South Ossetia and the "buffer zone.'"[291]

289 Most of the internally displaced persons from South Ossetia have not returned to this day. See: UN General Assembly Resolution 72/280 of 12 June 2018, "Status of Internally Displaced Persons and Refugees from Abkhazia, Georgia, and the Tskhinvali Region/South Ossetia, Georgia."

290 The Pre-Trial Chamber of the International Criminal Court noted in this regard that some members of the Russian forces actively participated while others remained passive and in series of instances members of the Russian forces purportedly intervened to protect and assist civilian victims. See: International Criminal Court. Pre-Trial Chamber I. Decision on the Prosecutor's request for authorisation of an investigation. No. ICC-01/15 of 27 January 2016. § 23.

291 Ibid. § 22, 54.

3.3. Level of Impunity, Qualification of Violations as War Crimes and Crimes against Humanity

Since the end of the conflict, neither side has effectively investigated the crimes committed by its representatives, and none of the suspects have been brought to justice. As a result, the Prosecutor of the International Criminal Court requested authorisation from the Pre-Trial Chamber to proceed with an investigation into presumed crimes committed in the period from 1 July 2008 to 10 October 2008 in South Ossetia.

On 27 January 2016, authorisation of the Pre-Trial Chamber was granted and the investigation was initiated. The Pre-Trial Chamber qualified the armed conflict as international.[292] It considered that the information provided by the Prosecutor established the specific elements of the war crimes of wilful killing, destruction of property and pillaging by South Ossetian forces against ethnic Georgians and their property, and intentionally directing attacks against peacekeepers (both by South Ossetian forces against Georgian peacekeepers and by Georgian forces against Russian peacekeepers). The Pre-Trial Chamber was of a view that the specific features characteristic of crimes against humanity – in this case, murder, deportation or forcible transfer of population and persecution – were met and that these crimes were committed as part of the attack by South Ossetian forces against the civilian population.[293]

3.4 Perspectives on Criminal Prosecution and Reparations

There are three possible ways in theory of exercising criminal jurisdiction over crimes committed by representatives of the Russian and South Ossetian sides of the conflict:

- Consideration of criminal cases by Georgia's domestic courts, according to the principles of territoriality and passive personality (i.e. according to the victim's citizenship) of criminal jurisdiction;
- Consideration by the domestic courts of the Russian Federation, in accordance with the principle of the citizenship of the perpetrator of the crime under Article 12 § 1 of the Russian Criminal Code;
- Consideration by the International Criminal Court (Georgia is a State-Party of the Rome Statute since 5 September 2003).

Although the ICC has launched its own investigation, it can be dropped if the parties to the conflict effectively investigate the crimes and bring the suspects to justice.

As in the case of the Chechen conflict, victims of crimes committed by representatives of the Russian and South Ossetian sides have not received any compensation for harm suffered.

4. Violations committed during the armed conflict in Ukraine

4.1. Background of the conflict

The territory of modern Ukraine, with its capital in Kyiv, was the cradle of the Old Rus state which emerged at the end of the first millennium AD and is known in modern historiography as Kievan Rus'. In the XIII century, this state ceased to exist as a consequence of feudal fragmentation and Mongol invasion.

292 Ibid. § 27.
293 Ibid. § 29–32.

In 1648, the Cossack Hetmanate was founded as a result of Khmelnitsky uprising. From 1654 (with interruptions), the Hetmanate was part of Muscovy and the Russian Empire, being finally abolished by the Russian government in 1764. Most of other territories of modern Ukraine were acquired by Russia during XVIII and XIX centuries as a result of the partitions of Poland and several Russo-Turkish wars. Following the 1917 revolution, the independence of Ukraine was proclaimed in Kyiv. In 1919, in the course of the Civil War on the territory of the former Russian Empire, the Bolsheviks established the Ukrainian Soviet Socialist Republic (Ukrainian SSR). In 1922, it became one of the founding states of the Soviet Union. On 24 August 1991, the Ukrainian SSR proclaimed its independence from the Soviet Union and subsequently renamed itself Ukraine.

In 1783, following the Russian-Turkish war of 1768–1774, the Crimean Peninsula was annexed by the Russian Empire. On 18 October 1921, the Crimean Autonomous Soviet Socialist Republic (ASSR) was formed within the RSFSR. Following the deportation of Crimean Tatars, Armenians, Bulgarians, Greeks, Germans, and members of other ethnic groups by Stalin's regime in May and June of 1944, the Crimean ASSR was reorganised into the Crimean Oblast on 30 June 1945. In April 1954, the Crimean Oblast was transferred to the Ukrainian SSR. In 1989, the Supreme Soviet of the USSR declared the deportation of Crimean Tatars unlawful and criminal, and they were given permission to resettle in Crimea, setting off a large-scale movement back to their historical homeland. On 12 February 1991, the Supreme Soviet of the Ukrainian SSR passed the law "On the Restoration of the Crimean ASSR," which was later renamed the Autonomous Republic of Crimea (*hereafter* ARC).[294]

On 8 December 1991, Russia, Ukraine, and Belarus signed the Agreement on the Creation of the Commonwealth of Independent States, according to which they declared that the Soviet Union ceased to exist and undertook to respect "each other's territorial integrity and the inviolability of existing borders within the Commonwealth."[295] On 5 December 1994, the leaders of Ukraine, the United States, Russia, and the United Kingdom signed a Memorandum on Security Guarantees in connection with Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons (Budapest Memorandum), whereby the parties undertook to respect the independence, sovereignty, and territorial integrity (in its existing borders) of Ukraine, and to refrain from the threat or use of force against the territorial integrity and political independence of Ukraine. They also committed themselves never to use any weapons against Ukraine, except in self-defence or otherwise in accordance with the UN Charter. On 31 May 1997, in Kyiv, the presidents of Russia and Ukraine signed a treaty on friendship, cooperation, and partnership between the Russian Federation and Ukraine. According to this treaty, the parties pledged to build "relations with each other on the basis of the principles of mutual respect, sovereign equality, territorial integrity, and inviolability of borders."[296]

In the fall of 2013, a wave of protests began in Ukraine over President Viktor Yanukovych's refusal to sign an Association Agreement with the European Union. On 22 February 2014, Yanukovych fled to Russia following a long and bloody confrontation on the Maidan in Kyiv between the government and the opposition.

294 On the history of Ukraine and Russo-Ukrainian relations in general, see: Plokhii S. The Gates of Europe. A History of Ukraine. Basic Books, 2021, К. М. *Александров, Н. В. Артемов, С. С. Балмасов и др.* История России. XX век. Под редакцией А. Б. Зубова. - Москва : Э, 2016-2017.

295 Agreement establishing the Commonwealth of Independent States of 8 December 1991. Article 5.

296 Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation of 31 May 1997.

In this revolutionary setting, the central government in Kyiv and the security agencies found themselves temporarily paralysed. The Russian authorities, perceiving the opposition's victory as a challenge to their interests, took advantage of these circumstances and began to implement a plan to destabilise the situation and seize territory from Ukraine.[297]

In Crimea, Russian authorities exploited the pro-Russian sentiments of a significant portion of the Russian-speaking population. The presence of Russian military bases with a large number of servicemen stationed on the peninsula allowed them quickly to establish control over government buildings and blockade military facilities of the Armed Forces of Ukraine (*hereafter* AFU). Russian servicemen acted without insignia. At the same time, pro-Russian activists supported by the Russian army, special services, and numerous mercenaries and volunteers brought in from Russia created a network of paramilitary units in Crimea ("self-defence of Crimea").

Initially, Putin denied that Russian armed forces had taken part in any way in the operation to seize the peninsula, but during a televised phone-in with the nation on 17 April 2014, he admitted that Russian servicemen were standing behind the "self-defence" fighters. The first military commander to publicly disclose details of the Russian operation in Crimea was Admiral Igor Kasatonov, former commander of the Russian Black Sea Fleet.[298] Moreover, in an interview for the documentary film *Crimea. The Way Home*, the Russian President frankly admitted that he had personally directed the actions of Russian troops in Crimea, even describing when and under what circumstances he gave the order to commence the annexation.[299]

The "need to protect the rights of the Russian-speaking population," supposedly threatened by the "fascists" who had come to power in Kyiv after the Maidan victory, was used as propaganda cover for the use of armed forces and for the invasion itself.

On the night of 26-27 February 2014, Russian special forces occupied the buildings of the ARC Supreme Council and Council of Ministers in Simferopol. On 27 February, the Supreme Council, whose deputies were herded into the session hall at gunpoint, appointed Sergey Aksyonov, leader of the Russian Unity party, as head of the autonomy. This decision – which, according to the Constitution of Ukraine and the ARC Constitution, required approval from the president of Ukraine – was not recognised by the new Ukrainian authorities. The Supreme Council also announced an all-Crimean referendum on the status of the autonomous region and the expansion of its powers.

On 1 March, Sergei Aksyonov took command of all of the republic's security agencies and appealed to Putin for "assistance in ensuring peace and tranquillity in the ARC." On the same day, Putin submitted a proposal to the Federation Council on the use of the Russian Armed Forces in Ukraine "until the social and political situation in the country has normalised." The Federation Council granted its consent to the use of Russian troops in Ukraine.[300] On 4 March, Vladimir Putin said that Russia was not

297 Положение в области прав человека и прав национальных меньшинств на Украине (отчёт БДИПЧ). 12 марта 2014. С. 22-25, at: https://www.osce.org/files/f/documents/4/9/122194.pdf (accessed: 22.06.2023).

298 Адмирал Касатонов: Севастополь готовится к базированию «Мистраля». РИА Новости. 13 марта 2015 г.; at: http://ria.ru/interview/20150313/1052368767.html (accessed: 08.07.2020).

299 At: https://www.youtube.com/watch?v=PGGNXIQXlcU (accessed: 22.06.2023).

300 Совет Федерации одобрил введение войск на Украину. Русская служба BBC. 2014. 2 марта, at: https://www.bbc.com/russian/international/2014/03/140301_live_ukraine_crimea_crisis (accessed: 23.06.2023)

considering the possibility of Crimea's accession to Russia.[301] On 6 March, the Crimean and Sevastopol authorities announced a change in the wording of the question on which the referendum was to be held and moved the voting date to 16 March 2014. The referendum presented the following two options for future developments: the accession of Crimea to Russia as a federal subject, or the restoration of the 1992 Constitution, with Crimea remaining part of Ukraine.[302] On 7 March 2014, Acting President of Ukraine Oleksandr Turchynov, citing relevant Articles from the Constitution of Ukraine and the ARC Constitution, issued a decree suspending the ARC Supreme Council resolution on holding a referendum.[303] On 14 March, the Constitutional Court of Ukraine declared the Crimean referendum unconstitutional.[304] On 15 March, 2014, the Verkhovna Rada of Ukraine resolved to prematurely terminate the powers of the ARC Supreme Council on the basis of relevant Articles of the Constitution of Ukraine and the ARC Constitution as well as the above decision of the Constitutional Court of Ukraine.[305]

In early March, Russian servicemen and "self-defence squads" blockaded all military facilities of the Ukrainian armed forces in Crimea, including naval harbours. Lacking clear orders from Kyiv, Ukrainian servicemen offered no armed resistance to the Russian forces, allowing them to seize military bases and garrisons without a fight, as well as Ukrainian Navy ships and vessels on the peninsula. Isolated armed clashes still occurred, nonetheless.

Shortly before the referendum, the Russian Federation launched a powerful anti-Ukraine propaganda campaign in Crimea, portraying the new Ukrainian authorities as Nazis whose main goal was the extermination or forced Ukrainianisation of the Russian-speaking population. At the same time, a campaign of harassment and terror was unleashed against supporters of unity with Ukraine.

The referendum was held on 16 March. On 17 March 2014, the ARC Supreme Council proclaimed Crimea an independent sovereign state and appealed to the Russian Federation with a proposal to accept the Republic of Crimea as a new subject. The Sevastopol City Council made a similar appeal proposing that Russia accept Sevastopol as a city of federal status within the Russian Federation. On the same day, President Putin signed a decree recognising the independence of the Republic of Crimea, and he approved a draft treaty on the admission of the Republic of Crimea to the Russian Federation. The treaty was signed on 18 March, and Russia established full control over the peninsula.[306]

On 27 March, 2014, the UN General Assembly adopted Resolution No. A/RES/68/262 "Territorial Integrity of Ukraine," in which it reaffirmed "its

301 Россия не рассматривает вариант присоединения Крыма к России. Интерфакс. 2014. 4 марта, at: https://www.interfax.ru/russia/362633 (accessed: 23.06.2023).

302 Парламент Крыма принял постановление «О проведении общекрымского референдума». Государственный совет Республики Крым. 2014. 6 марта, at: http://crimea.gov.ru/news/06_03_2014_1 (accessed: 23.06.2023).

303 Турчинов отменил декларацию о независимости Крыма и Севастополя. ТСН. 2014. 14 марта, at: https://tsn.ua/ru/politika/turchinov-otmenil-deklaraciyu-o-nezavisimosti-kryma-i-sevastopolya-354801.html (accessed: 23.06.2023).

304 Конституционный суд Украины признал незаконным референдум в Крыму. РБК. 2014. 14 марта, at: https://www.rbc.ru/politics/14/03/2014/5704195c9a794761c0ce7e0f (accessed: 23.06.2023).

305 ВР распустила парламент Крыма. УНИАН. 2014. 15 марта, at: https://www.unian.net/politics/896823-vr-raspustila-parlament-kryima.html (accessed: 23.06.2023)

306 Treaty between the Russian Federation of the Republic of Crimea on accession of the Republic of Crimea to the Russian Federation and foundation of new subjects with the Russian Federation of 18 March 2014.

commitment to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognised borders." It emphasised that "the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol."[307]

Inspired by their success in Crimea, pro-Russian forces also stepped up their activities in eastern Ukraine, which is largely populated by Russian speakers. Initially the same methods were used: proclaiming government authorities independent from Ukraine and seizing administrative buildings, police departments, and military units. The Russian Federation has consistently denied that its armed forces were involved in the conflict in eastern Ukraine; however, a host of facts indicate that Russian servicemen took part in the hostilities. The dispatch of organised armed groups of so-called volunteers from Russia was also widely reported in Russian media. In fact, the recruitment of fighters to these groups and their dispatch to the conflict zone took place out in the open.[308]

Nevertheless, pro-Russian sentiment was not as strong in eastern Ukraine as in Crimea. Society was split, and counter-rallies of supporters and opponents of unity with Ukraine gradually escalated into armed clashes resulting in significant casualties. The political agenda of the so-called Donbas separatists was just as unambiguous as that of Crimea – accession to Russia.

The timeline of the start of the conflict is as follows.

On 6 April 2014, pro-Russian demonstrators moved to seize a number of administrative buildings in Kharkiv, Donetsk, and Luhansk oblasts. On 7 April, the Donetsk People's Republic (*hereafter* DPR) was proclaimed in Donetsk.[309] On the same day, in Kharkiv, "alternative deputies" for the Kharkiv territorial community were chosen who decided to create the Kharkiv People's Republic.[310] On 8 April, the Ukrainian authorities regained control of the situation in Kharkiv.[311] However, by 12-13 April, the DPR had already spread its influence from Donetsk to the entire Donetsk oblast. On 12 April, a group of armed separatists led by Russian national Igor Girkin (Strelkov) seized Sloviansk, and the next day fighting broke out on the outskirts of the city. On 13 April, the DPR took control of Yenakiiyeve, Makiivka, and Mariupol. On 14 April, separatists seized Horlivka, Khartsyzk, Zhdanivka, and Kirovske.[312] On 15 April, fighting broke out near the airports of Kramatorsk and Sloviansk. On 16 April, bloody clashes occurred during an attempt to seize a base of

307 Resolution "Territorial Integrity of Ukraine" adopted by the General Assembly on 27 March 2014. United Nations document A/RES/68/262.

308 See: Восточная Украина: Вопросы международного гуманитарного права // Human Rights Watch. 2014. 11 сентября; at: https://www.hrw.org/ru/news/2014/09/11/254508 (accessed: 08.07.2020).

309 Донецк провозгласил себя суверенной республикой. Интерфакс. 2014. 7 апреля, at: https://www.interfax-russia.ru/south-and-north-caucasus/sobytiya-na-ukraine/doneck-provozglasil-sebya-suverennoy-respublikoy (accessed: 23.06.2023).

310 В Харькове вслед за Донецком провозглашена «народная республика». Лента.ру. 2014. 8 апреля, at: https://lenta.ru/news/2014/04/08/kharkov/ (accessed: 23.06.2023).

311 МВД Украины: в Харькове проходит антитеррористическая операция. Газета.ру. 2014. 8 апреля, at: https://www.gazeta.ru/politics/news/2014/04/08/n_6067397.shtml (accessed: 23.06.2023).

312 Прощание Славянска. Юго-восток Украины выходит из-под контроля Киева. Коммерсантъ. 2014. 14 апреля, at: https://www.kommersant.ru/doc/2452028; В Харцызске митингующие захватили мэрию. Росбалт. 2014. 14 апреля, at: https://www.rosbalt.ru/ukraina/2014/04/14/1256303.html; СМИ: В Донецкой области в городе Ждановка митингующие заняли здание городского совета. Коммерсантъ. 2014. 14 апреля, at: https://www.kommersant.ru/doc/2452459 (all links accessed: 23.06.2023).

the Internal Troops in Mariupol.[313] Separatists seized Novoazovsk on 16 April; Siversk on 18 April; Komsomolske and the village of Starobesheve on 19 April; and Krasnoarmiisk and Rodynske on 1 May.[314]

On 28 April, separatists in Luhansk announced the creation of the Luhansk People's Republic (*hereafter* LPR) and seized the building of the Security Service of Ukraine. The next day they occupied the oblast administration building and the oblast prosecutor's office. A Russian flag was hoisted over the oblast state administration building. On 30 April, the separatists took control of the city of Alchevsk.[315]

On 11 May, opponents of the central government proclaimed victory at the referendum they had organised on the independence of Donetsk and Luhansk oblasts. Based on the outcome, the self-proclaimed authorities of both "republics" expressed their wish to accede to Russia. The Russian presidential press service stated that "Moscow respects the will of the population of the Donetsk and Luhansk regions, and hopes that the practical implementation of the outcome of the referendums will proceed along civilised lines." The Kremlin refrained from directly recognising the "republics."[316]

Starting in mid-May, Ukrainian forces launched an offensive against the separatists. They managed to free most towns in Donbas, including Sloviansk and Kramatorsk, and virtually encircled Donetsk, completely cutting it off from Luhansk. The territory of the self-proclaimed DPR and LPR had shrunk by three-quarters since the beginning of hostilities. In maintaining their offensive momentum, the AFU came close to its main task – restoring control over the state border with Russia. However, on 19-20 August, the tide on the front turned, and the Ukrainian offensive stalled.[317]

On 17 July 2014, a Malaysia Airlines Boeing 777 flying route MH17 from Amsterdam to Kuala Lumpur was shot down in the region of the armed conflict in eastern Ukraine. All 298 people on board died. Both parties to the conflict blame each other for the tragedy. As was later ascertained by a report of the Dutch Safety Board, the plane was shot down by a surface-to-air missile.[318]

313 В Мариуполе в результате операции убиты 3 боевика, 63 задержаны — Аваков. Украинская правда, 2-14. 17 апреля, at: https://web.archive.org/web/20220127232852/http://www.pravda.com.ua/rus/news/2014/04/17/7022736/ (accessed: 23.06.2023).

314 Новоазовск поднял флаг Донецкой республики. Вести UA. 2014. 16 апреля, at: https://web.archive.org/web/20220228023439/http://vesti.ua/donbass/47838-novoazovsk-podnjal-flag-doneckoj-respubliki (accessed: 23.06.2023); В Северск приехали вооружённые сепаратисты на БМД, но город остался под контролем властей. УНИАН. 2014. 18 апреля, at: https://web.archive.org/web/20160304232658/http://www.unian.net/politics/909567-v-seversk-priehali-voorujennyie-seapartistyi-na-bmd-no-gorod-ostalsya-pod-kontrolem-vlastey.html; Над Старобешево подняли флаги Донецкой Народной Республики и объявили награду за Коломойского. Комсомольская правда. 2014. 19 апреля, at: https://www.kp.ru/online/news/1715687/; В Красноармейске и Родинском сепаратисты штурмом захватили горотделы милиции – СМИ. ТСН. 2014. 1 мая, at: https://web.archive.org/web/20180116052255/http://ru.tsn.ua/ukrayina/v-krasnoarmeyske-i-rodinskom-separatisty-shturmom-zahvatili-gorotdely-milicii-smi-363568.html (all links accessed: 23.06.2023).

315 В Луганске объявлена народная республика. Лента.ру. 2014. 28 марта, at: https://lenta.ru/news/2014/04/28/lugansk/; Украина: сторонники федерализации заняли здание обладминистрации в Луганске. Euronews. 2014. 29 апреля, at: https://ru.euronews.com/2014/04/29/ukraine-government-buildings-seized-in-luhansk; СМИ сообщили о захвате горсовета в Алчевске. Slon.ru. 2014. 30 апреля, at: https://republic.ru/posts/40492 (accessed: 23.06.2023).

316 Кремль: в Москве с уважением относятся к выбору населения Донецкой и Луганской областей. ТАСС. 2014. 12 мая, at: https://tass.ru/politika/1179654 (accessed: 23.06.2023).

317 *Яшин И., Шорина О.* Путин. Война. Доклад. Гл. 4. Российские военные на востоке Украины. At: https://www.bellingcat.com/app/uploads/2015/05/Putin.Voina_.pdf/ (accessed: 23.06.2023).

318 See: Dutch Safety Board: Buk surface-to-air missile system caused MH17 crash // Dutch Safety Board. 13 October 2015; at: https://www.onderzoeksraad.nl/en/page/3546/crash-mh17-17-july-2014 (accessed: 08.07.2020).

After the downing of the Boeing airliner, the international community significantly increased its pressure on Russia, and economic sanctions were imposed and subsequently expanded several times. This policy achieved a certain restraining effect. On 5 September 2014, in Minsk, the "Protocol on the results of consultations of the Trilateral Contact Group with respect to the joint steps aimed at the implementation of the Peace Plan of the President of Ukraine, P. Poroshenko, and the initiatives of the President of Russia, V. Putin" was signed. After the signing, a ceasefire went into effect on the same day. However, by mid-January, 2015, the armed conflict had flared up with renewed vigour, with the separatists managing to regain control of a number of important settlements. On 11-12 February 2015, the leaders of Germany, France, Ukraine, Russia, and the unrecognised republics signed a document titled "Package of Measures for the Implementation of the Minsk Agreements." Both documents call for a ceasefire and the return of territories not controlled by Ukraine in exchange for broad autonomy and amnesty for members of illegal armed groups. As of the completion of this chapter, the provisions of the Minsk agreements still have not been implemented.

According to the Office of the UN High Commissioner for Human Rights, the total number of human casualties related to the conflict in Ukraine (from 14 April 2014 to 15 February 2020) is 41,000-44,000, including 12,300-13,000 dead (at least 3,350 civilians, roughly 4,100 Ukrainian servicemen and 5,650 members of armed groups) and 29,000-31,000 wounded (approximately 7,000-9,000 civilians, 9,500-10,500 Ukrainian servicemen, and 12,500-13,500 members of armed groups).[319] In 2016 the number of internally displaced persons in Ukraine reached 1.8 million; by the end of 2019, the number had dropped to 1.4 million.[320]

The armed conflict was accompanied by a propaganda campaign unprecedented in Russia's modern history, which included calls to initiate and continue warfare, support for separatists, and stigmatization of Ukraine (its authorities and statehood) and the values of democracy and human rights in general. Furthermore, various fabrications were abundantly used by Russian media to dehumanise the image of the enemy.[321]

4.2. Russia's involvement in the armed conflict

The involvement of Russian armed forces in the seizure of Crimea is not a matter of controversy, since the authorities of the Russian Federation do not deny this fact. Nor do they deny that a large number of Russian "volunteers," including those holding high command positions in the DPR/LPR "military structures," participated in combat operations in eastern Ukraine. However, the Russian government categorically denied allegations that Russian armed forces took part in the confrontation in Donbas.

The question of Russia's participation in the Donbas conflict, as well as questions regarding the nature and extent of this participation, must be resolved by an independent and impartial court established in accordance with the law. Nevertheless,

319 Office of the High Commissioner for Human Rights. Report on the human rights situation in Ukraine 16 November 2019 to 15 February 2020. P. 8. §31; at: https://www.ohchr.org/en/documents/country-reports/report-human-rights-situation-ukraine-16-november-2019-15-february-2020 (accessed: 08.07.2020).

320 See: United Nations High Commissioner for Refugees. Ukraine; at: http://reporting.unhcr.org/Ukraine (accessed: 08.07.2020); Украина: ООН помогает обустроить внутренне перемещенных лиц // Новости ООН. 2019. 30 ноября, at: https://news.un.org/ru/story/2019/11/1368211 (accessed: 08.07.2020).

321 Regarding the main features of this campaign and the most typical examples of information manipulation and fabrication of information materials see: Ukraine at War: Truth against Russian Propaganda. Materials of the Conference. Brussels, European Parliament, 16 June 2015; at: http://eesri.org/2015/08/ukraine-at-war-truth-against-russian-propaganda/ (accessed: 08.07.2020).

as mentioned above, there is a substantial body of evidence supporting *prima facie* claims that Russia not only participated, but apparently played a decisive role in the unrecognised republics' military successes. It is important to note that, in their publications on this matter, Ukrainian,[322] independent Russian,[323] and international experts[324] all reach the same or substantially similar conclusions.

In 2018, the Joint Investigation Team set up to conduct a criminal investigation into the 17 July 2014 downing of the Boeing 777 stated that the plane was shot down by a Buk surface-to-air missile system operated by the 53rd anti-aircraft missile brigade of the Russian Armed Forces.[325]

In their preliminary study of the situation in Ukraine, the Office of the Prosecutor of the International Criminal Court concluded that direct military clashes between the armed forces of the Russian Federation and Ukraine indicate that, at least since 14 July 2014, there has been an international armed conflict in eastern Ukraine alongside a non-international armed conflict.[326]

4.3. Russia's actions in Crimea and Donbas as a crime of aggression

In giving a legal assessment of the course of the Russian-Ukrainian conflict, we proceed from four foundational theses. First, we consider the events in Crimea and Donbas to be part of the same armed conflict. Second, this conflict has features of both an international and an internal conflict. Its parties are Ukraine, the Russian Federation, and various separatist forces and governments that are under the effective control, or at least significant influence, of the Russian authorities. Third, Russia's armed intervention in the Autonomous Republic of Crimea should be considered the beginning of the conflict. Fourth, it is our view that the actions of Russia's leaders in this conflict should be qualified as a crime of aggression.

Attention should be paid to the definition of a crime of aggression given in Article 3 of the 14 December 1974, UN General Assembly Resolution 3314 (XXIX) and repeated verbatim in Article 8 bis of the Rome Statute. Seeing that not even Vladimir Putin denies the involvement of the Russian Armed Forces in the seizure of Crimea, the operation to annex the peninsula can be considered, at the very least, as falling under points (a) ("any annexation by force of the territory of another State or part thereof") and (e) ("the use of armed forces of one State which are within the territory

322 See, for example: Кабакаев С., Алексеева Е., Морозов Ф. Марионетки Кремля. Дорога войны на Донбассе. Доклад общественной организации «Безопасность и взаимодействие в Украине»; at: https://stopterror.in.ua/info/wp-content/uploads/2015/10/Marionetki-Kremlya.-Doroga-vojny-na-Donbasse.pdf (accessed: 08.07.2020).

323 See, for example: Между перемирием и войной // ПЦ «Мемориал»; at: http://old.memo.ru/uploads/files/1632.pdf (accessed: 08.07.2020).

324 See: *Чуперски М., Хёрбст Д., Хиггинс Э., Полякова А., Уилсон Д.* Прячась у всех на глазах. Война Путина против Украины. Вашингтон: Атлантический совет, 2015; Attacks on Civilians and Civilian Infrastructure in Eastern Ukraine. Brussels: International Partnership for Human Rights, 2017; at: https://iphronline.org/wp-content/uploads/2017/12/ICC-UA-15.02.pdf (accessed: 08.07.2020); *Tsybulenko E., Francis J.A.* Separatists or Russian Troops and Local Collaborators? Russian Aggression in Ukraine: The Problem of Definitions // The Use of Force against Ukraine and International Law: Jus Ad Bellum, Jus In Bello, Jus Post Bellum / ed. by *S. Sayapin, E. Tsybulenko.* The Hague: T.M.C. Asser Press; Springer, 2018. pp. 123-144.

325 Netherlands Public Prosecution Service. Update investigation JIT MH17 - press meeting (24-5-2018); at: https://www.prosecutionservice.nl/topics/mh17-plane-crash/criminal-investigation-jit-mh17/speakers-text-jit-mh17-press-meeting-24-5-2018 (accessed: 31.07.2020). In its judgments in the MH17 17 criminal case, the District court of the Hague came to a conclusion that the Russian Federation "exercised overall control over the DPR from mid-May 2014, at least until the crash of flight MH17". See Rechtbank Den Haag. 09/748006-19 English, 17 November 2022. §4.4.3.1.3.

326 Office of the Prosecutor of the International Criminal Court. Report on Preliminary Inquiry Actions for 2019. § 266, at: https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf (accessed: 08.07.2020).

of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement") of General Assembly Resolution 3314 (XXIX), Article 3.

As for the events in Donbas, they started in the same way as in Crimea – with the seizure of administrative buildings and police departments by heavily armed and well-equipped men in masks (sometimes acting behind civilians' backs), an attempted blockade and seizure of military units, and a referendum which was illegal from the standpoint of Ukrainian law.

Irrespective of whether the conflict in eastern Ukraine had internal causes of its own, and even if we ignore extensive evidence of Russian arms deliveries and involvement of Russian security forces in the conflict,[327] there is no doubt that the Russian state has provided and continues to provide substantial material and military assistance to the anti-government forces in the separatist regions of the Donbas, at the very least enabling the recruitment and dispatch of groups of mercenaries and volunteers from its territory to the conflict zone.

Thus, Russia's actions in Donbas are a continuation of the armed conflict that began with the annexation of Crimea and they pursue the same goal – annexation, or the creation of separatist enclaves under Russia's control if annexation is inexpedient because of increased sanctions – and, at the very least, constitute a violation of Article 3g of General Assembly Resolution 3314 (XXIX) ("the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State").

Russian leaders' responsibility for aggression in the form of annexation by force in Crimea is beyond doubt. Their responsibility for aggression in the form of initiating and waging war in Donbas can be established based on the principle of "effective control" (of Russian authorities over separatists) or, at the very least, the principle of "partial dependence" articulated by the UN International Court of Justice in *Nicaragua v. United States* (judgment of 27 June 1986).[328]

4.4. The main courses of unlawful conduct and their qualification

During the armed conflict, a number of national and international non-governmental organisations, as well as the OSCE mission, monitored the respect for human rights and international humanitarian law in Donbas, as well as in annexed Crimea. It should be emphasised that all parties to the conflict committed gross violations of human rights and international humanitarian law in Donbas. Nevertheless, in keeping with the aims of this report, we will only characterise the violations of the Russian party and the unrecognised republics, which are assumed to be under the effective control or significant influence of the authorities of the Russian Federation.

327 Such evidence is cited, in particular, in the Memorandum Ukraine submitted to the International Court of Justice on the dispute between Ukraine and the Russian Federation over the application of the International Convention for the Suppression of the Financing of Terrorism and the International Convention on the Elimination of All Forms of Racial Discrimination. See: International Court of Justice. Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (*Ukraine* v. *Russian Federation*). Memorial submitted by Ukraine. 12 June 2018. § 80-180.

328 In this regard, also see the preliminary findings of the Office of the Prosecutor of the International Criminal Court: Канцелярия Прокурора Международного уголовного суда. Отчёт о действиях по предварительному изучению ситуаций в 2019 году. § 277.

4.4.1. The situation in Donbas

Research by various human rights organisations and groups regarding violence during the armed conflict in the Donbas indicates that the following war crimes were committed by the parties to the conflict:[329]

- Deliberately attacking the civilian population as such or individual civilians not directly involved in hostilities;
- Deliberately attacking civilian objects, i.e. objects that are not military targets;
- Intentionally launching an attack knowing that the attack would cause incidental death or injury to civilians, damage to civilian objects, or extensive, long-term, and severe damage to the natural environment clearly disproportionate to the specific and directly expected overall military advantage;
- Attacking or bombarding – by whatever means – unprotected towns, villages, dwellings, or buildings that are not military targets;
- Inhuman and/or degrading treatment;
- Denial of the right to a fair trial;
- Unlawful imprisonment of civilians;
- Torture;
- Intentionally inflicting severe suffering or serious bodily injury or harm to health;
- Violation of human dignity, particularly humiliating and degrading treatment;
- Killings / premeditated murder;
- Destruction or seizure of property;
- Pillaging.

In addition, there are reasonable grounds to suppose that there have been widespread and systematic attacks on the civilian population of Eastern Ukraine as a matter of policy by the parties to the conflict, and that these attacks involved the following types of crimes against humanity:

- Imprisonment or other severe deprivation of physical liberty in violation of the fundamental norms of international law;
- Torture;
- Other inhumane acts of a similar nature involving the intentional infliction of great suffering, serious bodily injury, or serious harm to mental or physical health;
- Killings;
- Persecution on political and religious grounds.

Civilians were subjected to widespread and systematic attacks through unlawful imprisonment, torture, murder, and other inhumane acts and serious violations of basic human rights. Furthermore, there is reason to believe that leaders and members of various religious denominations were targeted.[330]

329 See: Fighting Impunity in Eastern Ukraine: Violations of International Humanitarian Law and International Crimes in Eastern Ukraine. Brussels: International Partnership for Human Rights, 2015; at: https://iphronline.org/wp-content/uploads/2016/05/Fighting-impunity-in-Eastern-Ukraine-October-2015.pdf (accessed: 08.07.2020); Attacks on Civilians and Civilian Infrastructure in Eastern Ukraine. Brussels: International Partnership for Human Rights, 2017; at: https://iphronline.org/wp-content/uploads/2017/12/ICC-UA-15.02.pdf (accessed: 08.07.2020); Жертвы вооруженного конфликта на Востоке Украины в 2014–2018 гг. Часть 1. Харьков: ООО «Издательство права человека», 2019; Жертвы вооруженного конфликта на Востоке Украины в 2014–2018 гг. Часть 2. Киев: Харьковская правозащитная группа, 2019.

330 Канцелярия Прокурора Международного уголовного суда. Отчёт о действиях по предварительному изучению ситуаций в 2019 году. § 279-280.

4.4.2. The situation in Crimea

The most comprehensive report so far on human rights violations by Russian authorities in Crimea is *The Peninsula of Fear: Chronicle of Occupation and Violation of Human Rights in Crimea*, prepared by a group of experts from well-known Ukrainian human rights organisations, including the Ukrainian Helsinki Human Rights Union, the Center for Civil Liberties, the Human Rights Information Center, the Crimean Human Rights Group, and others.[331] It is important to note that the contents and main conclusions of this publication match the data provided in the statements, monitoring reviews, and periodic reports of Russian human rights groups "Crimean Field Mission on Human Rights" and "OVD-Info,"[332] as well as international human rights organisation Human Rights Watch.[333] The following is an extract of that report.

Since significant segments of civil society in Crimea actively opposed its accession to Russia, the self-proclaimed Crimean authorities launched an all-out assault on civil society representatives. Victims of these actions included participants of peaceful demonstrations in favour of Ukrainian unity; Ukrainian servicemen; leaders of local "Euromaidans"; journalists; public activists; and members of the Crimean Tatar community, its representative body (the Mejlis), and public organisations. A wide range of methods of persecution were used for this, which were carried out using both quasi-judicial mechanisms – illegal detentions, fabrication of administrative and criminal cases, refusal to re-register individuals at their places of residence, illegal expropriation of private property – and illegal violence: threats, destruction of property, beatings, enforced disappearances, torture, and murder. All these actions were politically motivated and designed to achieve the goals of retaining and consolidating Russian power in Crimea and forcibly terminating the public activities of civil society representatives whose views on the situation in Crimea differed from those of Russian authorities. These crimes can be seen as part of the large-scale and systematic persecution of the civilian population. Their large-scale nature is evident in the all-out capture of all domains of public life on the peninsula. Essentially, the very presence of any institution not under the control of Russian authorities is viewed by them as a potential threat. The systemic nature is indicated by the organised and coordinated actions of various authorities – registration bodies, police, prosecutors, courts, and so-called Crimean self-defence paramilitary formations. These crimes affected a distinct group of people – active civil society representatives whose independent views (actual or attributed) on socio-political issues differed from those of the Russian authorities. The main risk groups were:

- Individuals who support the state sovereignty of Ukraine;
- Individuals who exercise their fundamental rights to freedom of speech, freedom of religion, freedom of peaceful assembly, and so forth;
- Members of the Crimean Tatar community;
- Individuals who undertake public activities not under state control or whose views differ from the "pro-government" perspective.

331 The Peninsula of Fear: Chronicle of Occupation and Violation of Human Rights in Crimea / under the general editorship of O. Skrypnyk and T. Pechonchyk. Second edition, revised and corrected. Kyiv: KBC, 2016.

332 See the report of the OVD-Info Internet Project: Не только Крым и Майдан. Политические преследования в России в 2015 и 2016 годах: основные тенденции и уголовные дела. Раздел «Преследование крымских татар»; at: http://reports.ovdinfo.org/2017/pp15-16/#topics/tatars (accessed: 08.07.2020).

333 Rights in Retreat. Abuses in Crimea // Human Rights Watch. 17 November 2014, at: https://www.hrw.org/report/2014/11/17/rights-retreat/abuses-crimea (accessed: 08.07.2020).

Thus, the main courses of unlawful conduct consisted of the following:

Illegal detentions (abductions) and torture, including those carried out by members of Russian-controlled paramilitary formations. The seizure of Crimea was accompanied by abductions and torture of pro-Ukrainian and Crimean Tatar activists, volunteers who had assisted AFU military units under blockade, and journalists, photographers, cultural figures, and artists – those who openly spoke out against the occupation of Crimea or documented events on the peninsula. Some of the abductees managed to escape and speak about their experiences undergoing interrogation, torture, and inhumane treatment.

Enforced disappearances and killings. As of the beginning of 2016, there were at least fourteen missing persons, mostly Crimean Tatars. Two of the missing – Memet Selimov and Osman Ibragimov – were found murdered on 29 August 2015.

Politically motivated criminal cases, illegal arrests and searches, and wrongful sentencing. The most well-known instances of these kinds of criminal cases are the *Sentsov-Kolchenko case* (the defendants were sentenced to twenty and ten years, respectively, on trumped up charges of terrorism); the *3 May case* concerning a peaceful protest by Crimean Tatars against the ban on Mejlis leader and former Soviet dissident Mustafa Dzhemilev entering Crimea (five arrested, all placed on probation); the *26 February case* concerning a peaceful rally in support of Ukraine's sovereignty (eight arrested, including the deputy chairman of the Mejlis; two were placed on probation); the *Oleksandr Kostenko case* (Kostenko sentenced to four years and two months on probation in connection with the Maidan events); and the *Volodymyr Balukh case* concerning the defendant's act of hanging a Ukrainian flag over his house (he was charged with insulting a public official and sentenced to compulsory labour). It should be noted that this practice is part of a general policy of persecuting civil and political activists in various regions of Russia (see Chapter 2, Section 2.6 of this report).

In its preliminary study of the situation in Ukraine, the Office of the Prosecutor of the International Criminal Court concluded that there were reasonable grounds to believe that the following crimes have been committed since 26 February 2014, in the period preceding the occupation and/or in the context of the occupation of Crimea:

- War crimes: wilful murder; torture; offences to human dignity; unlawful imprisonment; compelling protected persons to serve in the armed forces of an enemy state; wilfully depriving protected persons of their rights to a fair and regular trial; transferring groups of the population of an occupied territory to areas outside the territory (with respect to criminal detainees and prisoners); and seizure of enemy property in cases where there is no imperative military necessity (with respect to private property and cultural property).
- Crimes against humanity: murder; deportation or forcible population transfers (with respect to criminal detainees and prisoners); imprisonment or other severe deprivation of physical liberty; torture; persecution of any identifiable group or community for political reasons; and forced disappearance.[334]

334 Канцелярия Прокурора Международного уголовного суда. Отчёт о действиях по предварительному изучению ситуаций в 2019 году. § 272-273.

4.4.3. Presumed criminal liability of Russian Federation officials and jurisdictional issues

It is undeniable that, at least in connection with the annexation of Crimea, there are substantial grounds for charging Russian Federation officials with the crime of aggression.

The issue of Russian Federation officials' liability for war crimes and crimes against humanity, as well as for actions committed in the east of Ukraine which are recognised as crimes under Ukrainian domestic law, is a question of facts that need to be established through an independent and impartial trial. The authors do not presume to prejudge its conclusions.

At the same time, it is already clear that such charges can be brought against a significant number of Russian citizens who did not have an official capacity, but exercised command and control of separatist units implicated in gross violations of international humanitarian law.

As for possible jurisdiction over crimes committed by Russian officials and other Russian citizens in Ukraine, there are three obvious options for its exercise: hearing cases in national courts of Ukraine, in Russia, or in the International Criminal Court (except for the crime of aggression in the latter case – on this matter see Section 4 of Chapter 9). It should be noted that these options are not mutually exclusive, and cases involving different categories of perpetrators may be examined by different courts.[335]

Ukraine is not a party to the Rome Statute. However, on 17 April 2014, the Government of Ukraine filed a declaration under Article 12 § 3 of the Rome Statute recognising the jurisdiction of the ICC over alleged crimes committed on its territory between 21 November 2013 and 22 February 2014. Furthermore, on 8 September 2015, the Government of Ukraine filed a second application under Article 12 §3 of the Rome Statute to recognise the jurisdiction of the ICC over alleged crimes committed on its territory starting 20 February 2014, without an end date. Thus, the Court can exercise its jurisdiction over crimes qualified in the Statute which were committed on Ukrainian territory or by Ukrainian nationals beginning 21 November 2013.

A preliminary examination of the situation in Ukraine was initiated by the Prosecutor of the ICC on 25 April 2014. On 11 December 2020, the Office of the Prosecutor announced that the preliminary examination has been concluded and that there was a reasonable basis to believe that a broad range of conduct constituting war crimes and crimes against humanity have been committed in Ukraine.[336]

335 For more on this see: *Atadjanov R.* War Crimes Committed During the Armed Conflict in Ukraine: What Should the ICC Focus On? // The Use of Force against Ukraine and International Law: Jus Ad Bellum, Jus In Bello, Jus Post Bellum / edited by S. Sayapin, E. Tsybulenko. The Hague: T.M.C. Asser Press; Springer, 2018. pp. 385-407; Военные преступления на Донбассе. Вызовы в аспекте привлечения виновных к ответственности / сост. С. Кривенко, В. Новиков. Киев; Москва, 2020.

336 The International Criminal Court. Information for victims. Ukraine, at: https://www.icc-cpi.int/victims/ukraine (accessed on 20.06.2023).

5. Information on violations committed during the armed conflict in Syria

The armed conflict in the Syrian Arab Republic between supporters of President Bashar Assad (Syrian Arab Army), units of the "moderate" Syrian opposition (Free Syrian Army), Kurdish regionalists (People's Self-Defence Units), and various Islamist terrorist groups (Islamic State, Al-Nusra Front, etc.) started in March 2011 with mass anti-government demonstrations which by summer had grown into full-scale military clashes. The terrorists' seizure of large territories of Syria and Iraq in the summer of 2014 prompted the U.S. and its allies to intervene in the conflict, launching air strikes against Islamist positions in Syria beginning in September 2014. Starting 30 September 2015, the Russian Federation also became involved in the conflict on the side of government forces at the request of President Assad.

As the UN Special Representative of the Secretary-General for Syria stated in early 2016, 400,000 people have perished during the conflict.[337] The country's economy and infrastructure have suffered colossal damage. The conflict is characterised by fierce combat, indiscriminate shelling of populated areas, mass killings, and other war crimes committed by various parties to the conflict.

International human rights NGOs have repeatedly made credible statements about gross violations of international humanitarian law committed by the Russian side in the context of air strikes.

For instance, Amnesty International stated that at least two hundred civilians had been killed in Syria as a result of Russia's military operation. The organisation analysed data on 25 attacks in five regions (Homs, Hama, Idlib, Latakia, and Aleppo) between 30 September and 29 November 2015. It asserted that two hundred civilians and "dozens of fighters" had been killed. The Russian Aerospace Forces' attacks in Syria also resulted in the partial or complete destruction of hospitals and dozens of homes and civilian objects. According to the organisation's report, these conclusions are supported by the testimonies of witnesses and human rights activists, as well as video and photo materials. Amnesty International's research indicates serious violations of international humanitarian law. In a number of cases, Russian armed forces acted directly against civilians or civilian objects, striking residential areas lacking visible military targets. In some cases, even medical facilities were attacked, resulting in civilian deaths and injuries. In other cases, it appears that Russian military forces attacked military targets and civilian facilities without distinction or caused excessive damage to the civilian population during attacks on military targets. Such attacks may be considered war crimes.[338]

In addition, Amnesty International reports the use of cluster munitions by Russia in Syria, which has been confirmed by research conducted by other organisations, particularly Human Rights Watch.[339]

337 Syria Death Toll: UN Envoy Estimates 400,000 Killed // Al Jazeera. 23 April 2016; at: https://www.aljazeera.com/news/2016/04/staffan-de-mistura-400000-killed-syria-civil-war-160423055735629.html (accessed: 08.07.2020).

338 See: 'Clichés and fakes': Russia's response to concerns about its attacks in Syria fails to convince // Amnesty International. 29 January 2016, at: https://www.amnesty.org/en/documents/mde24/3296/2016/en/ (accessed: 08.07.2020).

339 See: Russia/Syria: Extensive Recent Use of Cluster Munitions. Indiscriminate Attacks Despite Syria's Written Guarantees // Human Rights Watch. 20 December 2015; at: https://www.hrw.org/news/2015/12/20/russia/syria-extensive-recent-use-cluster-munitions (accessed: 08.07.2020).

On 17 October 2016, the European Council stated that the actions of the Syrian government and its allies – especially Russia – during the offensive on Aleppo could be considered war crimes. The Council's statement mentioned targeted strikes on hospitals, schools, and critical infrastructure, as well as the use of cluster munitions and chemical weapons. The Council condemned systematic violations of human rights and international humanitarian law in Syria by all parties to the conflict. As an example of such violations, the Council mentioned an air strike on a humanitarian convoy in Aleppo on 19 September 2016, in which twenty civilians were killed.[340]

In a report published on 28 January 2020, the UN Human Rights Council's Independent International Commission of Inquiry into events in Syria concluded that the actions of the Russian Air Force, with its indiscriminate strikes against civilian residential areas on 22 July 2019, in Maarrat al-Nu'man and on 16 August 2019, near Haas,[341] contain indications of war crimes.

The information currently available does not allow us to make reliable assertions about the responsibility of specific officials for these crimes. However, there is no doubt that an independent and impartial investigation is needed.

6. Legal qualification of crimes under Russian law

We see that there are serious and consistent grounds to suspect that, during the armed conflicts in Chechnya, Georgia, Ukraine (including the illegal occupation and annexation of Crimea), and Syria, Russian officials acting in an official capacity and other Russian citizens have committed widespread and systematic violations of international law. These constitute a multitude of war crimes, crimes against humanity, and crimes of aggression, in addition to a number of violations of Russian law which should be qualified as grave and especially grave crimes under domestic law. The victims of these criminal acts are no fewer than tens of thousands of people, and the crimes themselves in many cases were committed demonstratively, out in the open. This is the essential difference between this category of offenses and all others examined in this report.

Given their particular gravity, the primary legal response to the criminal acts described here must obviously be criminal prosecution. Liability for war crimes is envisaged by the Russian Criminal Code: by Article 356 ("Use of prohibited means and methods of waging war") and Article 360 ("Attacks on persons and institutions that enjoy international protection"); for crimes against peace – by Article 353 ("Planning, preparing, initiating, or waging a war of aggression") and Article 354 ("Public calls for initiating a war of aggression"), where it is noteworthy that part 2 mentions calls for initiating war through mass media or by a person holding public office in the Russian Federation or within a subject of the Russian Federation. As noted further in section 3 of chapter 7, provisions on international crimes in Russian legislation contain significant gaps.

In addition, Article 286 of the Criminal Code ("Exceeding official authority") can be applied to the broader range of violations committed by state representatives.

340 See: Council of the European Union. Council Conclusions on Syria of 17 October 2016; at: http://www.consilium.europa.eu/en/press/press-releases/2016/10/17/fac-syria-conclusions/# (accessed: 08.07.2020).

341 See: Report of the Independent International Commission of Inquiry on the Syrian Arab Republic of 28 January 2020. A/HRC/43/57. P. 6. § 22-25; at: https://reliefweb.int/sites/reliefweb.int/files/resources/A_HRC_43_57_AEV.pdf (accessed: 08.07.2020).

Participants of illegal armed groups operating within foreign states (including "DPR and LPR armed forces" and "private military companies") may be held criminally liable in Russia under Criminal Code Article 208 § 2,[342] provided that these groups are shown to be in contradiction with Russia's interests.

Finally, the actions of a number of officials can be described through the dispositions of Criminal Code Articles 282, 282.1, and 282.2, which envisage liability for inciting hatred or enmity, just as for violation of human dignity on the basis of membership in a group and for organising extremist groups and communities. However, given serious doubts about the legal nature of these rules and their discriminatory application in practice (see Chapter 2, section 2.6), we are not sure that these provisions of the law are compatible with the requirements of the rule of law.

The offences described in this chapter may be treated as conventional crimes, but from the standpoint of international law such assessment may be deemed an improper legal response.[343]

7. Reparations

The scale of violations of international humanitarian law and human rights norms, unprecedented in modern Russian history, exacerbates the problem of reparation for harm caused. This is particularly relevant for the armed conflict in the Chechen Republic. Considering the scale and severity of violations committed in this region, we believe that bringing the perpetrators to justice and rectifying the consequences of unlawful violence are among the most difficult tasks of transitional justice.

Due to the near 100% impunity and the termination of virtually all criminal cases "owing to the impossibility of identifying the persons to be brought as defendants," no compensation was given to victims of crimes committed by state agents for material and non-material damage incurred. Exceptions are rare; only those awarded compensation by judgments of the ECtHR have managed to receive any. However, as we have already said, the percentage of such compensation in relation to the total number of victims appears to be negligible. To be fair, the Russian government has carried out an extensive compensation campaign for residents of the Chechen Republic whose homes were destroyed during the hostilities. However, these payments in no way involved recognising those who received them as victims of crimes.

A special restorative measure that Chechen society sorely needs is establishing the truth regarding several thousand individuals who were subjected to enforced disappearances. In a great number of cases relatives know nothing not only about the circumstances of the death of their "disappeared" loved ones, but even about their place of burial. A juxtaposition of the lists of Chechen ombudsman Nurdi Nukhazhiyev, who was hyper loyal to the Russian authorities, and Memorial Human Rights Center shows that there must have been no fewer than five thousand such

342 In Federal Law edition No. 302-FZ of 2 November 2013 «О внесении изменений в отдельные законодательные акты Российской Федерации" // СЗ РФ. 2013. № 44. Ст. 5641. For more details see: Евсеев А. Особенности национального законодательства РФ в аспекте привлечения граждан РФ и граждан других стран, находящихся на территории РФ, к ответственности за нарушение норм международного гуманитарного права // Военные преступления на Донбассе. Вызовы в аспекте привлечения виновных к ответственности. / сост. С. Кривенко, В. Новиков. Киев; Москва, 2020. pp. 35–47.

343 See *Богуш Г.И., Есаков Г.А., Русинова В.Н.* Op. cit. pp. 9–11.

victims.[344] At the same time, there are huge numbers of anonymous graves scattered across hundreds of Chechen cemeteries where local residents buried the corpses of unknown compatriots they had found bearing signs of a violent death. No one is keeping a record of these burial sites, and year after year the Russian government sabotages the strong recommendations of international organisations to undertake a program of exhumation and DNA identification.

What has been said about the situation in Chechnya is also to a certain extent relevant to the armed conflict in Ukraine. Here, too, the number of victims is very high, and enforced disappearances, while not affecting such a horrific number of people, are also practiced.

Another overarching problem related to the Ukrainian conflict is the compensation of victims of Russia's illegal annexation of the Crimean Peninsula. It is the authors' view that any compensation programs for individual victims and groups of victims (e.g. the Crimean Tatars), will not produce results until restitution, i.e. the restoration of victims' original condition, is undertaken. However, such restitution is hardly possible without an international legal settlement on the status of the unlawfully seized territory. Finding the best ways and mechanisms for such a settlement constitutes a separate legal and political challenge and goes far beyond the scope of the present chapter.

344 The database had been previously published on the official website of the Commissioner for Human Rights in the Chechen Republic (http://chechenombudsman.ru/), but was subsequently removed.

Chapter 5. Other serious human rights violations

Chapters 2-4 described the primary and most obvious categories of violations that need to be addressed by means of transitional justice. Naturally, the list of serious violations of law requiring a proper legal response does not end there.

In preparing this report, we compiled a broad list of such offenses, systematised according to the context in which they were committed. Owing to its limited size, we are not in a position to examine each of them in detail and therefore limit ourselves to compiling a list of additional offenses not covered by the preceding chapters, followed by a brief comment on their eligibility as potential objects of transitional justice:

A. Violation of the right to life, torture, and other inhuman treatment.

1. Violence in state-controlled institutions and inadequate responses to such violence.

1.1. The use of violence by the authorities in the context of maintaining public order or criminal intelligence with the purpose of obtaining evidence.

1.2. The use of violence by the authorities against persons in places of detention, including through organising or inciting other inmates to do so.

1.3. The use of violence against patients by employees of medical institutions (primarily in neuropsychiatric wards).

1.4. The use of violence in institutions for orphaned children.

1.5. The use of violence in the context of military service.

2. Non-violent mistreatment in state-controlled institutions and insufficient action to remedy the situation.

2.1. Inhuman, non-violent treatment in institutions of the Federal Penitentiary Service: inadequate detention conditions in pre-trial detention facilities, correctional colonies, and prisons; inadequate transportation conditions for prisoners; and failure to provide proper medical care in places of detention.

2.2. Mistreatment of patients in neuropsychiatric wards.

2.3. Mistreatment in the context of military service.

3. Inadequate response to the use of violence by private individuals outside of state-controlled institutions.

    3.1. Inadequate response to domestic violence and sexual violence against women.

    3.2. Inadequate response to violent racist and xenophobic crimes.

B. Unlawful restrictions on the right to freedom of assembly unrelated to the persecution of political opponents:

    1. Restrictions on the right to freedom of assembly regarding environmental degradation, inadequate urban planning, improper or illegal land use, and other issues of importance to local communities or of professional groups.

    2. The use of violence towards, or unjustified detention and prosecution of, activists from environmental and urban conservation groups (movements).

    3. Prohibitions on holding mass events for members of the LGBT community.

C. Unlawful restrictions on freedom of association:

    1. Legislative and administrative measures interfering with the activities of non-governmental organisations and civil society groups, including legislation on foreign agents and undesirable organisations.

D. Crimes against human rights defenders, lawyers, and journalists on grounds of their professional activities:

    1. Organising and inciting crimes against human rights defenders, lawyers, and journalists, as well as members of their families, their property, and the property of their organisations on grounds of their professional activities.

    2. Inadequate response to such crimes.

E. Discriminatory practices and lack of appropriate response to discrimination perpetrated by individuals:

    1. Inadequate response to violations of the labour rights of migrants, ethnic minorities, and people with disabilities.

    2. Discrimination based on religious affiliation using anti-extremist laws.

    3. Discrimination against people with disabilities and ethnic minorities in education and inadequate response to cases of such discrimination.

F. Violation of environmental and cultural rights resulting in irreparable harm:

1. Destruction and/or irreparable damage to natural monuments and valuable protected areas, including unjustified refusal (caused by corruption or other motives) by the authorities to grant protected status to such sites or areas.

2. Destruction and/or irreparable damage to objects of cultural heritage (architectural ensembles, protected areas, landmarks, and historical and urban complexes of historical settlements), including unjustified refusal (caused by corruption or other motives) by the authorities to grant protected status to such sites or areas.

3. Inadequate legal response to violations listed in the preceding two points by law enforcement and supervisory bodies.

G. Discriminatory laws banning adoptions by U.S. citizens.

H. Fundamental non-violent infringements of the right to a fair criminal trial (including violations of the right to defence and fabrication of criminal cases).

At the first glance, all the above violations may be considered quite serious, and their impunity is widespread or even systemic in nature (the violation mentioned in point B.3 is even part of officially proclaimed state policy; the same can also be said about point C.1, with some reservations). Thus, there are no formal obstacles to classifying them as objects of transitional justice according to our chosen criteria.

However, some of the behavioural patterns outlined here should not be considered in isolation, but rather in relation to contexts already described in previous chapters. Thus, the unlawful restriction of freedom of association, including the adoption and implementation of the laws on foreign agents and undesirable organisations (point C), can be examined as a measure implemented in the context of a strategy of unlawful retention of power. There is no doubt that the ruling regime in Russia perceives any independent social activism – particularly human rights activism – as hostile and externally orchestrated by unfriendly forces. Neither the rhetoric of the head of state ("those scavenging at embassies"[345]) nor the public statements of other government officials, let alone official propaganda, leave any room for doubt. The amendments[346] made in autumn 2012 to the laws "On Non-Commercial Organisations" and "On Public Associations" provide for a discriminated category of non-profit organisations described as "organisations performing the functions of a foreign agent." These amendments, as well as the law on undesirable organisations[347] passed in 2015, fit in well with the general strategy of the authorities – frightened by the 2011-2012 protests – to increase pressure on civil society institutions, stigmatise them as an enemy, and fan propaganda-induced hysteria. Crimes against human rights defenders,

345 A memorable characterisation from Vladimir Putin's campaign speech in December 2007. See: Камышев Д. Кто во что гарант // Коммерсантъ Власть. 2007. November 26. https://www.kommersant.ru/doc/828818 (accessed 22.06.2020).

346 Federal Law No. 121-FZ of 20 July 2012 "On Amendments to Certain Legislative Acts of the Russian Federation Regarding Regulation of Activities of Nonprofit Organisations Functioning as Foreign Agents."

347 Federal Law No. 129-FZ of 23 May 2015 "On Amendments to Certain Legislative Acts of the Russian Federation."

lawyers, and journalists (point D) should also be included here. These attacks essentially pursue the same goals as the legislative restrictions on civil society institutions, and can scarcely be examined outside of the political context (see Chapter 2, sections 2.2 and 2.6 of this report). The ban on the adoption of Russian orphans by citizens of the United States and certain other countries[348] (point G) was expressly adopted as an official response to the Sergei Magnitsky Rule of Law Accountability Act of 2012 (it introduced personal sanctions for perpetrators of human rights violations in Russia) and can also be included in the same category of "political offences." The ban is accompanied by legislative amendments concerned with the prosecution of citizens for "promoting non-traditional sexual relations."[349] Both of these laws were designed primarily to create a propagandistic effect, whereby the ruling regime proclaimed itself as the guardian of morality while its opponents were stigmatised as proponents of "sexual perversions" and "murderous" foreign adopters. The repressive measures applied to violators of these laws were discussed in Chapter 2, section 2.6.

As for the remaining violations, three subgroups stand out based on their gravity and prevalence. First, torture and other forms of cruel treatment by law enforcement officers in the context of maintaining public order and criminal intelligence (point A.1.1). Second, a set of violations related to the functioning of the penitentiary system. These violations range widely from poor detention conditions that reach the threshold of cruel treatment, to torture, murder, and the systematic use of *de facto* slave labour of prisoners (point A.1.2). Third, the violence-based system of suppression in the Armed Forces, colloquially called "dedovshchina" (hazing) (point A.1.5). This system also includes torture, murder, and various forms of abuse.

Both sociological studies and data from human rights organisations give an indication of the widespread nature of torture committed in the context of law enforcement. This category of torture can easily be considered one of the fundamental problems of life in Russia and the scourge of domestic law enforcement practices. According to sociologists, nearly one in ten adult Russian citizens has been tortured at least once.[350] In "classical" cases, torture is used for the purpose of compelling a suspect incriminate him/herself or third parties (even if law enforcement officials know it to be false). However, other scenarios are also widespread: torture upon arrest; torture of administrative detainees; torture in sobering-up stations; and so on. Police violence could occasionally serve to satisfy unhealthy proclivities toward domination and cruelty. This is not to say that the state has not done anything at all to combat torture. In recent years, the existence of the problem has been grudgingly acknowledged by the

348 Federal Law No. 272-FZ of 28 December 2012 "On Measures to Influence Persons Involved in Violations of Fundamental Human Rights and Freedoms, Rights and Freedoms of Citizens of the Russian Federation."

349 Federal Law No. 135-FZ of 29 June 2013 "On Amendments to Article 5 of the Federal Law 'On the Protection of Children from Information Harmful to Their Health and Development' and Certain Legislative Acts of the Russian Federation in order to protect children from information that denies traditional family values."

350 For an analytical report on the results of the study, see: *Гудков Л.Д., Зоркая Н.А., Кочергина Е.В.* Пытки в России: Распространенность явления и отношение общества к проблеме. М.: Левада-центр, 2019. https://www.pytkam.net/sites/default/files/analiticheskiy_otchet_final_0.pdf (accessed 22.06.2020).

authorities, both at the national[351] and international level.[352] However, impunity for torture remains the general rule, and cases of officials being held criminally responsible for it are the fortunate exception, because behind these cases there is usually either a high-profile national scandal or painstaking, multi-year efforts by multiple specialised human rights organisations applying the method of "nongovernmental investigation."[353] The level of impunity of torture can be judged by the following indicators: The Russian Committee against Torture (Nizhny Novgorod) posted on its website a list of "established facts of torture"[354] – a mere 201 – and a list of people convicted of torture[355] containing 145 names. A comparison of the two lists shows that convictions of at least one perpetrator were made for only 56 of the 201 established facts. In other words, 72% of the torture cases verified by the Committee (based on the high standards of evidence adopted by this organisation) remain unpunished.

Thus, torture in Russia is virtually always accompanied by ineffective investigation of complaints of torture. One of the landmark documents acknowledging the problem of the ineffective investigation of torture complaints was the ECtHR judgment in the case of *Mikheev v. Russia*.[356] In recent years, the number of ECtHR judgments on Russian cases involving the improper investigation of torture has increased significantly.[357] At best, Article 3 of the European Convention of Human Rights is violated through inaction of the investigating authorities, who fail to verify complaints or do so with considerable delay. At worst, the investigation is intentionally sabotaged, with investigators refusing to interrogate individuals that victims clearly identify as eyewitnesses to a crime; refusing to attach documents to the case file that incriminate officials; pressuring victims and witnesses; and trying in other ways to cover up for the perpetrators. In cases where officials shield each other, the most absurd explanations are given for seemingly indisputable facts. The situation is exacerbated by the fact that this type of sabotage usually does not result in any adverse consequences for the unscrupulous investigator, even if his procedural decisions are found to be unlawful and are revoked by a senior authority or court. On the contrary, practice shows that such employees are often rewarded with rapid promotions and bonuses. Even when law enforcement officials are prosecuted for torture, roughly half of them receive suspended sentences, which is often perceived as a disproportionately lenient punishment for this grave crime.[358]

351 See, for example, the report of the Krasnodar Krai Prosecutor's Office on the verdict against former employees of the Belorechenskaya educational colony convicted of torture. http://prokuratura-krasnodar.ru/news/segodnya-12-maya-2017-goda-vynesen-obvinitelnyy (accessed 22.06.2020).

352 See, for example, the statement by M. L. Galperin, head of the Russian delegation to the UN Committee against Torture, on the consideration of the 6th periodic report on the Russian Federation's implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. United Nations Document CAT/C/SR.1661. 6 August 2018. § 2-3. Also see: *Козкина А.* ООН начинает сердиться. О чем спрашивали российскую делегацию на сессии Комитета против пыток // Медиазона. 27 July 2018. https://zona.media/article/2018/07/27/un (accessed 22.06.2020).

353 For example, the interregional public organisation Committee Against Torture, the Public Verdict Foundation, and their regional partners.

354 See: https://www.pytkam.net/node/47 (accessed 22.06.2020).

355 See: https://www.pytkam.net/node/48 (accessed 22.06.2020).

356 ECtHR. *Mikheyev v. Russia.* Application no. 77617/01. Judgment of 28 January 2006.

357 On the website of the Public Verdict Foundation in the section "Russia and the European Court of Human Rights," one can read references containing a summary of the judgments of the ECtHR in which facts of torture and their ineffective investigation are established, at http://publicverdict.org/topics/eurocourt/ (accessed 22.06.2020).

358 See: *Мароховская А., Долинина И.* Кто поднимает Россию на дыбу // Новая газета. 8 October 2018. https://novayagazeta.ru/articles/2018/10/08/78095-kto-podnimaet-rossiyu-na-dybu?fromtg=1?mobile=true (accessed 22.06.2020); Никонов М. Насилие силовиков. Преступление без наказания. pp. 7-10, at http://zonaprava.com/events/pytki-v-rossii-siloviki-poluchayut-uslovnye-sroki-a-poterpevshie-mizernye-kompensatsii-doklad/ (accessed 22.06.2020).

The level of impunity of torture is demonstrated by the fact that the Committee of Ministers of the Council of Europe found no reason to complete its oversight of any (!) of the 364 cases of violations of Russia's procedural obligations to investigate torture and inhuman treatment that were established by the European Court of Human Rights.[359] This suggests that the practice of torture in the context of law enforcement, as well as impunity of this crime, are not a coincidence of individual excesses, but a systemic problem of Russian law enforcement practices.[360]

The same can be said of violations associated within the penitentiary system. Nongovernmental investigations of such violations by specialised human rights organisations face even greater challenges. While cases of poor detention conditions reaching the threshold of cruel and inhuman treatment have been confirmed in a vast number of ECtHR judgments, it has been extremely difficult for NGOs and independent lawyers to verify complaints of torture coming from places of detention, due to absolute control that the administration of penitentiary institutions exercises over the fate of incarcerated persons. Prison officials have many ways of forcing those lodging complaints to retract their testimonies, including threats of sexual violence – a universal tool of intimidation that works without fail given Russian prison subculture. The most egregious cases of violations of fundamental rights in penitentiary institutions involve systemic crimes, namely, the systematic use of violence to break the will of prisoners and the systematic use of slave labour for the administration's benefit. The state's response to these violations is the same as in the case of torture in the course of law enforcement activities: There are only individual, isolated instances of criminal prosecution for the episodes that received media attention. However, this takes place against the backdrop of investigative agencies' systematic refusal to conduct effective investigations into the vast majority of such violations.

As for the situation in the Armed Forces, hazing is a widespread phenomenon that many male Russians have had the misfortune to become acquainted with while performing their conscripted military service. The severity of this "custom" can range (depending on the specific military unit and time period) from fairly "innocent" physical punishments, such as sleep deprivation and forcing conscripts to perform excessive labour or physical exercise or wait on other servicemen, to systematic abuse, sophisticated torture, attacks on human dignity, and even sexual violence, murder, and incitement to suicide. The state, as represented by the Defence Ministry, has on many occasions, acknowledged the existence of this problem and announced campaigns against non-regulation relations; however, in reality there is a systematic practice of refusing to conduct effective investigations with only isolated exceptions. In the context of law enforcement activities and operation of detention facilities, the difference between hazing and torture is the following: While in the latter case crimes of abuse are committed by state representatives or alternatively by third parties at the instigation of state representatives (torture of certain prisoners by other prisoners in order to obtain evidence the investigators need – so-called "pressure huts"), in the case of hazing, crimes are committed by senior soldiers against their recently enlisted fellow soldiers. These relations within an age-related hierarchy – in which older enlisted soldiers are "entitled" and even "obligated" (under threat of stigmatisation) to exercise control over the human dignity of their juniors – remain a stable fixture of the

359 According to data from the website of the Department for the Enforcement of ECtHR Judgments as of 1 August 2019, at https://hudoc.exec.coe.int/ (accessed 22.06.2020).

360 *Дмитриевский С.М., Казаков Д.А., Каляпин И.А., Рыжов А.И., Садовская О.А., Хабибрахманов О.И.* Общественное расследование пыток и других нарушений фундаментальных прав человека / 2-е изд., испр. и доп. Нижний Новгород: Нижегородская Радиолаборатория, 2015. p. 24.

subculture of the Russian Armed forces, inherited from the Soviet army. Formally, both victims and tormentors are representatives of the state, and with the passage of time each serviceman rotates from one category to another. Thus, a large portion of the male population of the country passes through an idiosyncratic school of stigmatisation in which the willingness to be humiliated and to humiliate is part of the obligatory code of conduct for all. The high command has never formally endorsed this practice. However, there is ample evidence of the encouragement of these practices, at least by lower and middle-ranking officers, since informal "barracks laws" make it easier to maintain external discipline and manage soldiers.

The severity of the situation in all three contexts of illegal violence is further compounded by the fact that, in recent years, all Russian human rights organisations involved in nongovernmental investigations of torture and ill-treatment and representing the interests of victims (including protection of the rights of military personnel) have come under intense pressure from the authorities.

The practice of violence in neuropsychiatric wards and orphanages (points A.1.3 and A.1.4), though perhaps not as widespread as torture in the police and hazing, raises deep concerns about violations of fundamental human rights and about the particular vulnerability and defencelessness of victims before their tormentors, who have full control over them.

As for violations of the fundamental guarantees of a fair criminal trial (in "ordinary" criminal cases without political involvement), reliable statistics are lacking. However, media reports and accounts from the legal community show that this is an extremely acute problem in Russia, primarily because of the system adopted by law enforcement agencies for evaluating activities based on the crime clearance rate and due to the lack of an independent judiciary.

Violations of the social rights to preserve a nation's cultural heritage and its environment are not as obviously inhumane as violent crimes. But the seriousness of these violations stems from the irreplaceable nature (and, consequently, the impossibility of restitution) of each heritage and environmental loss; from the widespread occurrence of such crimes in the process of business operations; and from the long-term negative consequences that they entail for all the people of Russia. In recent decades, the country has lost an enormous number of unique historical and architectural monuments (including development programmes in historical settlements). The objective difficulty of combating such violations is that, in the vast majority of cases, the problem is not that protected cultural heritage sites are destroyed, but that the authorities refuse to grant these sites protected status. In such cases, the refusal is usually executed impeccably from a procedural standpoint and stems from corrupt motives, including the merging of government and business (above all, the construction business) at regional level. Even in cases where a monument that is formally under state protection is destroyed – i.e. where there are clear indications of a criminal offense – a proper legal response is the exception, and impunity the norm.

From the list proposed at the beginning of this chapter, it would seem that only violations under point A.2 do not require the application of comprehensive transitional justice measures. The problem of inadequate conditions of detention in state-controlled institutions, which the state generally acknowledges, requires not so much justice as effective institutional reforms, adequate funding, and effective

monitoring of expenditures. While a state program for the compensation and rehabilitation of those who have been detained in such conditions might be a fine addition to any plan for transitional justice, in the Russian context its implementation seems utterly utopian given the magnitude of this lamentable phenomenon.

Thus, the other violations, both formally and in substance, deserve to be classified as objects of transitional justice. To what degree it is appropriate, however, to classify each of them as such is a separate matter. Transitional justice is an extraordinary, rather specific, and very expensive mechanism not designed to deal with all unpunished violations of law committed under the former political regime. Hence, it may be necessary to introduce additional optional criteria for more careful selection. Three constraints may be tentatively identified: the violation must have been politically motivated; associated with systemic corruption; or be part of a large-scale system of illegal violence.

Violations falling under the first two criteria have been described in previous chapters. An indicator of a large-scale system of illegal violence would be the existence of stable groups of officials who would have banded together for the primary objective of perpetrating such violence (however, the final objectives may vary, including career advancement, illicit enrichment, and so forth), as well as the recurrence and systematic nature of the violent actions themselves. In the context of torture, a classic example of such a system is the infamous story of the Dalny police department in Kazan, where torturing suspects to obtain confessions was an almost everyday occurrence. Over a long period of time, a large number of people were subjected to torture by numerous officers of the department on the direct instruction and with the participation of their superiors.[361] Another example (documented by the Russian Committee Against Torture) is the systematic torture and sexual violence perpetrated on premises that functioned as a pre-trial detention facilities for the Correctional Colony #14 in Nizhny Novgorod Oblast, carried out by officers of the FSIN and by other inmates – at the direction, and with the personal participation, of the head of the institution – for the purpose of obtaining confessions. For some years, this facility essentially functioned as a regional "junk-tank" to which, at the "request" of investigators, the most "uncooperative" suspects were taken.[362] Often inmates themselves would be involved in carrying out torture at the request of prison officials. Other examples are situations involving the systematic use of prisoner slave labour, similar to what Nadezhda Tolokonnikova encountered in her colony.[363]

361 *Сергеев Н.* Полицейские из «Дальнего» сели надолго // Коммерсантъ. 16 June 2014. https://www.kommersant.ru/doc/2492336 (accessed 22.06.2020).

362 «Мы годами тут работаем. И не таких ломали. Ты не выживешь!» // Комитет против пыток. 24 June 2014. https://www.pytkam.net/ru/news/my-godami-tut-rabotaem-i-ne-takih-lomali-ty-ne-vyzhivesh-foto-video-strogo-18 (accessed 22.06.2020); *Сковорода Е.* «Красней не бывает». История нижегородской ИК-14, которую правозащитники называли пыточной, а сотрудники ФСИН – образцово-показательной // Медиазона. 17 August 2016. https://zona.media/article/2016/08/17/ik-14 (accessed 22.06.2020).

363 Защита Толоконниковой просит Генпрокуратуру проверить массовые нарушения прав женщин в колонии №14 // Новая газета. 25 September 2013. https://novayagazeta.ru/news/2013/09/25/75014-zaschita-tolokonnikovoy-prosit-genprokuraturu-proverit-massovye-narusheniya-prav-zhenschin-v-kolonii-8470-14 (accessed 22.06.2020).

Chapter 6. The unpunished crimes of the totalitarian Communist regime

In contrast to the previous chapters, this chapter covers a specific time period rather than a category of crime. This approach is related to the fact that, in post-Soviet Russia, comprehensive legal measures have been adopted and applied (more or less successfully) to remedy the consequences of at least one category of "lawless actions of the totalitarian regime"[364] – that of political persecution (repression). For this reason, manifestations of systemic impunity for the crimes of the Communist regime are discussed here not in terms of behavioural patterns, but in terms of gaps in the existing legal institutions created to address those crimes.[365]

1. Political persecution as a criminal offence

It is no exaggeration to say that a policy of persecution of its own people was inherent to the Soviet regime throughout its history, with the exception, perhaps, of the last few years of its existence.[366] The Law of the Russian Federation "On Rehabilitation of Victims of Political Persecution" (hereafter, the Rehabilitation Law),[367] adopted on 18 October 1991, gives a general definition of political persecution as encompassing various coercive measures used by the state for political reasons, taking the form of: deprivation of life or liberty; compulsory treatment in psychiatric institutions; expulsion from the country and deprivation of citizenship; eviction of groups of people from their places of residence; exile, deportation and special settlement; imposition of forced labour with restriction on freedom; and other kinds of deprivation or restriction of rights and freedoms of individuals recognised as socially dangerous to the state or the political regime because of their class, social status, ethnicity, religion, or other characteristics. These coercive measures were taken based on decisions of courts and other bodies with judicial functions, or the administrative decisions of executive authorities, public officials and organisations or their agencies vested with administrative powers.[368]

364 Ruling No. 523-O-P of the Constitutional Court of the Russian Federation of 3 July 2007.

365 The chapter is a summary (with additions) of an article by N.A. Bobrinsky. See *Бобринский Н.* Постсоветское переходное правосудие в России: достижения и упущенные возможности.

366 This position is reflected in § 3 of the preamble and in Article 2 § 1 of Law No. 1761-I of 18 October 1991 "On Rehabilitation of Victims of Political Persecution." The law defines 25 October (7 November) 1917 as the day of the beginning of the political persecution yet does not specify a term for the end of the persecution. 8 April 1989 can be considered the formal end date, as this was when the Decree of the Presidium of the Supreme Soviet of the USSR "On Amendments and Additions to the Law of the USSR 'On Criminal Responsibility for State Crimes' and Some Other Legislative Acts of the USSR" abolished criminal responsibility for anti-Soviet agitation and propaganda (Article 70 of the RSFSR Criminal Code, whose content was significantly changed) and for distribution of knowingly false statements denigrating the Soviet state and social system (Article 190.1 of the RSFSR Criminal Code that was excluded from the Criminal Code).

367 Law of the Russian Federation of 18 October 1991, No. 1761-I "On Rehabilitation of Victims of Political Persecution" // Bulletin of the RSFSR Congress of People's Deputies and the RSFSR Supreme Soviet. 1991. № 44. Art. 1428.

368 An (incomplete) example of the description of basic Soviet repressive practices can be found in: *Petrov N.V.* Crimes of the Soviet Regime: Legal Assessment and Punishment of the Guilty Ones // Crimes of the Communist Regimes: An Assessment by Historians and Legal Experts: Proceedings of an International Conference Held in Prague, 24–26 February 2010. Prague: Institute for the Study of Totalitarian Regimes, 2011. pp. 87–92.

The fact that political persecution was carried out on the orders of the Soviet government appears to rule out the possibility that it could contradict Soviet laws and that there could be any criminal liability for the repressive measures. In reality, however, its relationship to the law as written varied according to different periods of Communist rule and depending on the nature of the repressive measure. According to the criterion of compliance with Soviet law, political persecution can be conditionally divided into:

1. Legalised persecution;
2. Persecution resulting from the implementation of agency-level instructions that contradicted the law;
3. Persecution deprived of any regulatory basis, i.e. of an absolutely arbitrary nature.

This classification does not take into account the issue of the justifiability of the repressive measures.

Examples of persecution falling under the first category include criminal court verdicts issued by the courts for anti-Soviet agitation and propaganda based on Article 70 of the 1960 Criminal Code of the Russian Soviet Federative Socialist Republic[369] (hereafter, RSFSR Criminal Code).[370] The second category includes repressive measures carried out by illegal extrajudicial bodies (e.g. NKVD *troikas* in the times of the Great Terror). The third category includes murders committed by state security officers devoid of any legal cover.

The third category clearly implies a direct violation of Soviet law. Since this kind of political persecution was carried out by government officials, their actions should generally qualify as abuse of authority[371] (in the example above – abuse of authority[372] combined with premeditated murder). However, with regards to their criminal prosecution, perpetrators of clandestine acts of political violence could argue that they had no lawful opportunity to evade orders without risking being held themselves persecuted.

As far as the second category is concerned, the persecution could be considered unlawful because the agency-level acts that guided the activities of the extrajudicial bodies contradicted the Soviet constitution and its laws. However, even if that was the case, perpetrators of persecution could argue that the relevant agency-level acts were not considered illegitimate at the time of their application and were unconditionally binding on them, meaning that they would face liability if they failed to comply.

369 The RSFSR was one of the constituent republics of the Soviet Union. On 25 December 1991 the RSFSR was officially renamed into the Russian Federation (Russia). For description of the events of 1991, both "Russia" and the "RSFSR" are used hereafter.

370 See: RSFSR Criminal Code of 27 October 1960 (as amended until 10 April 1989) // Ведомости Верховного Совета РСФСР. 1960. № 40. Art. 591.

371 See in particular Article 110 ("Abuse of power or official authority"), Article 193.17 ("Abuse, excess, or omission of power, as well as negligence of individuals in command of the RKKA, RKM and UGB NKVD") of the 1926 RSFSR Criminal Code, Article 171 ("Abuse of power or official authority"), Article 179 ("Compulsion to testify") of the 1960 RSFSR Criminal Code.

372 See Article 102 ("Aggravated premeditated murder") and Article 103 ("Premeditated murder") of the 1960 RSFSR Criminal Code and similar Articles 136 and 137 in the 1926 RSFSR Criminal Code.

These arguments, however, do not absolve of responsibility those Soviet leaders who gave unlawful orders or adopted regulations that justified unlawful persecution. Thus, the leaders could be found guilty of the crimes regardless of whether the actual perpetrators would be held liable.

If we are talking about political persecution as directly stipulated by the law (the first category), one necessary element of crime that is missing is the unlawful nature of an act. In the above example, lawful criminal prosecution and conviction for anti-Soviet agitation and propaganda (Article 70 of the 1960 RSFSR Criminal Code) could not qualify as a crime committed by the investigator, prosecutor, or judge under Soviet law.

In addition to abuse of power, Soviet law also established criminal liability for officials who knowingly committing unjustified acts of a repressive nature, including abuse of power; criminal prosecution of a knowingly innocent person; issuing a knowingly unfair verdict; knowingly illegally arresting, detaining, or coercing testimony from someone (Articles 170, 176, 177-178 of the 1960 RSFSR Criminal Code, Articles 112, 114-115, 193-17 of the 1926 RSFSR Criminal Code).[373]

Many episodes of Soviet political persecution may be regarded as crimes against humanity or war crimes under international law.[374] Acts that constitute crimes against humanity are regarded as such irrespective of whether they qualify as violations of domestic law.

2. Criminal prosecution of perpetrators of political persecution

Some organisers of political persecution were held criminally liable while Stalin was still alive. In March 1938, Genrikh Yagoda, former People's Commissar for Internal Affairs of the USSR and one of the organisers of the Gulag, was convicted at the third Moscow trial and executed a few days later for his involvement in the "conspiracy of the Bloc of Rightists and Trotskyites." His successor, Nikolai Yezhov – who headed the People's Commissariat for Internal Affairs (NKVD) during the Great Terror – was executed two years later. Other high-ranking and low-ranking officers were also held liable during Stalin's purges of punitive agencies. Following Stalin's death, the struggle for power led to the conviction of former Interior Minister Lavrenti Beria and a number of his subordinates belonging to the state security agencies. A total of 62 former Chekists were sentenced as part of the policy of "denunciation of Stalin's cult of personality," associated with the name of Nikita Khrushchev.[375]

It is difficult to consider those criminal trials as acts of fair retribution. With the exception of Yagoda, all the other purged Chekists were tried in closed sessions. As a rule, they were tried for various counter-revolutionary crimes, rather than for murder or abuse of authority.

The second attempt at carrying out criminal investigations of political persecution was made during the period of *perestroika*. Starting in 1988, investigative agencies began to initiate criminal cases related to political persecution carried out during the Stalin

373 See the 1926 RSFSR Criminal Code (as on 1 March 1957) // Собрание узаконений и распоряжений Рабочего и Крестьянского правительства РСФСР. 1926. № 80. Article 600.

374 In his dissenting opinion to the Decision of the Constitutional Court of the Russian Federation of 30 November 1992, No. 9-PHIS, Constitutional Court judge A.L. Kononov attempted to qualify the crimes in this manner.

375 See *Petrov N.V.* Op. cit. p. 91.

era, primarily following the discovery of the graves of the victims.[376] Over 45 years had passed since mass extrajudicial executions had been carried out by the time the criminal cases were initiated. Key organisers of the Great Purge had already died (Vyacheslav Molotov and Georgy Malenkov died in 1986 and 1988, respectively, having outlived all other members of the Politburo of the Central Committee of the VKP(b)-CPSU of the Stalinist era; Lazar Kaganovich lived until the summer of 1991). Nevertheless, some lower-ranking participants in the Purge were still alive at that time and were interrogated as witnesses,[377] yet no charges against anyone were issued and no criminal cases referred to courts were ever reported. As a rule, investigative agencies dropped criminal cases due to the death of the perpetrators. For example, the investigation into the shooting of a workers' demonstration in Novocherkassk was closed in 1994,[378] and the notorious criminal case into the execution of Polish prisoners of war at Katyn – in 2004. Subsequently, the practice of initiating criminal cases for mass executions following the discovery of the graves of the victims was also abandoned.[379]

Thus, the provision on the criminal prosecution of those who had participated in political persecution during the Soviet era, included in the Rehabilitation Law (Article 18 § 2), remained a mere declaration of good intentions.

In post-Soviet Russia, the judicial review of political persecution was limited to the re-examination of the illegal actions of State security officers who had been found guilty back in the 1930s-1950s. After the adoption of the Rehabilitation Law, the relatives of repressed officers could demand that their sentences be reviewed on an equal basis with 'regular' victims of political persecution. Rehabilitation was denied to heads of the state security agencies such as Genrikh Yagoda, Nikolai Yezhov, Viktor Abakumov, and Lavrenty Beria, as well as a number of other high-ranking officials of the same agencies. For such refusals, the Rehabilitation Law envisaged a judicial review of the validity of the decisions. The decision denying rehabilitation of these persons was found legitimate. However, their acts were re-assessed as abuse of power (or exceeding authority), which had grave consequences, and which had been committed under particularly aggravating circumstances falling under Article 193 § 17b of the 1926 RSFSR Criminal Code. In particular, the Supreme Court of the Russian Federation posthumously found Abakumov and his subordinate officers from the Ministry of State Security (MGB) guilty of "systematic and prolonged abuse of power, manifested in the falsification of criminal cases and the use of measures of

376 See *Тарнавский Г.С., Соболев В.В., Горелик Е.Г.* Куропаты: Следствие продолжается. М.: Юридическая литература, 1990; *Филичкин В.* Репрессии на Южном Урале: Правда или вымысел? // Полит74. 20 January 2014, at: https://www.polit74.ru/comments/detail.php?ID=39787 (accessed: 24.06.2020); Мемориальное кладбище «Пивовариха» // Виртуальный музей ГУЛАГа, at http://www.gulagmuseum.org/showObject.do?object=126753&language=1 (accessed: 24.06.2020); Место расстрелов и захоронений в городе Курске (урочище Солянка) // Некрополь террора и ГУЛАГа. Картотека захоронений и памятных мест, at http://www.mapofmemory.org/46-01 (accessed 24.06.2020).

377 The best known is the interrogation in the Katyn case of the former head of the NKVD Department of the Kalinin Oblast, D.S. Tokarev, see *Яжборовская И., Яблоков А., Парсаданова В.* Катынский синдром в советско-польских и российско-польских отношениях / 2-е изд. М.: РОССПЭН; Фонд первого Президента России Б.Н. Ельцина, 2009. pp. 369–373. On another example see: *Черкасов А.* Крот истории // Полит.ру. 3 September 2004, at: http://polit.ru/article/2004/09/03/khaibakh/ (accessed: 24.06.2020).

378 See *Туровский Д.* Вторая Катынь. Как советские власти расстреляли мирную демонстрацию в Новочеркасске и кто сохранил память об этих событиях // Meduza. 2017. 26 октября, at: https://meduza.io/feature/2017/10/26/vtoraya-katyn (accessed: 24.06.2020).

379 See *Смирнова И.* Расстрел Великих князей: Дело положено под сукно // Свободная Пресса. 2010. 16 февраля, at: http://svpressa.ru/society/article/21258/ (accessed: 24.06.2020); *Рудницкий А.* «Мемориал» получил останки казнённых в новосибирской пересыльной тюрьме НКВД // Тайга.Инфо. 2015. 27 марта, at: http://tayga.info/120423 (accessed: 24.06.2020).

illegal physical coercion during preliminary investigations" that had led to particularly grave consequences, including "prosecution of numerous innocent citizens."[380]

The mechanism of posthumously revisiting the convictions (often death sentences) of purged officers belonging to Soviet punitive agencies was essentially a compromise decision between the need to rehabilitate them due to the lack of merit of the counter-revolutionary charges that had been made against them and the moral impossibility of denying their guilt in the massive abuses of power that took place during the Purge.

Russian officials explained their refusal to prosecute those who had committed political persecution by claiming that there were no legal grounds for such prosecution. For example, relatives of the Polish prisoners of war that had been killed in 1940 filed an application against Russia with the ECtHR, claiming that the investigation into the circumstances of the prisoners' deaths had been inadequate. The Russian government argued that the Katyn case investigation "was conducted in violation of criminal procedural requirements, for political reasons, and as a goodwill gesture towards the Polish authorities," because the statute of limitations for the crime (ten years) had expired, and the NKVD officers involved in the execution had died before the investigation started.[381]

Indeed, under the 1960 RSFSR Criminal Code, the statute of limitations was established at ten years for crimes punishable by more than five years of imprisonment (Article 48 § 1 § 4). Therefore, back in the Soviet era, the state missed the chance to prosecute participants in most of the crimes that accompanied political persecution.

Exceptions to the Soviet-era statutory limitation rules only applied to crimes punishable by death. Under Article 48 § 4 of the 1960 RSFSR Criminal Code, decisions to apply the statute of limitations to this kind of crimes were made by a court (a similar provision was included in the Criminal Code of the Russian Federation). From the list of crimes related to political persecution, only aggravated murder falls into this category.[382] For example, can a sentence issued by an illegal judicial body – the NKVD *troika* – qualify as murder? According to the Soviet-era rules for the subsumption of crimes in public office, abuses of power, combined with murder, had to be charged cumulatively.[383] This principle was used to assess the extrajudicial killings carried out in the village of Khaibakh by Soviet troops during the 1944 deportation of the Chechen people. In 1990, criminal proceedings were instituted "following the discovery of a mass grave of people with traces of violent death."[384] After examining the scene and interviewing an eyewitness, the prosecutor established sufficient evidence of crimes under Article 136 § 2 and Article 193 § 17b of the 1926 RSFSR Criminal Code, i.e. grave murder and abuse or excess of power, committed by high-ranking officers of the Red Army (or of equivalent state security agencies). Thus, under certain conditions, the statute of limitations does not apply to criminal political persecution that resulted in deprivation of life.

380 See Decision of the Presidium of the Supreme Court of the Russian Federation of 17 December 1997.
381 See ECtHR. *Janowiec and Others v. Russia* [GC]. Applications nos. 55508/07 and 29520/09. Judgement of 21 October 2013. § 109, 111.
382 Aggravated murder was covered by Article 102 of the 1960 RSFSR Criminal Code (i.e. in particular, murder of two or more persons or committed by a group of persons by prior conspiracy) and first-degree murder committed by a soldier was covered by Article 136 § 2 of the 1926 RSFSR Criminal Code.
383 See Resolution of the Plenum of the Supreme Court of the USSR of 30 March 1990, No. 4 "On Judicial Practice in Cases of Abuse of Power or Office, Excess of Power or Office, Negligence and Official Fraud." § 13.
384 See *Черкасов А.* Op. cit.

3. Establishing facts of political persecution

As mentioned above, investigations in post-Soviet Russia of Soviet-era political persecution did not result in any trials. Criminal proceedings that started following the discovery of the mass graves of executed citizens at the turn of the 1980s and 1990s were terminated at the stage of preliminary investigation. Under the Code of criminal procedure in force at the time, if criminal charges were dropped due to the perpetrators' death, investigators had to identify the perpetrators and describe the criminal acts that they had committed. In this way, the state could have officially established the circumstances of political persecution even after the death of the perpetrators. However, neither Soviet nor Russian law stipulated that decisions to dismiss criminal cases had to be published officially. As a result, facts revealed during the investigation of cases of political persecution have never been disclosed and even now give rise to disputes. The decision to terminate investigation of mass murders of Polish officers in the Katyn Forest and the village of Mednoye remains altogether classified.[385]

The Rehabilitation Law does not envisage any separate procedure of establishing the circumstances of political persecution. The rehabilitation process involves a review of the court cases of individuals to be rehabilitated. However, the point of the review is merely to establish the facts of the use of coercion by the state and to determine whether there are grounds for rehabilitation. The review does not cover any other circumstances of political persecution and does not identify the perpetrators of the coercive measures. Nor does it determine the distribution of roles between them, their goals and motives, legal assessment of their acts, etc.

Thus, Russia has not yet carried out any formal investigation of political persecution. The State neither prohibits nor supports research into this matter.[386] Nor do the authorities look for the graves of those executed, leaving this task to "organisations and citizens" (see Article 18.1 of the Rehabilitation Law).

Access to archival documents relating to political persecution is regulated by the Federal Law of 22 October 2004 "On Archival Services in the Russian Federation" and the Law of the Russian Federation of 21 July 1993 "On State Secrets" (hereafter, the State Secrets Law). The main reason for limiting access to archival documents is that they include the personal and family secrets of citizens as well as state secrets. This Law restricts access to archival documents containing information about citizens' personal and family secrets, their private life, as well as information jeopardising their security, for a period of 75 years from the date that the documents were created.

A Presidential Decree of 23 June 1992[387] declassified those legislative acts, decisions by governmental agencies and bodies of the Party, as well as agency-level acts which served as a basis for mass persecution and human rights violations. However, the decree was only partially implemented. Thus, KGB files transferred to state archives for storage included the files of those who had been rehabilitated or fell under the Law on Rehabilitation, as well as intelligence data on Soviet citizens who had been taken

385 See Расследование «катынского дела». Справка // РИА Новости. 6 April 2010, at: https://ria.ru/spravka/20100406/218669127.html (accessed: 24.06.2020).

386 Article 18.1 of the Rehabilitation Law mentions support for activities that identify archival documents on the history of political persecution, but the list of activities of socially oriented NGOs includes only "perpetuation of memory."

387 See Presidential Decree No. 658 of 23 June 1992 "On de-classification of legislative and other acts that served as a basis for mass persecution and human rights violations" // Rossiyskaya Gazeta magazine library. 1995. № 1. p. 45.

prisoner or deported to Germany. These materials became accessible to the general public. Other types of documents relating to persecution carried out by state security agencies are still kept in the archives of institutions that are the legal successors of the same agencies (in particular, the FSB – the successor of the KGB).[388]

According to Article 13 § 4 of the State Secrets Law, documents containing state secrets can be declassified after a period of thirty years. In 2012, the Constitutional Court ruled[389] that this period also applied to documents classified before the law took effect. Therefore, reservations allowing the extension of this period "in exceptional cases" were used as a basis to prolong the classification of a wide range of documents pertaining to political persecution. Any documents created between 1917 and 1991 and containing intelligence or counterintelligence data, operational intelligence, as well as information about the KGB's unofficial informants or staff involved in special operations, shall now remain classified as state secrets until the year 2044.

4. Reparation for damage caused by political persecution

Reparation is the main focus of the Rehabilitation Law and other related bylaws, envisaging the following measures that can qualify as reparations within the meaning of UN instruments on transitional justice:

- Rehabilitation;
- Recognition of the status of victims and condemnation of political persecution;
- Restoration of citizenship;
- Compensation of material damage;
- Compensation for deprivation of liberty and for compulsory treatment in a psychiatric hospital;
- Provision of housing;
- Social support;
- Return of property lost as a result of persecution, or compensation of its value, or payment of monetary compensation thereof.

It should be noted here that "rehabilitation" as a legal term is understood differently in the Russian and international contexts. In Resolution 60/147 (§ 21) and other UN documents on transitional justice, 'rehabilitation' is understood as a form of redress for the damage caused to victims of gross violations of human rights law that includes "medical and psychological care, as well as legal and social services." Meanwhile, Soviet and Russian law defines rehabilitation as "1) restoration of the good name and reputation of the wrongly accused or defamed person, and 2) restoration to previous rights by annulling the guilty verdict and the decision to apply specific legal sanctions against him/her."[390] In international terms, rehabilitation in the latter meaning refers to 1) satisfaction and 2) restitution, i.e. to two other forms of reparation.

388 See *Петров Н.* Десятилетие архивных реформ в России // Индекс / Досье на цензуру. 2001. № 14, at: http://index.org.ru/journal/14/petrov1401.html (accessed: 24.06.2020.).

389 See Ruling of the Constitutional Court of the Russian Federation of 22 November 2012 № 2226-O "On Refusal to Accept for Consideration the Complaint of Nikita Vasilyevich Petrov Concerning Violation of His Constitutional Rights in parts one and four of Article 13 of the Law of the Russian Federation 'On State Secrets.'"

390 *Кононов А.Л.* К истории принятия Закона «О реабилитации жертв политических репрессий» // Реабилитация и память. Отношение к жертвам советских политических репрессий в странах бывшего СССР / сост. Я.З. Рачинский. М.: «Мемориал» — «Звенья», 2016. p. 5.

4.1. Individuals eligible for reparation

Reparations under the Rehabilitation Law apply to two categories of persons:

- Direct victims of political persecution, against whom coercive measures have been used directly, as well as children deprived of parental care, whose parent(s) were repressed on political grounds; also, children who stayed with their parents (or their proxies) in places of detention, in exile or deportation, or in special settlements;

- Indirect victims of political persecution, i.e. children, spouses, parents of those who were killed or died in prison and were rehabilitated posthumously; in other words, individuals who were not personally subjected to coercive measures, yet lost a close relative as a result of the persecution.

Under the Russian Rehabilitation Law, restoration of rights only applies to citizens who were persecuted on the territory of the Russian Soviet Federative Socialist Republic. The law also applies to foreign nationals tried by Soviet courts and by extrajudicial bodies created by the Soviet authorities abroad on charges of having acted against the citizens and interests of the Soviet Union.

Political motivation is the main criterion for recognising the persecution as political. Several typical forms of political persecution are listed in the Rehabilitation Law (see Article 3). In addition, five types of criminal acts are recognised as political persecution regardless of the actual criminal charges specified in the case (1) anti-Soviet agitation and propaganda, 2) dissemination of false fabrications discrediting the Soviet state or social order, 3) violation of laws regulating the separation of the church from the state and from the school, 4) trespasses of privacy and the rights of citizens under the guise of religious ceremonies and 5) escape from places of imprisonment). Special decrees were adopted in relation to several specific cases of mass persecution which had been committed by the Soviet authorities, such as the suppression of the peasants' revolts of 1918-1922[391] and the Kronstadt Uprising of 1921[392]; deportations of peoples during World War II[393]; persecution of repatriated Soviet prisoners of war[394]; persecution of clergy and believers[395]; and the shooting of a demonstration in Novocherkassk in 1962.[396] The decrees recognised the acts of violence as unlawful and indicated that the victims had to be rehabilitated. The Rehabilitation Law does not apply to measures of coercive collectivisation that did not involve restrictions on freedom (in particular, confiscation of real estate, livestock, and inventory). Therefore, there is still no consistent practice for rehabilitating victims of dekulakisation.[397]

391 See Russian Presidential Decree No. 931 of 18 June 1996 "On Peasant Revolts of 1918-1922."
392 See Russian Presidential Decree No. 65 of 10 January 1994 "On the events in the city of Kronstadt in the spring of 1921."
393 See RSFSR Law No. 1107-I of 26 April 1991 "On the Rehabilitation of the Persecuted Peoples."
394 See Russian Presidential Decree No. 63 of 24 January 1995 "On the restoration of the legal rights of Russian citizens who are former Soviet prisoners of war and civilians repatriated during the Great Patriotic War and in the post-war period."
395 See Russian Presidential Decree No. 378 of 14 March 1996 "On measures to rehabilitate clergy and believers who were victims of unjustified persecution."
396 See Decree № 2822-I of the Supreme Soviet of the Russian Federation of 22 May 1992, "On the events in the city of Novocherkassk in June 1962."
397 See: *Петров А.Г.* О некоторых проблемах органов прокуратуры по исполнению Закона Российской Федерации «О реабилитации жертв политических репрессий» // История государства и права. 2007. №3. pp. 10–15.

The criterion of political motivation for persecution leaves considerable discretion to prosecutors and law enforcement agencies as to whom to recognise or deny recognition as victims or survivors of political persecution. In practice, the first to be rehabilitated were those individuals whose cases fell under the types of persecution listed in Articles 3 and 5 of the Rehabilitation Law.[398]

In addition, the Rehabilitation Law lists crimes that are not eligible for rehabilitation (see Article 4), regardless of whether the repressive measure has been applied by court or by an extra-judicial body.

These exceptions include "organisation of gangs for committing murder, robbery and other violent acts"; personal involvement in the commission of these crimes as part of these gangs; and any organised armed resistance to the Communist regime.

The definition of political persecution in the Rehabilitation Law is open-ended and includes "other deprivation or restriction of the rights and freedoms of persons recognised as socially dangerous to the state or the political system on the grounds of their class, social, national, religious or other factors." In reality, however, there has been no widespread practice of rehabilitating citizens deprived of their rights for political reasons without deprivation of life or personal freedom and unrelated to deportation.

4.2. Rehabilitation

Rehabilitation implies the formal recognition of a coercive measure carried out against an individual as having been politically motivated, illegal, or unjustified. Decisions on rehabilitation are made by the prosecutor's office or by law-enforcement agencies.

A certificate of rehabilitation is issued to a victim of political persecution as a sign of restoring his or her good name. In addition, the law stipulates that the lists of rehabilitated individuals should be published, indicating their main biographical data and the charges that they have been cleared of. However, these lists are not officially published by the state, but rather by public associations and private individuals.

In total, more than 3.5 million people have been rehabilitated (as of 2015) since the Rehabilitation Law was adopted, and more than 250,000 children of those repressed have been given the status of survivors of political persecution.[399]

4.3. Restitution

The Rehabilitation Law sets out a range of measures to restore the repressed individuals to the situation they were in before the coercive measures were applied against them.

Firstly, the socio-political and civil rights that they lost as a result of the persecution are restored, as are their military and other special ranks, and their state awards are returned to them. Secondly, the rehabilitated persons regain the right to live in the areas and settlements where they had lived before the persecution. However, this measure is no longer relevant following the abolition of most restrictions on freedom of movement and choice of residence that existed in the USSR. Thirdly, according to the Law, Russian citizenship is restored for all residents of the Russian Federation who

398 See "Жертвы политического террора в СССР." Preamble, at: http://lists.memo.ru/ (accessed: 24.06.2020).
399 See Decree of the Government of the Russian Federation of 15 August 2015 "On Approval of the Concept of State Policy on Commemoration of Victims of Political Persecution."

have been deprived of their citizenship against their will.[400] In practice, this provision could only benefit those who resided on the territory of the RSFSR "immediately before leaving the former USSR for permanent residence abroad."[401] When applying for a Russian passport, they had to present "confirmation of their permanent residence in the territory of Russia immediately before leaving the former USSR, a certified copy of their birth certificate in the territory of Russia." These terms for restoration of Russian citizenship apparently were not intended for those who lost their citizenship after emigrating from Russia during the civil war of 1917-1922, or for those Soviet displaced persons who refused to repatriate for political reasons after the Second World War. In particular, the Decree of the All-Russian Central Executive Committee (hereafter: VTsIK) and the Council of People's Commissars of 15 December 1921 "On deprivation of Citizenship for Certain Categories of Persons Staying Abroad" was not annulled.[402] Only a few representatives of those political migration waves were granted citizenship by presidential decrees.[403]

Fourth, the property that was confiscated, seized, or otherwise removed from their possession in connection with the persecution is returned to rehabilitated persons. In the event of a rehabilitated person's death, his/her property shall be returned, its cost reimbursed, or monetary compensation paid to his/her children, spouse, or parents. At the same time, the following assets shall not be refunded:

- Property nationalised (municipalised) or subject to nationalisation (municipalisation) under the legislation in force at the time it was disowned by the rehabilitated person. Thus, as a rule, real estate in urban areas is not returned.[404] Non-municipalised dwellings may be returned only when a number of additional conditions are satisfied;
- Property destroyed during the Civil War and the Great Patriotic War, also as a result of natural disasters;
- Land, fruit and berry plantations, and unharvested crops;
- Property withdrawn from public circulation (in particular, stored in museum collections).

In our opinion, the nationalisation of real estate, enterprises, bank deposits, and cultural property also falls under the category of political persecution, as defined in the Rehabilitation Law. However, the Law implicitly confirmed the outcomes of these coercive measures by excluding the objects named above from restitution.

In practice, one may claim the return of movable property not included in museum collections or otherwise restricted in circulation, as well as buildings in rural areas (for example, those seized during dekulakisation or lost as a result of deportations).[405]

400 Some individuals who were deprived of their Soviet citizenship for political reasons in the 1960s-80s had their citizenship restored even before the Rehabilitation Law was passed. See Decree No. 568 of the President of the USSR of 15 August 1990 "On Cancellation of the Decrees of the Presidium of the Supreme Soviet of the USSR on Deprivation of Citizenship of Some Persons Residing outside the USSR."

401 See "Regulations on the Procedure for Consideration of Issues Relating to Citizenship of the Russian Federation", approved by Presidential Decree № 386 of 10 March 1992 (as amended on 17 May 2000; no longer in force)

402 See Decree of the All-Russian Central Executive Committee and Council of People's Commissars RSFSR of 15 December 1921 "On Deprivation of the Right to Citizenship of Certain Categories of Persons Abroad."

403 See Russian Presidential Decree No. 499 of 6 April 2004 "On Admission to Citizenship of the Russian Federation"; Presidential Decree No. 469 of 25 April 2005 "On Admission to Citizenship of the Russian Federation."

404 See the Decree of VTsIK of 20 August 1918 "On Abolishing the Right to Private Real Estate in Cities."

405 See, for example, Decision of the Novolak District Court of the Republic of Dagestan of 20 December 2010 on civil case No. 2-187/2010; Decision of the Yadrinsky District Court of the Chuvash Republic of 18 September 2012 on civil case No. 2-279/2012; Decision of the Krasnogvardeisky District Court of the Belgorod Region of 6 February 2013 on civil case No. 2-37/2013.

If the lost property cannot be returned, its cost shall be reimbursed or compensation shall be paid (if the cost cannot be evaluated). The amounts of reimbursement and compensation are limited to 4,000 rubles for all property excluding residential houses, and 10,000 rubles for all property including residential houses.

4.4. Compensations and benefits

The Rehabilitation Law provides for one-off monetary compensation for deprivation of liberty, as well as measures of social support (see Articles 15-16).

The amount of compensation is calculated depending on the period of imprisonment. In the initial version of the Law, the compensation was set at 180 rubles per month of imprisonment, but could not exceed 25,000 rubles in total. Later the calculation method was changed so that it would be based on the minimum monthly wage, and the compensation was calculated as three quarters of the wage, but no more than one hundred times the minimum in total. Currently, the law again specifies fixed but smaller amounts: 75 rubles per month of imprisonment or stay in psychiatric institutions, but no more than 10,000 rubles in total.

Initially, the Rehabilitation Law (see Article 16) specified non-monetary benefits for rehabilitated individuals that included priority right to housing for those who lost their homes as a result of the persecution, as well as various privileges for the disabled and pensioners who had been previously imprisoned, exiled or deported for political reasons.

Since 2005, the provision of housing and social support for rehabilitated individuals has been the responsibility of the regions of the Russian Federation that independently determine the amount of support and the relevant procedures.

In December 2019, the Constitutional Court recognised Article 13 of the Rehabilitation Law as unconstitutional because of the ambiguous procedure for providing housing to returning victims of political persecution.[406]

As stated in its preamble, one of the goals of the Rehabilitation Law was to "ensure a currently affordable level of compensation for material damage" inflicted by political persecution. Amid the 1991 economic breakdown, the reference to "affordable" level of compensation seemed appropriate, but it remained unchanged during years of rapid economic growth of the 2000s, when the state could afford significantly higher levels of compensations for material losses than had been specified in the Law. Twenty-eight years after the adoption of the Rehabilitation Law, the Constitutional Court indicated the obligation of the state to do its best to ensure "the fullest possible compensation for such harm on the basis of the maximal possible use of available resources and financial and economic capabilities."[407]

406 See Decision № 39-P of the Constitutional Court of the Russian Federation of 10 December 2019 "On verification of the constitutionality of the provisions of Article 13 of the Russian Federation Law 'On Rehabilitation of Victims of Political Persecution,' Article 7 § 3 and § 5, Article 8 § 1.1, and § 2 of the Moscow City Law 'On ensuring the right of Moscow residents to residential premises' in connection with complaints from citizens A.L. Meissner, E.S. Mikhailova and E.B. Shasheva."

407 Ibid.

4.5. Satisfaction

As stated above, by its content rehabilitation is, *inter alia*, an individual measure of moral satisfaction for the victims of political persecution. This involves official recognition of the fact that the persecution was unjustified and that the repressed individual was innocent. This recognition is documented by the issuing of a certificate of rehabilitation, and this is as much as the State does on this matter. Contrary to the provision of Article 18 § 1 of the Rehabilitation Law, lists of rehabilitated individuals are not officially published, and those persecuted are only commemorated by public associations and private individuals.

Collective satisfaction is provided to survivors by officially recognising and condemning the political persecution in Soviet Russia in the preamble to the Rehabilitation Law: "During the years of Soviet power, millions of people fell victims of the totalitarian state's arbitrariness and were subjected to persecution because of their political and religious convictions, social status, ethnic origin, or other reasons. Condemning the many years of terror and mass persecution of our own people as incompatible with the idea of law and justice, the Federal Assembly of the Russian Federation expresses its deep sympathy to the victims of unjustified persecution, their family members and friends, and commits to continue unwavering efforts to ensure real guarantees of justice and human rights."

In addition to general recognition and condemnation of political persecution in the Law, the Russian authorities officially condemned individual cases or types of persecution. Some of these documents are listed above and include the 2 April 2008 statement of the State Duma "In Memory of Victims of the Famine of the 1930s in the USSR" that identifies the causes of the tragedy, recognises the connection between the famine and forced collectivisation, and condemns "the regime that disregarded human life for the sake of achieving economic and political goals." Also noteworthy is the 26 November 2010 statement of the State Duma "On the Katyn Tragedy and Its Victims" that referred to the execution of Polish prisoners of war as a "crime" committed "On the direct orders of Stalin and other Soviet leaders."

From a certain perspective, the hearing of the case of the Communist Party of the Soviet Union (CPSU) by the Constitutional Court in 1992 became an act of collective satisfaction. During the trial, the President of the Russian Federation presented documents and other evidence of crimes committed by the Communist Party, which could be seen as his acknowledgement of the party's crimes. However, the Constitutional Court's ruling itself refers to them just once,[408] and the materials of the trial were officially published only on one occasion in the mid-1990s.[409]

Measures of collective satisfaction should also include setting up museums and exhibitions dedicated to political persecution, as well as building monuments to commemorate the victims.

408 See Ruling № 9-P of the Constitutional Court of the Russian Federation of 30 November 1992 "On verification of the constitutionality of Presidential Decrees № 79 of 23 August 1991 'On suspension of the Communist Party of the RSFSR,' № 90 of 25 August 1991 'On the property of the CPSU and the Communist Party of the RSFSR' and № 169 of 6 November 1991 'On the activities of the CPSU and the Communist Party of the RSFSR,' and also on the verification of the constitutionality of the CPSU and the Communist Party of the RSFSR."

409 See Proceedings on the Verification of the Constitutionality of the Presidential Decrees concerning the activities of the CPSU and the Communist Party of the RSFSR, and on the Verification of the Constitutionality of the CSPU and the Communist Party of the RSFSR. In 6 volumes. M.: Spark, 1996-1998.

5. Other unlawful practices of the Communist regime

Political persecution is the only category of crimes of the Communist regime that has been consistently, albeit one-sidedly, addressed in post-Soviet Russia. Wide as it is, this category is not exhaustive of all the unlawful yet unpunished practices of the Soviet era.

The crimes of the Soviet system would require a study in their own right. Below we will attempt to show how contemporary Russian law evaluates the Communist regime as a whole, and to identify areas of Soviet systemic crime that in our opinion could be addressed through transitional justice in addition to political persecution.

5.1. The October Revolution and the Communist regime in Russia

The October Revolution and the subsequent dispersal of the Constituent Assembly constituted crimes under the laws of the Russian State, namely, as rebellion against the sovereign power, punishable under Article 100 of the 1903 Penal Code, as amended by the Provisional Government on 4 August 1917.[410] These crimes went unpunished. Obviously, the perpetrators had been long dead by the time the Communist regime fell, so they could not have been held criminally liable even theoretically. The victims of the crimes were the entire people of Russia, deprived of the opportunity to have the Constituent Assembly establish "the form of government and the new fundamental laws of the Russian State."[411] Hence, the damage caused by the Bolshevik upheaval could be remedied by re-establishing Russian statehood on the basis of democratic principles. The adoption of the Russian Constitution at a national referendum on 12 December 1993 can be considered as such a remedy. In our opinion, the referendum actually terminated the discourse over the legal consequences of the October Revolution in the Russian Federation.

The above does not apply to a legal evaluation of the Communist regime as a whole. This evaluation determines answers to at least three questions that remain legally significant even after the restoration of democratic statehood. First, did the retention of power in the country by the Communist party violate the law, and, if so, who would bear what responsibility for it? Second, what was the legal validity of the laws and regulations that formalised the political persecution, repressive economic measures, and other gross violations of human rights committed by the Soviet government? Third, did the Russian people have the right to resist the Soviet regime?

The question of the Communist Party's legal responsibility is inseparable from the attempted coup d'etat that took place in the Soviet Union in August 1991. The failure of the August coup led to a crackdown against the Communist Party, undertaken by the superior state bodies of the USSR and Russia. On 23 August 1991, the President of Russia suspended Russia's Communist Party and instructed the Interior Ministry and the Prosecutor's Office to investigate the Party's unconstitutional activities.[412] Two days later, the Russian authorities nationalised the property and assets of the Soviet

410 See *Цветков В.Ж.* Репрессивное законодательство белых правительств // Вопросы истории. 2007. №4. pp. 16–26.

411 See Act of 3 (16) March 1917 "On the refusal of the Grand Duke Mikhail Alexandrovich to accept the supreme power pending the establishment in the Constituent Assembly of the rule of government and new basic laws of the Russian State."

412 See RSFSR Presidential Decree No. 79 of 23 August 1991 "On Suspending the Activities of the Communist Party of the RSFSR" // Bulletin of the Congress of People's Deputies of the RSFSR and the RSFSR Supreme Soviet. 1991. № 35. Art. 1149.

and Russian Communist Parties within Russia.[413] On 29 August, the USSR Supreme Soviet suspended the Communist Party on the entire territory of the Soviet Union, and instructed the Prosecutor's Office to investigate the CPSU's involvement in the attempted violent overthrow of the constitutional order.[414] Criminal proceedings were instituted against members of the State Committee on the State of Emergency (GKChP) on charges of treason in the form of conspiracy with the intent to seize power (Article 64 of the RSFSR Criminal Code).[415]

The RSFSR Presidential Decree of 6 November 1991[416] extended the political charges against the Communist Party to its activities as a whole that were "clearly anti-people, anti-constitutional in nature, directly related to inciting religious, social and national hatred among the peoples of the country, to an encroachment on the fundamental human rights and freedoms recognized by the entire international community." As a preventive measure against new attempts of "upheaval directed against the people," the Soviet Union's and Russia's Communist Party were banned on the territory of Russia, and their organisational structures dissolved. At the same time, the President of Russia banned persecution for membership in the Communist Party, thus indicating the Russian leadership's refusal to vet functionaries and party members.

The discussion about vetting former party members re-appeared in connection with the CPSU case that challenged the aforementioned presidential decrees in the Constitutional Court and addressed the issue of the Party's constitutionality. The recognition of the Communist Party, its goals and activities as unconstitutional created an opportunity for introducing guarantees related to the non-recurrence of the offences that the Party had committed. Non- recurrence guarantees could include a ban on creating parties and public associations with names identical to those that were once used by the CPSU; a ban on associations that acknowledge their historical, legal, and organisational continuity from, or affiliation with, the Soviet Union's or Russia's Community Party; or that promote Soviet Communist ideology and practices. Anyway, this point of view was expressed in the dissenting opinion of Judge A. L. Kononov,[417] a reporting judge in the case who, by his recent admission,[418] prepared a draft judgment in this case. However, at the last moment, the draft was rejected by the majority of his colleagues, and the proceedings on the constitutionality of the CPSU were terminated due to the Party's actual disintegration. The court confined itself to recognising the constitutionality of key provisions of the presidential decrees that suspended and dissolved the CPSU and Communist Party of the Russian Federation on the grounds that, contrary to the constitutions of the Soviet Union and Russia, the Party's structures performed the legal functions of the state.

413 See RSFSR Presidential Decree No. 90 of 25 August 1991 "On the property of the CPSU and the Communist Party of the RSFSR" // Bulletin of the Congress of People's Deputies of the RSFSR and the RSFSR Supreme Soviet. 1991. № 35. Art. 1164.

414 See Decree № 2371-I of the USSR Supreme Soviet of 29 August 1991 "On the situation in the country due to the coup d'etat"// Bulletin of the Congress of People's Deputies of the USSR and the USSR Supreme Soviet. 1991. № 36. p. 1038.

415 *Шмараева Е.* Не судимы будете. Как проходил и чем закончился процесс по делу ГКЧП // Медиазона. 19 August 2016, at: https://zona.media/article/2016/19/08/1991 (accessed: 24.06.2020.).

416 See RSFSR Presidential Decree No. 169 of 6 November 1991 "On the activities of the Communist Party of the USSR and the Communist Party of the RSFSR" // Bulletin of the Congress of People's Deputies of the RSFSR and the RSFSR Supreme Soviet. 1991. № 45. Art. 1537.

417 Decision No. 9-P of the Constitutional Court of the Russian Federation of 30 November 1992, Dissenting Opinion of Judge A.L. Kononov of the Constitutional Court of the Russian Federation.

418 *Бобринский Н.А.* Анатолий Кононов о деле КПСС, at: https://zakon.ru/blog/2017/05/20/anatolij_kononov_o_dele_kpss (accessed: 24.06.2020).

Describing the political system of the Soviet Union, the Constitutional Court ruled that "for a long time the country was dominated by a regime of unlimited, violent power exercised by a narrow group of Communist functionaries, united in the Politburo of the CPSU Central Committee, headed by the General Secretary of the CPSU Central Committee." However, the expressive wording of the ruling did not result in any new criminal cases against former Politburo members. This is unsurprising, as prior to February 1990 Soviet law explicitly authorised the CPSU to determine the domestic and foreign policy of the USSR (Article 6 of the 1977 Constitution of the RSFSR), which allowed the party structures to legally govern the state.

The assessment of the Communist Party's power as usurpative and undemocratic could have been the basis for recognising Soviet laws as inherently null and void. The annulment of Soviet laws would be practical only insofar as the laws formalised those repressive acts of the Communist regime, whose consequences could be eliminated after the regime fell. Condemnation of the Communist Party's rule could also be used to justify re-consideration of repressive measures against participants of armed resistance to the Communist regime, be they the White movement or peasants' uprisings against collectivisation and de-kulakisation. Their rehabilitation would amount to a recognition of their right to revolt against the Soviet regime.

However, Russian law does not give an answer to the questions related to the usurpative nature of the Communist rule.[419]

The idea of retroactively annulling Soviet laws, as contradicting the Russian Constitution of 1993, has never been implemented in practice. In particular, the Constitutional Court repeatedly refused to accept applications complaining about the unconstitutionality of the VTsIK Decree of 20 August 1918 "On the Abolition of the Right of Private Ownership of Real Estate in Cities," stating that it had no jurisdiction over the matter. Applicants claimed that the Decree contradicted Article 35 of the Constitution of the Russian Federation that guaranteed the right to private property. In response, the Court pointed out that it was the legislator's prerogative to restore the rights of private owners to their nationalised property.[420]

The right to resist Soviet rule also was not recognised. A number of prominent repressed members of the anti-Bolshevik resistance were denied rehabilitation,[421] and consequently, the only methods of resisting Soviet rule legalized *ex post facto* were "anti-Soviet agitation" and escape from places of imprisonment.[422]

419 On the anti-legal and usurpative essence of the Communist regime in the USSR in connection with the Russia's responsibility for its crimes, see also Judge K.V. Aranovsky's opinion to the Decision No. 39-P of the Constitutional Court of the Russian Federation of 10 December 2019.

420 See Rulings of the Constitutional Court of the Russian Federation of 19 May 1998, No. 68-O, 18 June 2004, No. 261-O, 24 March 2005, No. 99-O.

421 For example, Supreme Ruler of Russia Admiral A.V. Kolchak, see Ruling No. 3-H of the Military Court of the Trans-Baikal Military District of 26 January 1999; Chairman of the Council of Ministers of the Russian Government V.N. Pepelyayev, see Как и почему пытаются реабилитировать белого адмирала Колчака // РИА Новости. 2017. 27 января, at: https://ria.ru/society/20170127/1486615462.html (accessed: 24.06.2020); Minister of Finance of the Russian Government I.A. Mikhailov, see Decision No. 043/46 of the Military Collegium of the Supreme Court of the Russian Federation of 26 March 1998.

422 See Articles 5a and 5e of the Rehabilitation Law. It should be noted that some acts of armed resistance against the Soviet power were in fact recognized as lawful by Presidential Decrees, such as Presidential Decree No. 65 of 10 January 1994, "On the Events at Kronstadt in the Spring of 1921"; Presidential Decree No. 931 of 18 June 1996 "On Peasant Revolts of 1918-1922".

5.2. Crimes committed in the context of armed conflicts

There is no systematic analysis of crimes committed by the Soviet state leadership and servicemen in armed conflicts. The elements of aggression were evident in the many armed conflicts in which the Soviet Union was involved, including the war against Poland in September 1939; the Soviet-Finnish war of 1939-1940; the annexation of the Baltic States in 1940; and the suppression of the Hungarian revolution of 1956 and the Prague Spring in Czechoslovakia in 1968. The 1979-1989 war in Afghanistan can also be seen as an aggression of the USSR.

Some acts that amounted to war crimes under international law were apparently investigated in the Soviet military justice system, and the perpetrators allegedly faced criminal charges. In particular, this was the practice during the Soviet military operation in Afghanistan.[423] In 1989, servicemen of the Soviet Armed Forces who had committed crimes in Afghanistan were exempted from criminal liability, which prevented their further prosecution.[424]

The Katyn case, already mentioned in connection with political persecution, is the only known case of Russia investigating Soviet-era war crimes. In his ruling of 13 July 1994, dismissing the criminal case, Anatoly Yablokov, Senior Military Prosecutor of the Chief Military Prosecutor's Office of the Russian Federation, found Stalin and members of the Politburo of the Central Committee of the VKP(b) Vyacheslav Molotov, Kliment Voroshilov, Mikhail Kalinin, Lazar Kaganovich, Anastas Mikoyan and Lavrenty Beria, as well as the leaders of the NKVD/NKGB/MGB of the USSR and those who carried out on-site shootings, guilty of crimes set forth in points "a," "b," and "c" of Article 6 (crimes against peace and humanity, and war crimes) of the Nuremberg Charter of the International Military Tribunal, as well as of genocide of Polish citizens.[425] However, that ruling was reversed by Yablokov's superior, and subsequently "the actions of a number of specific high-ranking officials of the USSR [were] subsumed under Article 193-17 of the RSFSR Criminal Code (1926)."[426] As follows from the statement of Russia's representative at the ECtHR, the Russian Government did not see any grounds for assessing the "Katyn events" as war crimes or crimes against humanity according to international law at the time, in 1940.[427] The ECtHR confirmed that Russia had no obligation to investigate the murders of Polish prisoners of war under the Convention for the Protection of Human Rights and Fundamental Freedoms, because the crimes had been committed ten years before the Convention was opened for signature.

Russian legislation does not provide for any special measures to compensate victims of violations of international humanitarian law in armed conflicts involving the USSR. The 2010 statement of the State Duma "On the Katyn Tragedy and its Victims"[428] is perhaps the only act of moral satisfaction for victims of war crimes as it recognises the responsibility of "Stalin and the other Soviet leaders" for the shootings and expresses "deep sympathy with all the victims of unjustified persecution, their families and

423 See *Григорьев О.В.* Деятельность военных трибуналов в период ввода советских войск в Республику Афганистан // Общество и право. 2013. № 3 (45). pp. 42–45.

424 See Decree of the Supreme Soviet of the USSR of 28 November 1989, No. 842-1 "On Amnesty for Former Servicemen of the Contingent of Soviet Forces in Afghanistan."

425 *Яжборовская И.С., Яблоков А.Ю., Парсаданова В.С.* Op. cit., p. 416.

426 See Main Military Prosecutor's Office's letter to the Chair of the Board of the Memorial Society of 24 March 2005, № 5y-6818-90.

427 ECtHR. *Janowiec and Others v. Russia* [GC]. Applications nos. 55508/07 and 29520/09. Judgment of 21 October 2013. § 109, 111.

428 Adopted by the Decree of the State Duma of the Federal Assembly of the Russian Federation on 26 November 2010 № 4504-5 GD.

friends." It is noteworthy that a statement made a year earlier by the upper house of parliament "in connection with the 30th anniversary of the deployment of a limited contingent of Soviet troops to Afghanistan"[429] makes no reference to victims of the war in Afghanistan and only speaks of "irreparable losses among Soviet and Afghan citizens."

5.3. Economic persecution

As mentioned above, the content and the enforcement practice of the Rehabilitation Law make it impossible to classify as political persecution the measures of economic coercion systematically used by the Soviet regime in different periods of its history.[430] These include, chronologically, nationalisation of land, enterprises, bank deposits, and real estate in cities; punitive taxation; collectivisation; forced unpaid or underpaid labour in collective and state farms; and other coercive measures. These initiatives of the Soviet government can be collectively referred to as economic persecution – economic in content, while the motive behind them can also be considered political (first and foremost, suppression of classes hostile to the dictatorship of the proletariat).

There are no special mechanisms of compensation for the damage caused by economic persecution in Russia. On the contrary, Russian legislation has gradually and explicitly renounced to return expropriated real estate to the original owners or to provide compensation for its value. As noted above, the 1991 Russian Rehabilitation Law contained provisions concerning the return of property dispossessed only in connection with political persecution, and it specifically provided for the seizure of land and other property nationalised (municipalised) under Soviet legislation. The Russian Land Code adopted in 2001 finally renounced the restitution of rights to land (Article 25 § 3).

The privatisation of agricultural land that started in 1991 can be considered as a partial measure of compensation for the damage caused by land nationalisation and collectivisation. The right to a land share (that theoretically could be allocated in kind) was granted to members of collective and state farms, including heirs of those peasants whose land had been nationalized in 1917–1918 and (or) had been subsequently seized in the course of collectivisation.[431]

Note that despite the legislative bans on restitution of rights to real estate, the property could still be restored insofar as previously nationalised lands and buildings remain in state or municipal ownership.

5.4. Politically motivated surveillance

Collection of intelligence on individuals whom the Communist leadership considered politically unreliable can be regarded as a type of political persecution, since it led to arbitrary intrusion into their privacy. In practice, however, the Rehabilitation Law does not apply to those whom the state security agencies "merely" placed under surveillance. The main remedy for politically motivated interference in one's private life is the provision of access to the intelligence that was collected. In addition to protecting the rights of the victims that subject to surveillance, disclosure of these

429 Adopted by the Decree of the State Duma of the Federal Assembly of the Russian Federation on 25 December 2009, № 3067-5 GD.

430 In 2009, the Presidential Commission on Rehabilitation of Victims of Political Persecution identified this gap. See unofficial publication of proposals for improving the rehabilitation law at http://arudnitsky.livejournal.com/50732.html (accessed: 24.06.2020).

431 *Кирчик О.И.* Земельная реформа: 1990–2002 // Отечественные записки. 2004. № 1 (16). pp. 91–95.

archival materials would help restore the good name of those suspected (potentially without foundation) of acting as informants of the Soviet political police.

A public debate regarding access to the KGB's archives and lustration began immediately after the defeat of the August 1991 coup. Russian President Boris Yeltsin, who emerged victorious from the political crisis, attempted to eliminate the two main pillars of the Soviet Communist regime: the Party and the security services. To this end, Vadim Bakatin, a person not affiliated with the state security agencies, was appointed as the new head of the KGB. In addition, several parliamentary and departmental commissions were established to investigate various aspects of the KGB's activities and to check them for constitutionality,[432] and a decision was made to confiscate the KGB's archives.[433] Under those circumstances, the idea of disclosing the names of KGB's secret informants became broadly debated, but was rejected by Bakatin, despite him assuming the role of "liquidator" of the state security apparatus. A week after the August coup d'etat had failed, Bakatin stated that "it is not the people who are to blame, but the system that cultivated them,"[434] and that calls for opening the archives could further divide society. Individual members of KGB inspection committees decided to take the initiative and in early 1992 published excerpts from reports of the 5th Directorate (ideological counterintelligence) disclosing the names of its informants.[435]

Against the backdrop of those spontaneous revelations, a proposal was made to transfer to the state archives all the personnel files of former KGB staff (with a retention period of 30 years or more), the operational records, and the personnel files of informants. However, these bold proposals did not receive the necessary political support. In March 1992, opponents of lustration ensured the adoption of the Russian Law "On Intelligence-Gathering Operations in the Russian Federation."[436] The law enshrined the secrecy of information about the organisation and tactics of intelligence-gathering operations, thereby removing disclosure of KGB's officers and informants from the political agenda.

6. Key gaps in post-soviet transitional justice

The vast majority of perpetrators of even the gravest crimes of the communist regime went unpunished. The state did not conduct any official public investigation into their crimes, entrusting this task to nongovernmental organisations and private individuals. Individual satisfaction (in the form of rehabilitation) for victims of political persecution has been performed relatively effective and consistent. Restitution and compensation have been provided, yet these remedies cannot be considered effective due to vast exclusions (in the former case) and insignificant amounts (in the latter case). Compensation for crimes committed by the communist regime other than political persecution was limited to separate acts of collective satisfaction. Lustration of Soviet security service officers that was intended to protect the country from a recurrence of the crimes was never carried out, and the KGB's archives are still largely closed to the public.

432 See *Кичихин А.* Привело ли расследование августовского путча к трансформациям в работе КГБ? // КГБ: вчера, сегодня, завтра: сб. докладов. М. : Знак-СП, Гендальф, 1993, pp. 49–58.

433 See Russian Presidential Decree № 82 of 24 August 1991 "On Archives of the USSR State Security Committee."

434 *Полещук А.* Вадим Бакатин: Сейчас не время бередить раны // Независимая газета. 1991. 29 августа. №101, p. 2.

435 See *Петров Н.* Op. cit.; *Мальгин А.* Как они работали с нами, at: http://avmalgin.livejournal.com/566420.html (accessed: 24.06.2020); *Мальгин А.* Штрихи к портрету, at: http://avmalgin.livejournal.com/695124.html (accessed: 24.06.2020).

436 See Law of the Russian Federation of 13 March 1992, № 2506-1 "On Intelligence Gathering Operations in the Russian Federation."

Chapter 7. Legal obstacles to overcoming systemic impunity

If the government finds the will to end systemic impunity, it will inevitably face various legal obstacles. We refer here to those legal mechanisms that impede efforts to hold perpetrators accountable, to address the damage done to human rights and freedoms, or otherwise to remedy the consequences of violations. These mechanisms include:

- In the field of criminal justice: statutes of limitations for criminal prosecution; amnesty; prohibition against double jeopardy (*non bis in idem*); gaps in criminal law;

- In the field of civil law: prescriptive periods (including objective ones); the concept of a bona fide acquirer of another's property; the impossibility of reviewing judicial acts that have entered into force, even upon discovery of new facts that may only be established by a court decision in a criminal case once the statute of limitations for criminal prosecutions has already expired; expiry of the term for appealing against judicial acts;

- In the field of administrative law: procedural time limits and a limited number of administrative plaintiffs in cases of annulment of election results.

Of these legal institutions, some are intended to provide legal certainty and protect citizens from arbitrariness, while others are acts of leniency toward criminals. In normally functioning legal systems, these create a reasonable counterbalance to the punitive functions of the state or ensure a balancing of the interests of the parties in civil law disputes. However, in a situation when these institutions actually serve opposite purposes, in our opinion, the interests of overcoming systemic impunity outweigh the automatic application of checks and balances. If legal certainty consists of guaranteed exemption from liability and secures results of wrongful acts, this certainty should at the very least be questioned.

In addition to obstacles in the strict sense (which prevent the goals of justice from being achieved), it is necessary to consider those norms and procedures that do not by and in themselves preclude the possibility of remedying the consequences of systemic impunity, but in the specific context of transitional justice may impose excessive burdens. For example, such norms imply that victims should defend their rights at their own initiative; they recognise that significant time is required for restoring rights; they ignore society's need to know the circumstances of systemic crime; they place the costs of overcoming widespread injustice on bona fide individuals, etc.

These obstacles are referred to in this text as 'legal' ones because they are enshrined in laws that obstruct the goals of transitional justice. This distinguishes them from other possible constraints that would affect transitional justice, such as lack of trained personnel, lack of funding, lack of political authorisation to prosecute people who have a special status, etc.

According to Principle 22 of the UN Set of Principles to Combat Impunity, "States should adopt and enforce safeguards against any abuse of rules such as those pertaining to prescription, amnesty, right to asylum, refusal to extradite, *non bis in idem*, due obedience, official immunities, repentance, the jurisdiction of military courts and the irremovability of judges that fosters or contributes to impunity."

1. Expiry of statutes of limitations and procedural terms because of restrictions on the volition exercised by competent officials

Laws establish time limits for the exercise of various powers and rights that are intended to address the violations of law, such as statutes of limitations, prescriptive periods, and terms of appeals against judicial acts. Their political and legal grounds are different, but they all are aimed at ensuring greater legal certainty and stability of enforcement.

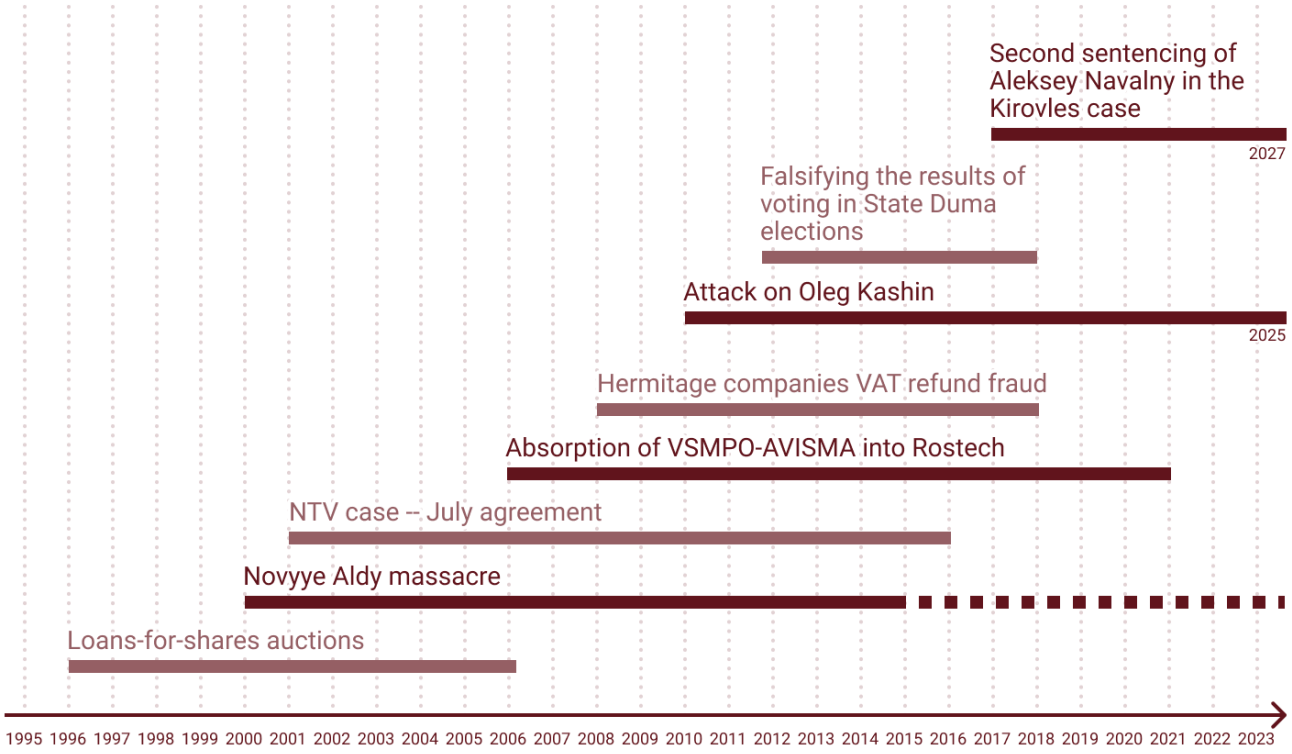
The expiry of prescriptive periods is an insurmountable obstacle to overcoming impunity within the framework of existing legislation. For example, it is impossible to institute criminal proceedings in the case of the fraudulent elections to the State Duma that were held in 2011, because the statute of limitations for criminal prosecution expired in December 2017. The three-year prescriptive period would probably lead to the dismissal of the Russian Federation's claim to recover the losses caused to Gazprom by the actions of its management, which sold its shares in the SOGAZ insurance company for a reduced price in 2004 (see section 2.2.1 of Chapter 3). In the absence of new or newly discovered facts, Sistema cannot appeal to a court in order to annul the court decision on reviewing the privatisation of the Bashneft oil company, since it has missed the deadline for appealing this judicial act (see section 3.4 of Chapter 3).

Statutes of limitations and procedural prescriptions have different purposes, but they all presuppose that those who are affected are able to exercise their time-bound powers or rights before they expire. But what if, in fact, they cannot do so – because of an unlawful order from a superior, violence, or threat? These restrictions on the volition of investigators and prosecutors, members of electoral commissions, or victims of crimes, can be observed in many of the cases mentioned in the previous chapters.

In Russian law, no reservations are made to general rule on the time limits to account for restrictions on volition, with only a few exceptions (which will be discussed below).

A timeline of statutes of limitations

Start and end times are rounded to the nearest year



1.1. Expiry of statutes of limitations for criminal prosecution

The statute of limitations for criminal prosecutions is one of the main obstacles that need to be dealt with to address the question of impunity. According to Article 78 of the Criminal Code of the Russian Federation, statutes of limitations may vary between two and fifteen years, depending on the gravity of the crime. Statutes of limitations do not apply to terrorism, aggravated hostage taking, and crimes against the peace and security of mankind (Article 78 § 5 of the Criminal Code).

The limitation period runs from the moment the crime is committed and applies if statutory limitations expired before the court sentence entered into force. For each category of crimes, the limitation period is calculated separately.

A statute of limitations may not be applied in the following two cases: if the defendant objects to its application; or if the crime is punishable with the death penalty or life imprisonment (in the latter case, it is up to the court to decide whether to apply a statute of limitations).

After the statute of limitations expires, criminal proceedings may not be instigated, and previously instigated criminal proceedings shall be terminated (Article 24 § 1.3 of the Code of Criminal Procedure of the Russian Federation)

Of the crimes that are not subject to statutory limitations (by virtue of law or at the discretion of the court), the following could be part of a transitional justice process:

- Aggravated murder (Article 105 § 2);
- Especially aggravated acts of terrorism (Article 205 § 3);
- Facilitation of terrorist activities (Articles 205.1 § 1,1, 2, 4);
- Establishment of a terrorist association (Article 205.4 § 1);
- Hostage taking resulting in intentional human death (Article 206 § 4);
- Establishment of a criminal association (organisation) by a person holding a senior position in the criminal hierarchy (Article 210 § 4);
- Encroachment on the life of a state official or public figure (Article 277);
- Encroachment on the life of an official administering justice or conducting a preliminary investigation (Article 295);
- Encroachment on the life of a law-enforcement officer (Article 317);
- Planning, preparation, unleashing or waging a war of aggression (Article 353);
- Use of prohibited means and methods of warfare (Article 356);
- Acts of genocide (Article 357);
- Acts of international terrorism (Article 361).

This list does not include any crimes related to corruption, official misconduct, or violation of the political rights. Therefore, limitations on criminal prosecution according to current Russian law means that a large proportion of the unlawful practices described in the previous chapters would automatically go unpunished.

Here are a few examples when the statute of limitations was applied to alleged crimes committed in cases mentioned in the previous chapters.[437]

- The loans-for-shares auctions of 1995: The statute of limitations expired in December 2005 (Chapter 3, section 2.1).
- The punitive operation ('massacre') in the village of Novye Aldy on 5 February 2000: The statute of limitations expired on 5 February 2015, but the court has the right not to apply it. If the crime falls under Article 356 of the Criminal Code, no statute of limitations would apply (Chapter 4, section 2.2.2).
- The NTV case ('July Agreement') of July 2000: The statute of limitations expired in July 2015 (Chapter 2, section 2.2).

437 The statutes of limitations given here are based on potential qualifications of these events as crimes, as indicated by the descriptions offered here. The exact qualification and, accordingly, the statutes of limitations can be only determined by an official investigation.

- The mop-up operation carried out in the villages of Assinovskaya and Sernovodsk in July 2001. For the aggravated murders, the statute of limitations expired in July 2016, but the court has the right not to apply it; for acts of violence other than homicide, the statute of limitations has expired in July 2011. If the crime is subsumed under Article 356 of the Criminal Code, no statute of limitations would apply (Chapter 4, section 2.2.2).

- VSMPO-AVISMA's acquisition by the state corporation Rostekhnologii in February 2006: The statute of limitations expired in February 2021 (Chapter 3, section 2.3).

- The Hermitage Fund companies' VAT refund fraud case of December 2007: The statute of limitations expired in December 2017 (Chapter 3, section 2.8).

- The attempted assassination of Oleg Kashin on 6 November 2010: The statute of limitations expires on 5 November 2025, but the court has the right not to apply it (provided that this crime is qualified as attempted murder) (Chapter 2, section 2.2).

- Election fraud related to the 4 December 2011 elections to the State Duma: The statute of limitations expired in December 2017, and for acts qualifying as fraud, associated abuse, or exceeding authority, it expired in December 2021 (Chapter 2, section 2.3).

- The unlawful conviction of Alexey Navalny in the Kirovles case (imposed during the retrial of this criminal case upon discovery of new facts in February 2017): The statute of limitations expires in February 2027 (Chapter 2, section 2.6).

Statutes of limitations in criminal law are applied for two main reasons. First, it is assumed that the public threat of the specific crime diminishes over time, so that it becomes no longer necessary to address it through criminal justice. Second, there is a widespread perception that it is inhumane to prosecute a case when a long time has elapsed since the crime was initially committed.[438]

However, in the context of government-sanctioned impunity, the release of perpetrators on the principle of statute of limitations can hardly be justified by humanitarian arguments. Unlike ordinary criminals, the perpetrators of this category do not usually live in daily fear of being detained, because they are well aware of the existing policy of impunity, which makes them feel confident that they will not face any justice. The argument relating to reducing the public threat does not apply in this case either, since society's need to prevent these kinds of crimes does not diminish over time, but rather increases because, by tolerating these crimes, the authorities are promoting their recurrence and expansion.

According to Principle 23 of the UN Set of Principles to Combat Impunity, "prescription – of prosecution or penalty – in criminal cases shall not run for such period as no effective remedy is available."

438 See, for example: Decisions no. 591-O-O of the Constitutional Court of the Russian Federation of 19 June 2007, "Refusing to Accept for Consideration the Complaint of Citizen Maria Alexandrovna Firsova on Violation of her Constitutional Rights by Article 78 § 1a of the RF Criminal Code," 19 June 2012; no. 1220-O "Refusing to Accept for Consideration the Complaint of Citizen Valentina Stepanovna Vihmann on Violation of her Constitutional Rights by Article 392 § 2.3 of the RF Civil Procedure Code and Article 24 § 1.3 of the Code of Criminal Procedure of the Russian Federation."

Our premise is that politically motivated impunity in Russia is insurmountable unless the problem of expired (as well as soon-to-expire) statutes of limitations is addressed. Otherwise, most of the crimes mentioned in this paper would remain outside the scope of criminal justice. This means not only that the perpetrators would escape responsibility, but also that the exact circumstances of their crimes would never be established, and the perpetrators would keep numerous benefits derived from their unpunished criminal activities, including political and economic influence. In addition, failure to prosecute perpetrators for violations of human rights due to expired statutes of limitations can lead – and has led[439] – to breaches of Russia's obligations under international law. Even in cases where considerations of meaningful transitional justice would require exemption from criminal liability, for example in cases of effective remorse, only the restoration of the threat of real punishment would prompt the emergence of such remorse in the first place.

1.2. Prescriptive periods

Similar to statutes of limitations, prescriptive periods may obstruct the restoration of the rights of victims of systemic impunity. The expired prescriptive period, as claimed by a party to the dispute, is the basis for the court to decide on dismissing the claim (Article 199 § 2.2 of the Civil Code of the Russian Federation).

Both general (three years) and special prescriptive periods apply to the remedies available to the victims of violations described in the previous chapters. The general prescriptive period applies, in particular, to claims intended to invalidate the consequences of a void transaction and recognise the transaction as null and void (Article 166 § 3, Article 181 § 1 of the Civil Code); to the recovery of property from unlawful possession (Article 301 of the Civil Code); to the recovery of damages, including those caused by unlawful actions (omissions) by public authorities (Articles 1064, 1069-1070 of the Civil Code); and to the recovery of damages caused to a legal entity by its authorised representatives or persons in control (Article 53. 1 of the Civil Code). The prescriptive period for claims to declare a disputed transaction null and void and invalidate its consequences is one year (Article 181 §2 of the Civil Code).

As a general rule, the prescriptive period runs from the day when a person learned or should have learned about the violation of his or her right and about the identity of the person who should be the appropriate respondent to his or her claim (Article 200 § 1 of the Civil Code).

An expired prescriptive period may be reinstated in exceptional cases if the court recognises a valid reason for missing the period, due to particular circumstances related to the claimant (serious illness, helpless condition, illiteracy, and the like).

In addition to the general prescription period in civil cases, since 1 September 2013 there also exists a so-called 'objective' prescriptive period (i.e. unrelated to the awareness of the victim having suffered from violation of his/her right) of 10 years after the day of the violation (Article 196 § 2 of the Civil Code). This means that the prescriptive period for claims against violations of rights that occurred after 1 September 2013 will anyway expire 10 years after the violation, even if the person whose rights are violated never learns who should respond to his/her claims.

439 ECtHR. *V.K. v. Russia.* Application no. 68 059/13. Judgment of 7 March 2017.

As seen from the above, determining the moment when the victim becomes aware of the violation of his or her right and the identity of the respondent plays a key role in the application of the statute of limitations prior to the objective prescriptive period. There is vast jurisprudence on this issue, including claims of victims of crimes. According to common practice, for claims for damages resulting from crimes, the prescriptive period runs from the moment when a judgment in criminal case establishing the damage and identifying the responsible person comes into legal force.[440] For claims by legal entities to invalidate their transactions for reasons of malicious collusion between the entity's director and another party to the transaction, as well as for claims against the director for compensation for the damages they caused to a specific legal entity, the statute of limitations runs from the moment a new, bona fide director is appointed who has made the legal entity aware of the misconduct of his or her predecessor.[441] For indirect claims by corporation members for damages, as well as for claims challenging the corporation's transactions during the period the claimants lost corporate control, the statute of limitations runs from the moment corporate control is restored. The prescriptive period for claims of public-law entities runs from the day when violation of rights and the identity of the respondent became known to bodies authorised to make claims.[442]

In the context of transitional justice, determining the start of the prescriptive period raises two problems. Can the victim's fear of negative consequences (i.e. groundless initiation of criminal proceedings, detention, etc.) be considered a valid reason for not submitting a claim to the court and missing the prescriptive period? Such a possibility is already stipulated by law in respect to claims relating to recognising a transaction as null and void if it was concluded under the influence of violence or threat (Article 181 § 2 of the Civil Code). It is advisable to extend this provision to other types of claims.

The second problem is more challenging. How should we determine the start date of the statute of limitations for claims by the Russian Federation and other public-law entities in relation to misconduct by their officials, who were responsible for making decisions to submit the claims to court in a timely manner? Is the judicial doctrine on calculating the statute of limitations from the moment a new bona fide director is appointed applicable to these cases as well?

At first sight, there are no obstacles to this in case of claims for damages inflicted by dishonest officials,[443] or claims to invalidate transactions made knowingly to the detriment of the public-law entity (Article 174 § 2 of the Civil Code, Article 179 § 1 of the Civil Code up to 31 August 2013).

440 See, for example: Appellate Determination no. 19-APU13-36 of the Judicial Board for Criminal Cases of the RF Supreme Court of 11 December 2013; Decision no. 17802/11 of the Presidium of the RF Supreme Arbitration Court of 24 May 2012 in case no. A40-99191/10; Decision of the Arbitration Court of the West Siberian District of 24 July 2019 in case no. A70-13789/2018. The review of jurisprudence on cases related to recovery of residential premises from bona fide purchasers on claims of state bodies and local public authorities (approved by the Presidium of the RF Supreme Court on 1 October 2014) suggests a different view: The prescriptive period for a claim to recover from illegal possession real estate dispossessed as a result of fraudulent actions should be calculated from the beginning of investigations in the criminal case initiated on the fact of the fraudulent actions.

441 See Decision no. 15036/12 of the Presidium of the RF Supreme Arbitration Court of 28 May 2013; Decision no. 62 of Plenum of the RF Supreme Arbitration Court of 30 July 2013 "On Some Issues of Compensation of Damages by Members of Bodies of a Legal Entity," § 10; Decision no. 381-PEK19 of the Presidium of the RF Supreme Arbitration Court of 17 June 2020; Сделки, представительство, исковая давность: постатейный комментарий к статьям 153–208 ГК РФ / под ред. А. Г. Карапетова. М. : М-Логос, 2018. p. 869.

442 See Decision no. 43 of Plenum of the RF Supreme Court of 29 September 2015 "On some Issues Relating to Application of Articles on Prescriptive Periods of the Civil Code of the Russian Federation," § 4.

443 See: Сделки, представительство, исковая давность: постатейный комментарий к статьям 153–208 ГК РФ. p. 1191.

By analogy with the judicial doctrine of restoration of corporate control,[444] the starting point of prescriptive periods for vindication claims that were not filed in time due to misconduct by competent officials can be linked to the moment of resignation of these officials. However, the analogy with this doctrine is appropriate only if it is proven that the public-law entity could not otherwise protect its rights while the dishonest officials were in office.

In addition, if a property was removed from the possession of the state as a result of a crime, it may in some cases be returned to the state as part of physical evidence (Article 81 § 3.4 of the Criminal Procedure Code) or through confiscation (Article 104.1 of the Criminal Code), disregarding the prescriptive period.

In the context of transitional justice, these rules could be applied in a very confused manner, e.g. when a transaction causing damage to a public-law entity is concluded by one official (for example, the head of the Russian Federal Property Management Agency), but in the interests of another official who is not the immediate supervisor of the former (for example, the Prosecutor General); both officials authorised to challenge the transaction and interested in it have left their offices since the damage occurred; and their successors knew about the violations, but failed to act upon them (for example, loans-for-shares in 1995).

Nevertheless, we can conclude that, for the purposes of transitional justice, no new statutory exceptions from the general rules about prescriptive periods by public-law entities are necessary. In general, clarifications from higher courts and judicial doctrines should be sufficient.

1.3. Prohibition of *reformatio in pejus* when reviewing criminal judgments one year after they enter into force

What is specific about Russia's systemic impunity is that politically motivated acquittals of those known to be guilty, used as a tool to shield them from criminal responsibility, are rather rare. We are not aware of any such cases. More common are convictions involving unjustly lenient sentences, such as conditional sentences for police officers accused of torturing detainees (see Chapter 5).

If a guilty person has been acquitted or convicted with an unjustly lenient sentence, as part of a general policy of tolerating certain offences; as a result of unlawful interference with the administration of justice; or through dismissal of the criminal case by a court (for example, on account of effective regret), this person cannot be prosecuted repeatedly for the same offence because of the double jeopardy rule (Article 50 § 1 of the Russian Constitution and Article 6 § 2 of the Criminal Code, and article 27 § 1.4 of the Criminal Procedure Code).

Such criminal convictions and judgements may be reviewed on cassation or as part of the supervisory review procedure. However, *reformatio in pejus* – i.e. a revision aggravating the defendant's situation – is **only possible within a year after the judgment enters into legal force** (Articles 401.6 and 412.9 § 2 of the Criminal Procedure Code).

444 See: Decision no. 17802/11 of the Presidium of the RF Supreme Arbitration Court of 24 May 2012 in the case No. A40-99191/10.

According to Principle 25 of the UN Set of Principles to Combat Impunity, "The fact that an individual has previously been tried in connection with a serious crime under international law shall not prevent his or her prosecution with respect to the same conduct if the purpose of the previous proceedings was to shield the person concerned from criminal responsibility, or if those proceedings otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

1.4. Time limits for appealing court decisions

In addition to prescriptive periods, the expiry of time limits for filing an appeal, cassation appeal, or supervisory complaint may also prevent the restoration of a victim's rights. This applies, in particular, to cases when perpetrators who enjoy impunity take legal action against a property owner for the purpose of embezzling the property, so that the owner is coerced (e.g. by initiating or threatening to initiate criminal proceedings against them, or by detaining them) to plead no defence or to refuse to appeal the judgment of the court.

Even after the reasons for impunity and hence the risk of the threats cease to exist, the victim will not be able to appeal against the judicial act that "formalised" the seizure of his or her property because the time limit for appeal would expire (see Articles 259 § 1 and 2, 276 § 1 and 2, 291.2 § 4 and 291.2 § 5, 308.1 of the Commercial Procedure Code, Article 321 § 2 of the Civil Procedure Code)). Pursuant to the Civil Procedure Code, the time-limit for filing cassation and supervisory appeals may be reset without any limitation if there are valid reasons for missing the time limit (Articles 376.1 § 2, 390.3 § 2, 391.3 § 3 of the Civil Procedure Code). However, if the judgment was not appealed in a timely manner, the opportunity for cassation will still be denied to the victim.

The victim, however, may still seek a review of the court decision upon discovery of new facts, if the judgment in the criminal case establishes that a crime was committed in the course of proceedings with regard to a claim that the victim was forced to accept.

1.5. Impossibility of reviewing judicial acts upon discovery of new facts because of expired statutes of limitations for criminal prosecution, an amnesty, or the death of the suspect or defendant

All procedural codes allow for the review of judicial acts that have entered into force upon discovery of new facts. For the purposes of transitional justice, these may include crimes committed by persons involved in the case, their representatives, or judges during the examination of the case, as well as falsification of evidence or knowingly giving false testimony (Article 311 § 2 of the Commercial Procedure Code, Article 392 § 3 of the Civil Procedure Code, Article 350 § 2 of the Administrative Court Procedure Code, and Article 413 § 3 of the Criminal Code[445]).

445 Article 413 § 3.2 of the Criminal Procedure Code connects the possibility of review only with the criminal actions of inquirers, investigators, prosecutors, or judges; representatives of the defense in a criminal proceeding are not included in this category.

A court may not pass a sentence in a criminal case when the statute of limitations for criminal prosecution has expired (unless the suspect or the accused object to termination of criminal case, see section 1.1 of this chapter). Consequently, a judicial act issued in criminal circumstances (e.g. by a bribed judge) cannot be reviewed upon discovery of new facts after the statute of limitations for the underlying crime (bribery, in this case) has expired. The same applies when a criminal case is terminated due to an amnesty (see section 2 of this chapter) or because of the death of a suspect or a defendant.

This problem is not especially relevant for the purposes of transitional justice, because it is proposed that the statutes of limitation for criminal prosecutions be reset, and amnesties not applied. Nevertheless, for cases involving the death of a suspect, a review may be relevant, as otherwise it would not be possible, for example, to quash judicial acts issued by corrupt judges after their death.

1.6. Procedural limitations for challenging election results

According to Article 239 § 15 of the Administrative Court Procedure Code, election results may be challenged only by candidates and electoral associations that were registered and took part in the elections (the prosecutor may only challenge election results "in cases stipulated by law"). It follows from this provision that the annulment of election results by a court depends on the discretion of individuals and public associations.

In addition, the deadline for appealing election results is set at only three months after the election date and cannot be reset (Article 78 § 3 of the Federal Law "On Basic Guarantees of Electoral Rights and the Right to Participate in the Referendum of the Citizens of the Russian Federation").

Thus, unless these procedural norms are adjusted, election results that do not reflect the actual will of the voters can only be cancelled as part of the procedure for reviewing judicial acts that have entered into legal force upon discovery of new facts. In other words, falsified election results can be cancelled only if a candidate or party who participated in the election challenges them in a timely manner and then (after the end of the policy of impunity) seeks a review of dismissal of his or her claim. In particular, criminal conviction in election fraud cases could be used as a basis for reviewing associated judgments in electoral disputes upon discovery of new facts.

Obviously, the consequences of distorting the democratic will can be remedied in another way: through new elections. However, unless election results are cancelled, this would require the voluntary resignation of previously elected officials; self-dissolution of representative state and local government bodies; or the forced termination of their powers on the basis of specially adopted laws. From our perspective, this would predominantly be a political alternative and as such would not be part of transitional justice. We should also note that the Constitution of Russia (also as amended in 2020) does not provide for self-dissolution of the chambers of the Federal Assembly.

2. Amnesty

Persons who have committed crimes may be relieved from criminal liability by an amnesty. Convicted persons may be relieved from punishment, or the punishment imposed on them may be reduced or replaced with a more lenient penalty, or they may be absolved from additional penalties (Article 84 § 2 of the Criminal Code).

As a rule, amnesty laws list categories of persons exempted from liability or punishment for certain crimes (also specified in the amnesty law) committed prior to the date the act was adopted. Unlike expired statutes of limitations, in cases where a crime is discovered, the amnesty does not prevent the initiation of criminal proceedings, but it does prevent criminal prosecution of the suspect or accused, provided he/she is subject to the amnesty (Article 27 § 1 § 3 of the Criminal Procedural Code) and does not object to the termination of the criminal prosecution.

A characteristic of amnesties that is important for the purposes of transitional justice is that they apply only to crimes committed before the amnesty was declared. However, the crimes committed may be uncovered even after the declaration of the amnesty, without any time limits.

Post-Soviet Russia has repeatedly declared amnesties. Since the current Russian Constitution came into force, the State Duma has issued 17 amnesty laws.

The role of amnesties in preserving impunity can be illustrated by the example of the two most recent ones – those of 18 December 2013[446] and of 24 April 2015.[447]

The 2015 amnesty prevents the punishment of many perpetrators of crimes of medium and low gravity, including, without exception, all crimes committed against the constitutional rights and human rights of citizens (Chapter 19 of the Criminal Code), as well as crimes which involve unaggravated excesses of authority (Article 286 § 1 of the Criminal Code) and abuse of power while in office (Article 285 § 1 of the Criminal Code), which are key to addressing criminal acts aiming at appropriating and retaining power (see Chapter 2). The 2015 amnesty applies, inter alia, to combatants and equivalent participants in the armed conflict and counter-terrorist operation in the Chechen Republic; recipients of state awards; women and single men with children who are minors or children with disabilities; men over 55; and women over 50.

Under the 2013 amnesty, connected to the twentieth anniversary of the adoption of the Russian Constitution, certain categories were exempted from punishment (their list largely coincides with that in the 2015 amnesty law), including persons convicted for medium-gravity crimes (provide details) as well as grave crimes, if sentenced to up to five years of imprisonment.

446 Resolution No. 3500-6 GD of the State Duma from 18 December 2013 declaring amnesty in connection with the 20th anniversary of the adoption of the Constitution of the Russian Federation.

447 Resolution No. 6576-6-6 GD of the State Duma from 24 April 2015 declaring amnesty in connection with the 70th anniversary of the victory in the Great Patriotic War of 1941–1945.

The following example illustrates the effect of the amnesties: All those involved in rigging the election to the State Duma on 4 December 2011, whose acts fall under Articles 141 – 142.1 or Article 286 § 1 of the Criminal Code, are exempt from criminal liability if they had reached the age of 50 (women) or 55 (men) by 24 April 2015. They no longer have to fear criminal prosecution even if the expired statutes of limitations are reset.

Principle 24 of the UN Set of Principles to Combat Impunity reads as follows: "Even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within the following bounds:

> (a) The perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met the obligations to which Principle 19 [*i.e. held the persons liable and punished them – N.B.'s note*] refers or the perpetrators have been prosecuted before a court with jurisdiction – whether international, internationalized or national – outside the State in question."[448]

3. Gaps in criminal law

As seen from the previous chapters, some patterns of unpunished unlawful conduct cannot be fully reflected in the categories of Russian criminal legislation. In most cases, this should not prevent the restoration of justice — it is enough that the misconduct would have signs of some element of a crime. For example, the Criminal Code does not envisage responsibility for the misuse of "administrative resources" in elections (see section 2.3 of Chapter 2); however, different subtypes of this misconduct fall under Articles 141 § 2, 141.1, 149, 285, and 286 of the Russian Criminal Code.

However, in some of the cases described above, we can still speak about gaps in the special part of the Criminal Code in terms of provisions regulating illegal acts that undoubtedly pose a greater public danger. These include, inter alia, responsibility for knowingly appropriating or retaining official powers in violation of law. Criminal liability for these acts is envisaged in Article 4 § 4 of the Russian Constitution; however, this constitutional provision is not fully reflected in the Criminal Code. Article 288 of the Criminal Code only includes punishment for cases of appropriation of official powers by a state or a municipal employee; Article 286 applies to illegal interference of one official into the competence of another ("appropriation of power without appropriation of office," see section 1 of Chapter 2), Articles 141– 142.2 apply to appropriation of elected state office as a result of crimes against electoral rights, provided that the person who received this office was an accomplice in the crimes. However, individuals who take a position resulting from acts that they know to be illegal (for example, election fraud, illegal coercion of the employer) bear no responsibility if they did not take part in these illegal actions.

448 See also: ECtHR. *Yaman v. Turkey*. Application no. 32446/96. Judgment of 2 November 2004. § 55; *Yeter v. Turkey*. Application no. 33750/03. Judgment of 13 November 2009. § 70; *Ould Dah v. France*. Application no. 13113/03. Judgment of 17 March 2009. § 17; *Marguš v. Croatia* [GC]. Application no. 4455/10. Judgment of 27 May 2014.

Another significant gap in criminal law is illicit enrichment. This act is criminalized under Article 20 of the UN Convention against Corruption, which defines illicit enrichment as a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income. Public discussions have been ongoing over the issue for years. If introduced, this norm would allow for the prosecution of officials who have unjustly enriched themselves while in office, without the need to prove the crimes of corruption that they committed. Opponents of this legislative decision claim that it contradicts the constitutional right of a person not to prove his/her innocence (Article 49 § 2 of the Russian Constitution). Note that, since 2012, Russia has a mechanism in place that partially addresses the crime of illicit enrichment. It is the mechanism by which the assets of officials and deputies who cannot prove that they purchased those assets with their lawful income are transferred to the state (for details, see section 3.1 of Chapter 3).

In the context of transitional justice, the most significant gap in Russian criminal law is related to international crimes.[449] This is most relevant for the prosecution of acts of violence committed during armed conflict. Although the Criminal Code has an entire section on crimes against peace and the security of humankind, its provisions on these crimes are clearly insufficient.

Crimes against humanity in Russia are not criminalised at all: Under national law, they can be considered either as conventional criminal acts or, if committed in the context of an armed conflict, as war crimes. War crimes are dealt with under Articles 356 ("Use of prohibited means and methods of warfare") and 360 ("Attacks on persons and institutions that enjoy international protection") of the Criminal Code. These Articles have a blanket nature, either referring directly to the "international treaties of the Russian Federation," or indirectly to the norms defining "international protection."

Only provisions on punishing of crimes against peace would be sufficient. These kinds of crimes are mentioned in two articles of the Criminal Code: Article 353, which imposes responsibility for "planning, preparation, launching or waging of an aggressive war," and Article 354 – for public calls to launch one.

In this regard, the imprecise definition of war crimes and the lack of provisions on crimes against humanity in Russian law make criminal prosecution of persons responsible for these types of crimes more difficult. Assessing these groups of crimes as conventional can be regarded as an inappropriate form of legal response.[450]

4. Protection of bona fide purchasers of another's property

Recovery of the property held in adverse possession (vindication, Article 301 of the Russian Civil Code) is one of the meaningful remedies for the consequences of crimes of corruption. However, the application of this remedy is limited by statutory protection of *bona fide* acquirers. If a person buys a property from somebody who had no right to dispose of it and has been unaware and could not have been aware of that

449 For details, see: *Богуш Г.И., Есаков Г.А., Русинова В.Н.* Op. cit.

450 The problem of incomplete norms on international crimes in Russian criminal law can be illustrated by the aforementioned attempt by investigators of the so-called "Katyn case" to identify this atrocity as a war crime and a crime against humanity on the basis of the Charter of the International Military Tribunal against the principal Nazi criminals, which ended with the respective decision being reversed and the crime being re-subsumed under the 1926 RSFSR Criminal Code (see more details in Chapter 6, section 5.2).

fact, he or she is considered a bona fide acquirer. The owner has the right to reclaim the property from a bona fide acquirer only if the property was lost by the owner or by the person to whom it was transferred by the owner; it was stolen from either of them; or it was otherwise taken from their possession against their will.

Protection of the rights of bona fide purchasers may prevent the state from recovering the property it lost through privatisation fraud. The possibility to claim it back from persons who did not participate in privatisation transactions depends on whether the buyers can be considered as bona fide purchasers and whether state authorities can assess such transactions as depriving the owner of the disputed property against their will (i.e. the Russian Federation or other public legal entities).

In our opinion, to justify this position it is in any case necessary to initiate criminal proceedings and to investigate the privatisation fraud. Property recognised as physical evidence in such criminal cases may be returned to the owner even from a bona fide purchaser under Article 81 § 3 of the Criminal Procedure Code.

General vindication procedures with protection of bona fide purchasers apply to property that cannot be recognised as physical evidence in a criminal case. It appears that the transitional justice authorities can demonstrate the bad faith of defendants in claims for vindication of fraudulently privatised property, by showing that they could not know about abuses during privatisation, and for this reason cannot be considered bona fide purchasers. Their knowledge can be proven by publications in the media; findings of the Accounts Chamber on privatisation malpractice (see section 2.1 of Chapter 3); findings of due diligence that is usually conducted when a large enterprise is purchased and that likely mentions risks stemming from suspicious grounds for its private ownership, etc.

Notwithstanding these potential challenges, the special legal restrictions on the protection of bona fide purchasers seem clearly disproportionate in the context of transitional justice. On the contrary, a large-scale campaign to return fraudulently privatised assets to the state as part of transitional justice is likely to exacerbate the problem of deficiency in protection of these assets.

5. Legal obstacles to effective fact finding and compensation to victims

As mentioned above (see section 3 of the introduction), apart from punishing the perpetrators, key objectives of overcoming impunity in the context of transitional justice include identifying and disclosing information concerning the unpunished crimes and ensuring compensation to the victims for the damage inflicted. Under current law, victims are assumed to exercise their right to access to information by getting acquainted with the criminal file and participating in the court investigation, as well as through the judgment, the descriptive part of which should contain details of the case (Article 307 § 1 of the Criminal Procedure Code). The public can only receive information by attending court hearings and listening to the judgment, as well as by reading its text published on the court's website.

Compensation for damages resulting from a crime can be claimed through a civil action that can be brought either during criminal proceedings or separately in civil proceedings. In both cases, the courts apply the provisions regulating obligations due to infliction of damage set out in Chapter 59 of the Civil Code.

It is not our intention to critically analyse these legal institutions in general. We would like to note only some patterns that limit the effective exercise of the right to know the truth about the crimes and to receive a compensation for damages in the context of transitional justice:

- Cases of large-scale and repetitive infliction of harm.
- Comparatively older cases.
- Cases where victims were deprived of effective remedies.
- Cases where evidence was not collected in a timely manner or was subsequently lost.

5.1. Time needed to exercise victims' rights

Under the current rules, victims cannot have immediate access to the criminal case file or to compensation for damages. The interests of criminal prosecution take precedence over these rights of the victims (although they do not seem to be in conflict with them). Victims have to wait: They can only become acquainted with their file after the preliminary investigation is completed (Article 42 § 2.12 of the Criminal Procedure Code) and can receive compensation only after the sentence enters into force. If compensation for the damages caused by the authorities is sought from the treasury (under Article 1069 of the Civil Code) separately from the criminal proceedings, the individual usually has to wait for the criminal conviction and only then can he/she file a civil action in court. Adjudicating a civil action also may take quite long. In the context of transitional justice, the period between a criminal incident and the initiation of criminal proceedings can comprise many years or even decades; therefore, having to wait even longer might cause further distress to the victim.

5.2. Limited range of circumstances reflected in judgments in criminal cases

A judgment in the criminal cases is the main remedy for the right of the victim and the public to know the circumstances of the crime. However, the descriptive part of a judgment contains only basic details, including the place, time, modus operandi, form of guilt, motives, aims and consequences of a crime (Article 307 § 1 of the Criminal Procedure Code). These details are sufficient in case of individual abuses. However, a comprehensive description of systemic violations requires a broader context, which may not be the target of preliminary investigation or judicial enquiry and thus would not be reflected in the judgment. Some important characteristics of systemic violations are not necessarily relevant for the purposes of criminal proceedings, such as the recurrence of violations by the same state institutions; reasons for inadequate responses to crimes (these can be treated as separate criminal cases); and the social and political context that extends beyond the setting of a specific abuse.

As stated in paragraph 24 of Resolution 60/147, "victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations."

5.3. High standards of evidence and proof in criminal proceedings

Evidence in criminal proceedings must meet the requirements of admissibility (Articles 74-75 of the Criminal Procedure Code), which inevitably narrows the range of sources of information about the committed crime. In addition, probabilistic

characteristics cannot be used when describing the circumstances of a crime in a judgment, and different theories cannot be considered and assessed (Article 302 § 4 of the Criminal Procedure Code). These restrictions serve the interests of justice but may infringe the victim's right to access complete information about the crime, including details that have not been established with complete certainty.

5.4. Reparation prospects depending on the outcomes of criminal prosecution

As a general rule, the person who inflicted harm is responsible for its reparation (Article 1064 § 1.1) of the Civil Code). In order to receive reparation, a person needs to know whom they have to claim it from. This condition also applies to reparation for damages caused by a crime, but unlike common civil cases, in case of criminal damage, the state assists the victim to find and prosecute the perpetrator. Thus, the victim's ability to receive reparations for the inflicted harm directly depends on the findings of the investigation and the criminal trial. If the victim files a civil action separately before the criminal case is over, the court is obliged to suspend the proceedings (Article 215 § 5 of the Civil Procedure Code). For the victim, this means, at the very least, having to wait. In the worst case, if the perpetrators are not identified, there will be no one to claim reparations from, even if the context clearly implies that the harm was caused by state officials (for example, when a person was killed by a missile attack[451] or by armed men driving military vehicles[452]). The European Court of Human Rights has repeatedly noted the lack of effective civil remedies for victims of crimes in criminal cases where the investigation is ineffective.[453]

5.5. Unsustainable jurisprudence relating to compensation for moral damages resulting from unlawful actions of governmental officials

The amount of compensation for moral damages depends on the discretion of the judge. In practice, even in criminal cases of torture, judges often refuse compensation for moral damages to victims, and satisfy the claim only partially, reducing the amount to be paid several times over. There are no guidelines in law for awarding compensation for moral damages.[454]

In 2018, the Russian Supreme Court awarded a record high compensation for moral damages (2,366,000 rubles) in a case of illegal detention, taking into account the

451 See ECtHR. *Abdulkhanov and Others v. Russia.* Application no. 22782/06. Judgment of 3 October 2013.

452 Decision no. 23-KG19-11 of the Judicial Board for Civil Cases of the Supreme Court of the Russian Federation of 3 February 2020. It is worth noting that the inability to obtain compensation for damages because the perpetrator has not been identified is inconsistent with the provisions of Resolution 60/147. According to § 9 of this Resolution, a person is considered a victim regardless of whether the perpetrator of the violation has been identified, detained, prosecuted, or convicted.

453 See ECtHR. *Aslakhanova and Others v. Russia.* Applications nos. 2944/06, 332/08, 42509/10, 50184/07, 8300/07. Judgment of 18 December 2012. § 156. However, in some cases, victims of unlawful violence by government officials have been able to claim compensation from the state for the inflicted harm, even without criminal charges being brought against the perpetrators. See, for example, the Russian NGO Committee against Torture in defence of Anton Shestopalov; at: https://www.pytkam.net/ru/dor/komitet-protiv-pytok-v-zashchitu-prav-antona-shestopalova (accessed: 21.06.2020).

454 The average amount of compensation for property and moral damages to victims of torture in the practice of the Committee against Torture in the Nizhny Novgorod region is 152,000 rubles, and the median amount is 30,000 rubles. See also: *Мароховская А., Долинина И.* Кто поднимает Россию на дыбу // Новая газета. 2018. 8 октября, at: https://novayagazeta.ru/articles/2018/10/08/78095-kto-podnimaet-rossiyu-na-dybu (accessed: 21.06.2020); *Фаст И., Нестеров А., Соколова М.* Компенсация морального вреда при причинении вреда жизни и здоровью: 25 лет существования института в РФ. М.: Гражданские компенсации, 2017, at: http://www.sila-zakona.ru/images/docs/research/booklet.pdf (accessed: 21.06.2020).

practice of the ECtHR.[455] However, this example does not mean that the problem has been eliminated.

5.6. Unsustainable jurisprudence relating to compensation for ineffective criminal investigations

Since 2010, Russian law envisages compensation for the violation of the right to criminal trial within a reasonable time frame. This can be claimed, in particular, by the victim of the crime.[456] Even before this law entered into force, there had been individual cases when compensation had been given for moral damages from ineffective investigation of human rights violations, based on general provisions of the Civil Code.[457]

According to the 2018 Alternative Report of the Interregional Public Organisation Committee against Torture on Russia's Compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the practice of paying compensation for ineffective investigation varies greatly from region to region, and the amounts of the compensation are generally much lower than those awarded by ECtHR for similar violations.[458]

5.7. Absence of mechanism of apology for crimes against human rights committed by public officials

There is no general rule in Russian law regarding apologies to victims of crimes committed by government officials. The law envisages that the police can apologise to a citizen whose rights and freedoms have been violated by police officers (Article 9 of the Federal Law "On the Police"). However, this norm, firstly, suggests that the perpetrator apologizes only at the request of the victim and not at the initiative of the police and, secondly, this procedure is subject to formal limitations that allow for it to be neglected in practice.[459] Other government officials are not required by law to apologise for their crimes or misconduct.

An apology, however, is included among the measures recommended in 22§e of Resolution 60/147.

455 Decision no. 78-KG18-38 of the Judicial Board for Civil Cases of the RF Supreme Court of 14 August 2018.

456 Federal Law No. 68-FZ of 30 April 2010 "On compensation for violation of the right to trial within a reasonable time or the right to execution of a judicial act within a reasonable time."

457 For example, in 2009 a court ruled that torture victim S.V. Lyapin should receive compensation to the value of 500 rubles for ineffective investigation of the case. Some other decisions to compensate for violation of the right to trial within a reasonable time can be found in ECtHR's resolutions, see ECtHR, *Burdov (no. 2) v. Russia*. Application no. 33509/04. Judgment of 15 January 2009. § 115.

458 See the Shadow Report of the Interregional Public Organisation Committee against Torture on the Russian Federation's Compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2018, at: http://pytkam.net/u/editor/news/4724/text/alternativnij-doklad-2018.doc (accessed: 21.06.2020). § 96. For an overview of practical difficulties in exercising this right, see: *Казарин И.* КАС РФ: взыскание компенсации за нарушение права на разумный срок досудебного производства по уголовному делу; at: https://zakon.ru/blog/2018/01/07/kas_rf_vzyskanie_kompensacii_za_narushenie_prava_na_razumnyj_srok_dosudebnogo_proizvodstva_po_ugolov (accessed: 21.06.2020).

459 Shadow Report… § 143-153.

6. Deficiencies in procedures regulating restoration of the rights of persons unlawfully prosecuted for criminal and administrative offenses

6.1. Limitations on review of criminal convictions that have entered into force

Under current rules, a criminal conviction that has entered into force may be reviewed during cassation or supervisory review. Courts of cassation and courts of supervision may overturn a judgment if there have been substantial violations of criminal or procedural law that affected the outcome of the case (Articles 401.15 § 1 and 412.9 § 1 of the Criminal Procedure Code). In other words, inconsistency between the court's conclusions set forth in the judgment and the actual circumstances of the criminal case in these instances cannot be a basis for a reversal of the judgment. At the same time, if the judgment is reversed, the cassation and supervisory courts may not independently recognise or consider as proven facts that were not reflected in it or were rejected by it, or decide on the credibility or unreliability of any evidence (Articles 401.16 § 7 and 412.12 § 3 of the Criminal Procedure Code). Therefore, a person prosecuted for political or corrupt motives, without evidence or on trumped-up evidence, strictly speaking, cannot secure the reversal of a sentence that has come into force. If, however, when considering the complaint, the court recognises that the findings reflected in the judgment should be reviewed because the law has been violated, it may not independently issue an acquittal or terminate criminal proceedings but must refer the case to the court of first instance for re-consideration.

Thus, unjustified criminal convictions can be re-considered only in cases of serious violations of criminal or criminal procedural law, and only in two stages. This procedure fails to ensure quick restoration of the rights of individuals unlawfully prosecuted for political or corrupt reasons.

In addition, the law prohibits the filing repeated cassation appeals on the same legal grounds with the same court of cassation (Article 401.17 of the Criminal Procedure Code). However, there are no restrictions on repeated filing of supervisory complaints.

6.2. Absence of the right to rehabilitation when a crime is decriminalised

Some of the provisions of the Criminal Code can be viewed as inherently unlawful and unconstitutional, since they were designed to prosecute the peaceful, non-violent exercise of fundamental rights, while the real purpose of introducing these norms was, apparently, to suppress political opponents' rivals (see section 2.6 of Chapter 2 above). A vivid example is Article 212.1, "Repeated Violation of the Established Procedure for Organising or Conducting a Meeting, Rally, Demonstration, March, or Picketing." Decriminalisation of such politically motivated crimes would allow those convicted to be released from punishment (Article 10 of the Criminal Code), but it would not give them the right to a rehabilitation (see Article 133 § 4 of the Criminal Procedural Code).

In this case, rights can be fully restored only if a norm of the criminal law is recognised as not complying with the Constitution of Russia through constitutional proceedings.

6.3. Absence of a mechanism for the rehabilitation for persons unlawfully or unjustifiably prosecuted for administrative offences

The legislation on administrative offences does not envisage any special mechanism for rehabilitation. Persons who have been unjustifiably held administratively liable have themselves to seek the restoration of their rights and obtain compensation for the harm that they have suffered. After a decision on an administrative offence is reversed, they may get compensation for property and moral damage by filing a claim under Articles 1069 or 1070 of the Civil Code. Fines that have been imposed and collected will only be refunded upon application.

The new Code of Administrative Offences intends to include a mechanism for rehabilitation,[460] but the new Code has not yet been adopted at the time of publication.

6.4. Incomplete compensation for damages caused by criminal and administrative sanctions and procedural coercion measures

There is no legal provision stipulating payment of interest on criminal or administrative monetary penalties imposed in criminal or administrative cases. According to the Russian Supreme Court, provisions of Article 395 of the Civil Code regulating interest for the use of another's money do not apply to unreasonably imposed financial penalties.[461] In the context of transitional justice, this gap is also relevant because of the time factor: The longer one has to wait for an unjust administrative judgement or ruling to be reversed and for the money collected based on the judgement to be returned, the more inadequate the compensation will be due to decreased purchasing power as a result of inflation. The Russian Supreme Court proposes to recover damages from the treasury under the general procedure, yet it may be difficult (in particular in terms of proof) and costly to recover.

It is even more difficult to obtain compensation for damages inflicted by the seizure of property as a penalty in a criminal case or by a substantially similar measure of freezing of funds in bank accounts, securities, and other property under the Federal Law "On Counteraction to the Legalisation of Proceeds of Crime (Money Laundering) and Financing of Terrorism." Since in this case the property is not seized, only the use and disposal of it by its owner restricted, it seems that damages in the form of profit loss can only be proven if a pre-planned profitable transaction with the arrested property has collapsed, or if commercial activities using this property have been terminated; the mere abstract possibility of making such transactions is not taken into account.

In addition, a person deprived of subsistence after his or her bank accounts are arrested or blocked may experience serious moral suffering. However, this circumstance is not mentioned as independent grounds for compensation for moral damage either in civil or criminal procedural legislation, so the recovery of this kind of compensation would be at the very least problematic.

460 The concept of a new Code of Administrative Offences of the Russian Federation; at: http://government.ru/news/36971/ (accessed: 21.06.2020), § 5.1.9.

461 Resolution № 7 of the Plenum of the Supreme Court of the Russian Federation of 24 March 2016 (ed. from 07.02.2017) "On the application by courts of certain provisions of the RF Civil Code on liability for breach of obligations."

Chapter 8. Measures to address systemic impunity

The previous chapters of this report defined the problem of systemic impunity, illustrated its characteristic manifestations in various contexts, and listed the legal limitations that make it difficult to restore justice and remedy the consequences of unpunished crimes.

Now we have arrived at the main part of this report to try and ask ourselves: *What should we do?* I.e. *What lawful means can we use to overcome the systemic impunity for crimes in Russia?*

Before presenting our suggestions, we should clarify the assumptions that support our choice of priorities.

Chapter 1 presented the following eligibility criteria to justify transitional justice measures:

- An offence infringing on human rights or the foundations of the constitutional order;
- Persisting impunity for an offence due to systemic reasons;
- Existence of a valid interest in a legal response;
- Demand for justice by society as a whole or by the victims.

However, these criteria are not enough to build a transitional justice policy. In addition, consideration should be given to Russia's international legal obligations to investigate human rights violations; to the specific situation of the victims of unpunished crimes and the nature of harm caused to them; and to possible internal contradictions between the objectives of transitional justice.

As a party to the Convention for the Protection of Human Rights and Fundamental Freedoms,[462] Russia should have ensured effective investigation of human rights violations, in particular the right to life; the prohibition of torture, slavery and forced labour; the right to liberty and security of person; and the right to respect for private and family life. According to the Department for the Execution of Judgments of the European Court of Human Rights, Russia failed effectively to investigate 364 cases of torture and cruel treatment and 476 cases of violations of the right to life.[463] These violations should be given a high priority because applicants should be rewarded for their efforts to obtain justice.

In planning for transitional justice, violations of human rights should be distinguished from the encroachments on the rights and interests of the state and of the people that did not affect individuals personally. This distinction rests on the assumption that the state is capable of protecting its legitimate interests through general procedures. All that is required is the removal of legal impediments to justice and redress (primarily statutes of limitations). In contrast, individual victims of unpunished violations may

462 The Russian Federation ceased to be a Contracting Party to the ECtHR on 16 September 2022.

463 According to the database of the Department for the Execution of Judgements of the ECtHR (https://hudoc.exec.coe.int/), as of 1 September 2019.

require special assistance for their rights to be restored. It is important to remember that the victims have been deprived of legal protection (potentially for years or decades), and many have themselves suffered as a result of the illegal actions of authorities. It is therefore necessary to seek the most beneficial mechanisms for restoring their rights: they should be swift; they should not require significant effort from victims; and they should include guarantees of real (and, potentially, full) compensation for the inflicted harm.

In theory, the four objectives of transitional justice (as well as conventional criminal justice) – specifically, prosecuting perpetrators; telling the truth about atrocities; making reparations; and creating guarantees of non-recurrence – complement each other.[464] However, in situations of widespread impunity for crimes, even partial implementation of all these objectives could be challenging. The most striking and widely discussed contradiction is between justice and the right to know the truth about violations. Foreign doctrine and practice, as well as the recommendations of international organisations, suggest various ways to resolve this contradiction.[465] This could be resolved in favour of the "right to the truth," where there is a considerable public interest in exposing widespread systemic crime, and the waiver of justice does not affect the victims' rights and the state's international obligations to investigate human rights abuses.

The following recommendations build around the four recognised pillars of transitional justice: the right to the truth; reparations; criminal prosecution; and guarantees of non-recurrence.

1. Extrajudicial fact-finding and disclosure mechanisms

In our opinion, there is no need for transitional justice to deviate from general procedures in order to establish the circumstances of crimes in criminal proceedings. However, extrajudicial fact-finding and disclosure mechanisms could be used to supplement the investigation of crimes in such proceedings.

These mechanisms are necessary when unlawful practices, on the one hand, go beyond purely criminal manifestations, and, on the other hand, fall into a multitude of separate episodes sharing a common political goal. The number of such episodes can run into thousands (see examples in section 2.3 of Chapter 2). It is hardly possible and, in any case, extremely time-consuming and costly, to fully establish the circumstances in each case by means of criminal justice. Meanwhile, society should not wait until, figuratively speaking, a sufficient number of pieces of the huge puzzle of systemic crime[466] fall into place.[467] In order to give society a complete and clear picture of systemic crime within a

464 See: De Greiff P. Theorizing Transitional Justice // Transitional Justice / ed. by M.S. Williams, R. Nagy, J. Elster. New York: New York University Press, 2012. pp. 31–77.

465 See: *Roht-Arriaza, N., Mariezcurrena, J.* Transitional Justice in the Twenty First Century: Beyond Truth versus Justice. Cambridge: Cambridge University Press, 2006; Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice: https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf (accessed on 01.07.2020).

466 For more information on systemic crime see: Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives. New York; Geneva: Office of the United Nations High Commissioner for Human Rights, 2006. pp. 11-17.

467 In this regard, it seems appropriate to mention Principle 2 of the Set of Principles to Combat Impunity: "Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations."

reasonable time, we could separate the task of studying and describing systemic crime from the task of the criminal prosecution of the perpetrators of individual crimes.

In addition to guaranteeing the collective right to know the truth about systemic crimes, extrajudicial investigative mechanisms could be used to eliminate the culture of tolerance toward them. Public testimony of victims and those involved in illegal activities could serve this purpose.

Establishing the circumstances of criminally inflicted harm beyond criminal proceedings could be part of the extrajudicial procedure of delivering reparations to the victims of such harm.

Finally, existing means of criminal justice tend to be irrelevant for investigating events of the remote past whose participants have already perished.

For these reasons, it appears that extrajudicial mechanisms (in addition to judicial mechanisms) could be used to establish and disclose the circumstances of the following categories of unpunished crimes:

- Usurpation and retention of power;
- Torture, ill-treatment, and abuse of power;
- Violence against civilians in the course of armed conflicts in the North Caucasus;
- Undue interference in private life, violation of the secrecy of correspondence and negotiations in the course of operational and investigative activities;
- Crimes of the Communist regime in Russia.

1.1. Establishing the circumstances of the illegal usurpation and retention of power (Commission for Investigating the Usurpation of Power)

The above challenges of investigating systemic crime through criminal justice alone fully apply to political offences. These are criminalised only partially (see Chapter 7 section 3); moreover, they are very diverse and range from clearly criminal and concealed acts of violence to official acts framed as laws or presidential decrees. These crimes have been committed for a decade or two, and some of them (for example, election rigging) involve thousands of people.

An extrajudicial body, which might be named as suggested in the title of this section, could be authorised to investigate and publish information about the ways in which power has been usurped and retained in the Russian Federation, as well as to produce recommendations to guarantee non-recurrence of usurpation.

For this purpose, this body should be authorised to question witnesses and victims, seize documents, and conduct expert examinations. The hearing of witnesses may take place at open hearings.

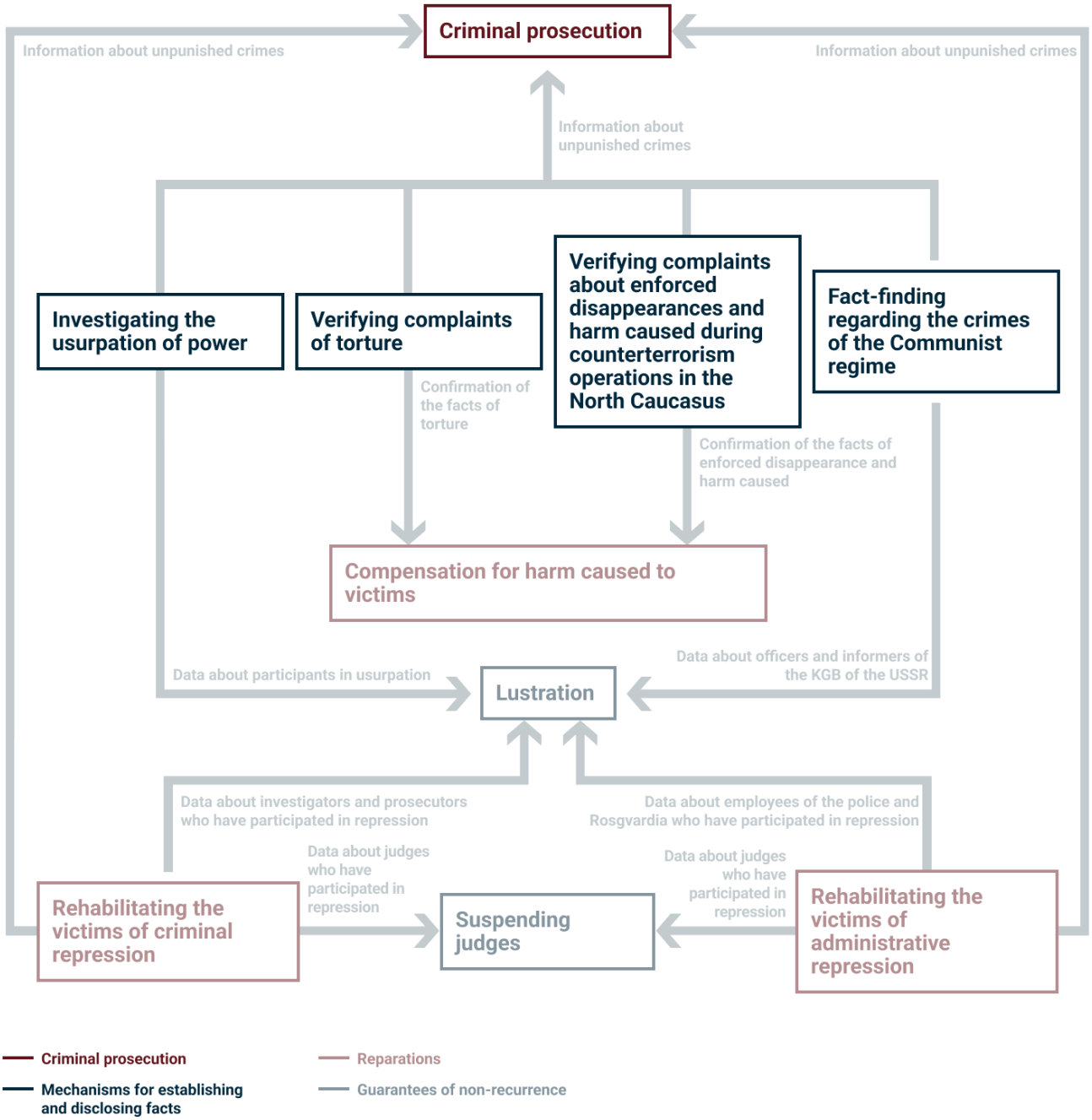
In order to obtain detailed information about the usurpation of power, its rank-and-file accomplices may be offered a conditional amnesty.[468] An amnesty applicant would be required to inform the commission of the known circumstances of the crime perpetrated by him or her; to describe it publicly at the commission's hearings if necessary; and to expose his or her high-ranking accomplices. The amnesty would be granted to those involved at the lower levels of the vertical of government, who have been involved in illegal interference with democratic procedures. For example, it could be granted to members of precinct and territorial election commissions, who have committed crimes under Articles 141, 142, 142.1, 142.2 of the Criminal Code of the Russian Federation in the course of their duties – such as obstructing the free exercise of election rights by knowingly making an unfounded decision to refuse to register a candidate or help rigging the election (see examples in section 2.3 of Chapter 2).

Information about falsifications can be disclosed within an amnesty framework intended to cover informants through voluntary notification/reporting. In this case, the participants and witnesses would be invited to submit a report to the commission within a certain period of time (for example, six months) about significant violations of electoral procedures. The format of the report would be an open-ended list of typical violations, and would indicate the relevant election or referendum, briefly describe the circumstances (time and place), the violation and its consequences, the informant's role, and the organiser (the person who instructed the informant to perpetrate the illegal activities). A real chance of criminal prosecution for those who would not apply for an amnesty could serve as an incentive for informants to report violations.

The informant would be offered relief from criminal liability for the acts described in his or her voluntary report. At the same time, the informant would undertake, at the request of the investigating authority, to confirm his or her statement while testifying in criminal proceedings (if any) and, at the request of the commission, at its public hearing; otherwise, the relief would be revoked. Without confirmation in testimony, the information could not be used as evidence in criminal proceedings against the informant or other persons.

468 The idea of a conditional amnesty is borrowed by the authors from the Promotion of National Unity and Reconciliation Act 34 of 1995, Republic of South Africa: https://www.justice.gov.za/legislation/acts/1995-034.pdf (accessed on 01.07.2020); *Du Bois-Pedain A.* Accountability through Conditional Amnesty: The Case of South Africa // Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives / ed. by F. Lessa, L.A. Payne. Cambridge: Cambridge University Press, 2012. P. 238–262. The proposed solution has certain similarities with the so-called amnesty of capital on the basis of the Federal Law No. 140-FZ of 8 June 2015 "On the voluntary declaration by individuals of assets and accounts (deposits) in banks and on amendments to certain legislative acts of the Russian Federation," as well as with the institution of witness immunity in US law.

The relationships between the main transitional justice institutions



The blocks refer to the main transitional justice institutions described in that chapter (they should not be conflated with the transitional justice bodies discussed later in Chapter 9). The arrows show how the work of some transitional justice institutions can be used for the purposes of other institutions.

If successful, the amnesty would help obtain a lot of information about the manner and extent of unlawful interference by the authorities in electoral procedures. Exempting the immediate perpetrators and low-ranking instigators is unlikely to unduly limit the administration of justice, since the preferable focus of justice should be on the main culprits of attacks on the democratic institutions, while large-scale criminal prosecution of thousands of ordinary perpetrators would hardly be practicable.[469]

Based on the results of its work, the Commission for Investigating the Usurpation of Power would have to present a public report and a series of recommendations, and to submit information on crimes obtained during the investigation (including from amnestied informants) to the investigative authorities of transitional justice.

In addition to the above, the commission would carry out lustration (see section 4.1 below).

1.2. Examination of allegations of torture and ill-treatment (Commission for Reparations to Victims of Torture)

Unlike attacks on the political institutions of the state – which the Russian state could generally refuse to prosecute without violating its international legal obligations – in the case of torture and wrongful death, the state must, under the international law of human rights, carry out effective investigations in any case. For this reason, extrajudicial mechanisms for establishing the circumstances of such crimes are justified only insofar as they help facilitate compensation for the harm inflicted. These mechanisms should not apply to criminal prosecution.

As a way of facilitating compensation, one could recommend a procedure separate from the standard criminal one, for proving damages caused to the applicants and acknowledging their right to receive compensation from the public purse. This procedure would save the victims the trouble of waiting for a judgment against the perpetrators or proving damages in civil proceeding. The procedure can also apply to cases of death, torture, cruel and inhuman treatment.

Since an extrajudicial procedure cannot classify infliction of harm as crime or find particular individuals guilty, a lower standard of proof should be selected that would be sufficient in order to recognise the state's responsibility for the damages. A combination of the following circumstances can be used as grounds for reparation:

- Death, pain, physical, and (or) moral suffering has been caused to the victim;
- This has occurred while they are subject to coercive measures by officials, serving a sentence in a place of detention, or are under the control of officials in other circumstances;
- Unless it has been established that this act was lawful or was committed by the victim or by third parties acting on their own initiative.

469 The authors are aware that conditional amnesty is associated with a number of political, legal and procedural issues requiring careful examination. How fair or appropriate is it to define the scope of informants to be amnestied with formal features? On the one hand, this approach obviates the need for individual verification of each case (which would be inevitable if conditional amnesty was extended to cover an indefinite number of persons, because in this case it could be used by high-ranking instigators of crimes, among others). On the other hand, not all perpetrators of election fraud who could share valuable information were members of election commissions and could be thus formally identified. Informants must be protected from threats, retaliation, and legal claims from people they have exposed. For this reason, the Commission for Investigating the Usurpation of Power should refrain from revealing the names of perpetrators disclosed by informants. Equally problematic would be the issue of providing safeguards to ensure that the testimony of amnestied persons could not be used against them.

In other words, we suggest proceeding from the presumption of the state's responsibility for violence, pain, and suffering caused to those under the control of law enforcement and penal authorities. This presumption may be rebutted in the course of examination.

In order to apply to the reparations commission, one would only need to describe the circumstances of his or her abuse or ill-treatment and attach available supporting documents. The commission would conduct its own investigation into the allegations, for which it would be authorised to collect evidence, i.e. be able to question witnesses; inspect the premises of government agencies and institutions; examine victims; conduct exhumations; and seize documents. Based on the results, the commission would then decide whether the state should be held responsible for the act of violence against the applicant, whether an apology and reparation should be made (see section 2.4 of this chapter), or whether the available evidence is insufficient for the above.

The commission may additionally be tasked with establishing the facts of ineffective investigations into allegations of torture, as well as preparing reports on practices of torture, on the policy of impunity, and on promotion of such practices – especially among law enforcement officials – in order to eradicate the "culture of torture" among them.

1.3. Examination of allegations of enforced disappearance and damage to life and health during counterterrorist operations in the North Caucasus (Commission for Reparations to Victims of Armed Conflict in the North Caucasus)

An extrajudicial mechanism for establishing the facts of violence carried out against civilians during the armed conflicts in the North Caucasus is also intended to meet the interests of the victims. Many still do not know the causes of death of their killed family members or the fate of those abducted during counter-terrorist operations. Moreover, the victims have not received any compensation for the harm inflicted upon them. From the authors' point of view, it would be cruel and immoral to make them wait until the outcome of a criminal investigation, which could last several years and would not necessarily result in convictions, is produced.

International and Russian human rights organisations have repeatedly recommended that the Russian government establish a special body to investigate the fate of the people who disappeared during counter-terrorist operations in the North Caucasus, and to provide assistance to their families.[470] The ECtHR[471] also pointed to the need for such a body, but to date this recommendation has remained unaddressed.

The Commission for Reparations to Victims of Armed Conflict in the North Caucasus would have to register those missing and killed; search for graves; identify discovered remains; and clarify the circumstances of forced disappearances and deaths. The victims should be involved in the commission's work. The commission could be also tasked with providing reparations.

470 See for example: Families of Missing Persons: Responding to their Needs, a report by the International Committee of the Red Cross, based on an assessment carried out in the North Caucasus: https://www.icrc.org/ru/doc/resources/documents/publication/russia-publications-300810.htm (accessed on 01.07.2020): https://www.icrc.org/ru/doc/assets/files/publications/fnaq_public_version_rus.pdf.

471 ECtHR. Aslakhanova and Others v. Russia. Applications nos. 2944/06, 332/08, 42509/10, 50184/07, 8300/07. Judgment of 18 December 2012. § 223–228.

The commission should have all necessary investigative authorities, including access to information constituting state secrets (for example, regarding the organisational structure and personnel of the troops and forces involved in the counter-terrorist operation).

A "soft" standard of proof not mandating the establishment of guilt for specific individuals, would be also needed to establish the state's responsibility for the harm caused during armed conflict. This standard could be based on the presumption of Russia's responsibility for all cases of harm to life and health and for disappearances of people during the counter-terrorist operations in the relevant territories, unless it is proved that the harm is unrelated to the actions of government forces. A stricter criterion of presumption of state's responsibility could also be opted for.

In addition to monetary compensation, the commission should coordinate the provision of psychological and medical assistance to survivors and families of the dead and missing, as well as implementation of social rehabilitation programmes (see section 2.5 below).

In order to draw public attention to the suffering of the civilians, the commission could hold public hearings that give the victims an opportunity to share their experiences.

1.4. Providing access to data collected through covert surveillance and investigative measures

Reforming the system of state surveillance activities is beyond the scope of transitional justice, but remedying the consequences of politically motivated interference in private life (see section 2.6 of Chapter 2) is one of its tasks.

It appears (*inter alia*, based on the ECtHR judgement in *Roman Zakharov v. Russia*[472]) that remedies for violation of the rights of individuals subjected to covert surveillance for political reasons or without sufficient grounds would include:

- Notifying them of the use of covert surveillance or investigative measures; and
- Ensuring their access to the collected data.

According to the conclusion reached by the ECtHR, failure subsequently to notify the person about covert surveillance and investigative measures (unless their results are not included in their criminal case file) is a violation of Article 8 of the European Convention, since such notification is a necessary condition for appealing against these measures.[473] For this reason, the right to know about interference in private life must be granted regardless of the reasons for the interference, and the only criterion for denying this right is the justified legitimate purpose of keeping the surveillance secret.

A new special mechanism is needed to meaningfully control the justification for covert surveillance and investigative measures. This task should be performed by a structure that would be independent from the agencies carrying out the surveillance. The main dilemma in planning for such a mechanism is the need to choose between comprehensive inspection of all the data collected through covert surveillance and other investigative measures with subsequent notification of all those who were subjected to them, and selective inspection of collected data at the request of

472 ECtHR. *Roman Zakharov v. Russia* [GC]. Application no. 47143/06. Judgment of 4 December 2015.
473 Ibid. § 286–302.

interested persons. Comprehensive inspection would place an enormous burden on the relevant agency.[474] In order to restore violated rights in the context of transitional justice, it would be sufficient to notify individuals about their surveillance upon request. It is noteworthy that this principle guides the activities of the Federal Commissioner for Stasi Records in Germany, which is the most famous body providing access to the archives of the political police.[475]

The effectiveness of the mechanism directly depends on providing access to the surveillance records and criminal case files for inspectors. If there is a decision to dissolve certain law enforcement agencies, their archives could be transferred to an agency authorised to ensure access to surveillance records. At the same time, the agency should be entitled to request these records from the agencies that continue their work and to seize them independently if their request is denied.

1.5. Establishing the facts of the crimes of the Communist regime in Russia (Institute for Public Memory)

As discussed in section 3 of Chapter 6, the crimes of the Communist regime have never been fully investigated at state level in Russia. Despite the many years that have passed and a great deal of research into various aspects of Soviet repressive policies, there is still a demand for justice in this area.

It is necessary to officially establish the circumstances of Communist crimes, including the identity of the perpetrators; to organise access to the archives of the top Soviet leadership and special services; and to search for and protect the graves of the victims.

Recommendations set out in the state and civil society Programme on Perpetuating the Memory of Victims of the Totalitarian Regime and on National Reconciliation, prepared in 2011 by the Presidential Council for the Development of Civil Society and Human Rights (hereafter, the Human Rights Council, HRC) would be used for this purpose. This initiative recommended that the Federal Security Service, Interior Ministry and Federal Archival Agency (Rosarkhiv) search the archival records for the burial places of victims of terror; open access to these records; launch a unified state programme to prepare memory books for victims of political persecution; and open a single online database entitled "The Victims of the Totalitarian Regime in the USSR." In addition, it was proposed to allow state archives to independently declassify documents related to repression and remove any restrictions on access. Moreover, the drafters of the programme advocated for "a political and legal evaluation of the crimes of totalitarianism," in the form of an official declaration on behalf of both the executive and the legislature, as well as for an authoritative legal decision classifying the criminal acts in accordance with law.[476]

474 According to estimates by experts of the Agora Human Rights Association, from 2007 to 2016 alone 4,517,515 court decisions were issued to satisfy requests to intercept and record telephone and other conversations, as well as to circumscribing the secrecy of correspondence. See: *Гайнутдинов Д., Чиков П.* Россия под наблюдением: Как власти выстраивают систему тотального контроля над гражданами: https://www.agora.legal/articles/Doklad-Mezhdunarodnoi-Agory-%C2%ABRossiya-pod-nablyudeniem-%E2%80%93-2017%C2%BB/9 (accessed on 01.07.2020).

475 See: *Лёзина Е.* Люстрация и открытие архивов в странах Центральной и Восточной Европы // Вестник общественного мнения. 2015. No. 2 (120). pp. 61–62.

476 See: Предложения об учреждении общенациональной государственно-общественной программы «Об увековечении памяти жертв тоталитарного режима и о национальном примирении» // Российская газета. 2011. 7 апреля, at: https://rg.ru/2011/04/07/totalitarizm-site.html (accessed on 01.07.2020).

In our opinion, in addition to these measures, there is a need for a separate state and civil society initiative for a comprehensive study of Communist crimes with the purpose of establishing, on behalf of the state, the scale, the mechanisms, and the typology of the crimes; identifying the perpetrators; and illustrating the suffering of the victims. It would be advisable to publish a report that could then be submitted to the Federal Assembly for consideration. Along with the report, an extended research programme on the crimes of Communist totalitarianism should be launched.

An independent governmental institution – the Institute for Public Memory – should be established to preserve and provide access to the archival records of the repressive agencies of the Communist regime and to conduct research into its crimes. Lustration of former KGB employees could be an additional task of the institute (see section 4.1 of this chapter).

1.6. General procedural issues

The Commissions and the Institute for Public Memory should cooperate with the investigative authorities, namely by transmitting to them data collected for criminal prosecution. In the interests of the investigation, the identity of suspects should not be disclosed in the reports of the commissions and during their public hearings. Otherwise, the Commissions should disclose their identity, provided that they would have a chance to contest the allegations in court (as part of a defamation action).

2. Remedies for the consequences of violations (reparations)

Given the need to prioritise the protection of victims of the most widespread (systematic) and gross violations of basic human rights, transitional justice could include special mechanisms to restore the rights of persons subjected to unconstitutional criminal and administrative repressions, torture, and ill-treatment, as well as victims of violence during the armed conflicts in the North Caucasus, and (in addition to the existing measures) victims of political persecution in the USSR.

For other situations involving harm and mentioned in this report, the remedies set out in the current legislation (especially if used together with the measures to eliminate criminal impunity recommended below) appear to be sufficient. Therefore, beyond the areas listed in the previous paragraph, we have only made a few general recommendations (sections 2.7-2.10 of this chapter).

In addition, we propose to reform the mechanism of compensation for violations of the right to trial within reasonable time. But this task is beyond the scope of transitional justice and requires a separate study.

2.1. Special procedure for rehabilitating victims of unconstitutional criminal repression

The previous chapter listed the shortcomings of the existing procedure for restoring the rights of individuals who have been unjustly prosecuted from the perspective of transitional justice. We would propose to simplify the procedure, specifying cases where unlawful criminal prosecution has occurred for political reasons or because of corruption, and combining under one procedure all the restorative measures for victims of unlawful criminal prosecution and related coercive measures, as well as individual measures to prevent the recurrence of such violations in the future.[477]

Violation of the constitutional principle of the rule of law – that is, the use of coercive measures for a clearly unlawful purpose rather than the purpose of justice – could be used as a general criterion for overturning verdicts that have entered into force and other judicial decisions in criminal cases, as well as for dismissing criminal cases and illegalising investigative and other measures of procedural compulsion (for example, the seizure of property).

Violation of the constitutional principle of the rule of law (i.e. the anti-constitutional character of a judgment/measure) can be established in the following cases:

1. Criminal prosecution or measures of procedural coercion were used exclusively for political purposes, in particular:
    - With the purpose of removing political opponents (depriving them of the opportunity to participate in social and political life, intimidating them, or forcing them to emigrate);
    - Against an act that constituted the peaceful exercise of the constitutional freedoms of expression, assembly, and conscience (not accompanied by violence or calls to violence);
2. Criminal prosecution or applications of measures of procedural coercion for corrupt purposes, i.e. if used as a way to extort a bribe, or to force someone to perform a transaction or abandon the use of legal remedies.

Regardless of the factual validity, prosecution for the following is considered anti-constitutional (see section 2.6 of Chapter 2 for justification):

- Public actions expressing open disrespect for society and committed for the purpose of insulting the religious feelings of believers (Article 148 § 1 and 148 § 2 of the Criminal Code);
- Public justification or propaganda of terrorism (liability for these actions is stipulated by Article 205.2 of the Criminal Code; public calls to terrorist activity punishable under this Article are not subject to the presumption of anti-constitutionality);

477 The main sources for the proposals outlined in this section are: Law of the Russian Federation "On Rehabilitation of Victims of Political Persecution" and the Institute for Rehabilitation of Victims of Illegal Criminal Repressions in Germany. See: Gesetz über die Rehabilitierung und Entschädigung von Opfern rechtsstaatswidriger Strafverfolgungsmaßnahmen im Beitrittsgebiet.: https://www.gesetze-im-internet.de/strrehag/ (accessed on 24.06.2020).

- Repeated violation of the established procedure for organising or holding meetings, rallies, demonstrations, marches, or pickets (Article 212.1 of the Criminal Code);

- Conducting activities on the territory of the Russian Federation on behalf of a foreign or international non-governmental organisation that is considered undesirable (Article 284.1 of the Criminal Code); malicious evasion of the duties defined by the legislation on non-profit organisations performing the functions of a foreign agent (Article 330.1 of the Criminal Code);

- Failure to comply with the obligation to submit a notification of foreign citizenship or a residence permit abroad (Article 330.2 of the Criminal Code);

- Public dissemination of deliberately false statements about the activities of the USSR during the Second World War (Article 354.1 § 1 and 2 of the Criminal Code - "Rehabilitation of Nazism") and dissemination of statements about military glory days and memorable dates of Russia related to the defence of the Fatherland (§ 3 of the same Article) that express open disrespect for society.

Criminal prosecution for acts under the following Articles of the Criminal Code is also considered to be motivated solely by political considerations, **provided that they do not involve any calls for violence:**

- Public calls to engage in extremist activity (Article 280 of the Criminal Code);

- Public calls to engage in actions aimed at violating the territorial integrity of the Russian Federation (Article 280.1 of the Criminal Code);

- Incitement of hatred or enmity, as well as abasement of dignity of a person (Article 282 of the Criminal Code);

- Organising an extremist community (Article 282.1 of the Criminal Code);

- Organising the activity of an extremist organisation (Article 282.2 of the Criminal Code);

- Financing extremist activity (Article 282.3 of the Criminal Code).

In the presence of the above grounds, judgments and other court rulings in criminal cases should be overturned; pending criminal cases should be dismissed; measures of procedural compulsion should be declared illegal; and convicts and persons subjected to criminal prosecution or other measures of procedural compulsion would be entitled to rehabilitation.

Related decisions on terrorist and extremist designations, as well as on freezing bank accounts, securities and property based on the Federal Law "On Countering the

Legalisation (Money Laundering) of Criminal Income and the Funding of Terrorism," would be annulled on the same grounds.

Court decisions and other law enforcement acts should be cancelled by courts upon receipt of a request by individuals subjected to official compulsion measures, their relatives, or the transitional justice body (see section 3.3 of Chapter 9). For accelerating and simplifying the procedure for the applicant in these cases, it would be advisable to combine decision-making on the review of repressive law enforcement acts, recognition of the right to rehabilitation, compensation for property and moral damage, and the use of other remedies.

When examining an application for rehabilitation, the court must verify both the legality and factual validity of the contested law enforcement acts, considering the evidence of their anti-constitutional nature presented by the applicant and the conclusion of the transitional justice body regarding the existence of grounds for rehabilitation.

Judgments and rulings on initiating criminal proceedings under Articles 148 (§ 1 and 2), 205.2 (justification and propaganda of terrorism), 212.1, 284.1, 330.1, 354. 1 (public dissemination of deliberately false statements about the activities of the USSR during the Second World War and dissemination of statements about the days of military glory and memorable dates of Russia related to the defence of the Fatherland, expressing open disrespect for society) of the Criminal Code should be dismissed by the court by virtue of law, without checking the factual circumstances of the case.

In granting the application, a court would:

- Specify why the contested law enforcement act is incompatible with the constitutional principle of the rule of law;
- Revoke the contested judicial decision, dismiss the criminal case, and declare illegal the investigative actions or other measures of procedural coercion;
- Recognise the right for rehabilitation of the individual subjected to anti-constitutional repression;
- Award compensation for property damage and moral harm and restore other rights to the rehabilitated individual.

It appears that the substance of the right to rehabilitation for victims of unconstitutional repression should not go beyond the scope of Article 133 § 1 of the Criminal Code. However, it should be supplemented with criteria for determining the amount of compensation for moral damage, including the minimum amount of compensation depending on the nature and duration of the restriction on the individual's rights, and the circumstances for compensation above the minimum amount. The inability of the rehabilitated individual to use their money and other property that constituted their means of subsistence due to seizure or freezing should become a separate ground for compensation for moral harm. Moreover, a list of types of compensable property damage should include losses resulting from measures of restraint or other measures of procedural compulsion, as well as from freezing of funds or other property.

2.2. Rehabilitation of victims of unconstitutional administrative repressions

Given the scale of administrative political repressions (see section 2.6 of Chapter 2), a special mechanism is required to restore the rights of victims, especially as the current legislation lacks any procedure for the rehabilitation of citizens unjustly prosecuted for administrative offences.[478]

Similar to criminal repressions carried out for political reasons, administrative repression is often (and sometimes even more frequently than the former) formalised through special Articles of the Code of Administrative Offences of the Russian Federation (hereafter, Administrative Offences Code) that prohibit inherently lawful behaviour (from the perspective of the Russian Constitution and international human rights law) or establish disproportionately strict penalties for minor offenses. In assessing the legality of prosecution under such "politically motivated" Articles, there is no need to check for sufficient grounds and compliance with procedures. Instead, all rulings made under these Articles should be recognised as unconstitutional in law and revoked without any fact-checking (see section 2.6 of Chapter 2 for arguments in favour of this approach).

We would propose regarding the following Articles of the Administrative Offences Code (numbers of the Articles are given in parentheses) as "politically motivated" elements of administrative offenses:

- Illegal missionary activity (Article 5.26 § 4);
- Failure to provide information by a non-profit organisation performing the functions of a foreign agent (Article 19.7.5-2);
- Violation of the operating procedures of a non-profit organisation performing the functions of a foreign agent (Article 19.34);
- Dissemination on the Internet of information expressing open disrespect for society, the State, official state symbols, the Constitution of the Russian Federation or bodies exercising state authority in the Russian Federation (so-called "disrespect for authority" (Articles 20.1 § 3 and 4);
- Violation of the established procedures for arranging or conducting a meeting, rally, demonstration, procession or picket (Article 20.2 as amended by Federal Law No. 65-FZ of 8 June 2012 and with subsequent amendments, except for 20.2.7);
- Organisation of mass simultaneous presence and/or movement of citizens in public places resulting in disturbance of public order (Article 20.2.2);
- Propaganda of attributes or symbols of extremist organisations (Article 20.3, except for propaganda of Nazi attributes or symbols);

478 One of the sources for the proposals outlined in this section was the German Administrative Rehabilitation Act, see: Gesetz über die Aufhebung rechtsstaatswidriger Verwaltungsentscheidungen im Beitrittsgebiet und die daran anknüpfenden Folgeansprüche. URL: https://www.gesetze-im-internet.de/vwrehag/ (accessed on 01.07.2020).

- Operation of an undesirable organisation (Article 20.23);
- Production and dissemination of extremist materials (Article 20.29).

In addition to recognising rulings in the cases of the above administrative offences as suppression of lawful activity and as such illegal regardless of the actual circumstances in each specific case, a simplified review procedure should apply to prosecution for 'non-political' reasons that is also aimed at penalising lawful behaviour.

Cases potentially eligible for the review include administrative sanctions for disobeying a lawful order of a police officer (Articles 19.3 § 1 and 6 of the Administrative Offenses Code), applied in connection with participation in peaceful public events, as well as for public display of Nazi attributes or symbols (Article 20.3 of the Administrative Offenses Code) where actual propaganda of Nazi symbols was not intended.

In our opinion, the revocation of administrative rulings made under anti-constitutional Articles of the Administrative Offences Code should be followed by their removal from the Code and the revision of anti-extremist legislation, which should include lifting restrictions on dissemination of "extremist" materials and reviewing decisions to dissolve organisations declared "extremist."

The system for rehabilitating the victims of anti-constitutional administrative repressions should be centralised. The transitional justice body should apply to the courts to revoke rulings on administrative violations and restore the rights of those held liable for perpetrating them. An application for rehabilitation may also be filed by the repressed individual. The court should vacate rulings under the "politically motivated" Articles of the Administrative Offenses Code without any fact-checking (unless an application is filed against prosecution under a "non-political" Article), reimburse fines that have been paid (with interest accrued), and compensate for material and moral damages.

The proposed law on administrative rehabilitation should include rules for determining the amounts of compensation, including the minimum amount, for moral harm resulting from measures of compulsion that restrict freedom and are applied in connection with administrative liability (bringing to court, detention, arrest).

2.3. Specifics of granting compensation for violations of the right to effective investigation of a crime

Despite the numerous examples of ineffective investigation of crimes cited in this paper, we would not recommend establishing a special mechanism for granting compensation for this violation within the framework of transitional justice. The shortcomings of the existing institution of compensation for violation of the right to trial within a reasonable timeframe are not limited to cases of politically motivated impunity, and correction of these shortcomings (first of all, bringing the amounts of compensation to fair levels, corresponding to the ECtHR's practice) should cover all violations of this right irrespective of their causes. It seems reasonable to make exceptions to the general judicial procedure for crimes whose victims we believe should be offered extrajudicial reparation mechanisms (i.e. torture and ill-treatment, as well as enforced disappearances, causing harm to life and health during counterterrorist operations in the North Caucasus – see sections 2.4-2.5).

In addition, in the interest of transitional justice, several provisions should be added to the general rules on compensation for ineffective investigation. In criminal cases taken over by (or referred to) bodies of transitional justice, these bodies should also participate in the court hearing of applications for compensation for the previously violated right to effective investigation. They should submit to the court collected data on wrongful inaction on the part of the investigating agencies, including cases of political interference in their work. The court must take these circumstances into account when evaluating the gravity of the violation and assigning the amount of compensation.

2.4. Compensation for victims of torture and ill-treatment

Victims of torture can independently apply to court for compensation of the property and moral damage inflicted to them. The extrajudicial compensation mechanisms proposed below are necessary because of the severity of the situation of these victims who have long been deprived of effective remedies. Society has a moral duty to promptly and fully compensate the harm that these people have suffered and, if necessary, to provide medical and social rehabilitation. Additionally, extrajudicial procedures (see sections 1.2 of this chapter) help protect the victims from re-victimisation, which is more likely to happen in adversarial proceedings.

Of course, even a well-designed compensation programme and other remedies cannot cover all possible cases and guarantee the full compensation that the victim is entitled to under the law (Article 1064 §1 of the Civil Code). Therefore, extrajudicial measures should not exclude compensation for harm in a general judicial procedure.

1. Individual reparations should include:

    1.1. Compensation for harm to the victim's health. Awarded under the general rules of the Civil Code.

    1.2. Compensation for harm resulting from the death of the breadwinner (if death was caused by torture). Awarded under the general rules of the Civil Code.

    1.3. Compensation for moral harm caused by torture. The minimum amount of the compensation should be stipulated in the law on compensation for victims of torture. The compensation should be awarded by a Compensation Commission, taking into account the nature of the physical and moral suffering of the victim (including close relatives of the individual who died of torture). At the same time, the amounts of compensations awarded by the commission should not be lower than those usually awarded by the ECtHR for complaints against similar violations of Article 3 of the ECHR.

    1.4. Compensation for moral harm caused by ineffective investigation (see section 2.3 of this chapter). The list of grounds for the compensation set out in the current compensation procedure for violation of the right to trial within a reasonable timeframe should be expanded. The minimum eligibility requirement for this compensation would be a single refusal by the state to initiate criminal proceedings at the request of a victim of torture if this refusal was subsequently overturned (including by the transitional justice bodies).

1.5. Formal apology. The apology should follow a failure to take measures to prevent and investigate torture.

2. Collective reparations should include:

2.1. Medical care and rehabilitation. Victims of torture should have access to qualified medical treatment and psychological and social rehabilitation, which might be as important as monetary payments.

2.2. Outreach work to eradicate tolerance of torture in society, including financing of films and other projects on this topic.

The compensation programme would be implemented by a specialised body – the Commission for Reparations to Victims of Torture – which would provide compensation and offer apologies on behalf of the state to persons whose claims meet the criteria for recognising the state's responsibility for the acts of violence outlined in section 1.2 of this chapter.

The Commission should assist individuals eligible for reparation in gathering all documents required to determine the amount of the compensation.

2.5. Compensation for victims of violence suffered during the counterterrorist operations in the North Caucasus

The recommendations outlined in the previous section are largely applicable to civilians who have suffered from violence during counterterrorist operations in the North Caucasus, with the following reservations:

- The search for and identification of remains of those missing as a result of violent actions by the authorities and transfer of the remains to families for reburial should be defined as a special type of reparation for their family members.

- Additions should be made to the general rules for determining the amount of compensation for the damage inflicted on persons who lost a breadwinner in the course of federal or regional counterterrorist operations. It is often impossible to verify the amount of earnings of residents of Chechnya, who died or went missing many years ago, as required by Article 1086 of the Civil Code, because the tax authorities in Chechnya did not function for a long time; local residents had no taxable ("formal") income; and no statistical records were kept. As an exception to the general rule, average earnings of various categories of employees could be obtained from other data, for example, from opinion polls.

Other individual measures mentioned in the previous section should also apply to this category of victims. Their implementation should be the responsibility of the Commission for Reparations to Victims of Armed Conflicts in the North Caucasus (see section 1.3 of this chapter).

As a special collective remedy for the harm caused to the civilian population by the wars in the North Caucasus, the highest political bodies of the state (i.e. the President, or the Federal Parliament) could issue an official statement acknowledging the massive and flagrant civilian suffering during the conflict and apologising for the disproportionate use of force by government troops and for the years of impunity for abductions, tortures and killings.

2.6. Compensation for damage caused by political repression and other crimes of the Communist regime in Russia

The Human Rights Council's proposed "Programme on Perpetuating the Memory of Victims of the Totalitarian Regime and on National Reconciliation" (see section 1.5 of this chapter) contained the following recommendations concerning compensation for damages caused by the crimes of the Communist regime:

- Expand the list of grounds for rehabilitation of victims of political persecution; ensure the proactive rehabilitation of victims of administrative persecution; introduce procedures for establishing facts of persecution in the absence of documentary evidence.

- Increase the amount of lump-sum compensation for rehabilitated victims of political persecution and those who suffered from the persecution; make monthly payments to rehabilitated victims from the federal budget and establish a single amount of compensation with the possibility of indexation; introduce in-kind medical benefits; implement special support measures and increase compensation for inmates of camps and prisons.

- Initiate a federal programme to install monuments dedicated to victims of political persecution; register the existing monuments and classify them as cultural heritage sites; grant the memorial status to sites of mass executions; bury Lenin's body; and pass a law on place names to prohibit the perpetuation of the memory of the main perpetrators of mass repressions and other crimes against rights and freedoms of citizens.

Apart from these measures, a special law should be adopted on the perpetuation of memory and rehabilitation of those who fought for Russia's freedom. The law would create grounds for providing benefits and privileges, similar to those enjoyed by veterans, to freedom fighters; for perpetuating their memory; and for rehabilitating individuals repressed by the Soviet regime who do not fall within the category of victims of political persecution.[479]

An all-federal mechanism should be established to provide housing to rehabilitated individuals in the places from which they were evicted due to persecution, as stated in the Judgment of the Constitutional Court No. 39-P of 10 December 2019.

In order to restore the rights of the heirs of victims of economic repression, ownership rights on real estate that was nationalised by the Soviet authorities and is still owned by public-law entities should be restored to the heirs of the original owners.

2.7. Calculation of prescription that expired due to violence or threats

In order to allow victims of unpunished extortion (including by persons in authority) to restore their rights in court, Chapter 12 of the Civil Code should be amended to include a provision on commencing the limitation period for filing trial motions for the recovery of property from illegal ownership and for receiving compensation for losses from the moment of the cessation of violence or threats that prevented the

479 As a possible source for adaption in this regard, we can suggest the Czech law on participants in anti-communist opposition and resistance. An unofficial English translation of this law is available at: http://www.proyectos.cchs.csic.es/transitionaljustice/sites/default/files/maps/info/other-legislation/czech-republic-/czech_rep_act_262_2011.pdf (accessed on 01.07.2020).

applicant from bringing the action earlier. This provision should have a retroactive effect.

For eligibility under this provision, an applicant would need to prove the subjective validity of his/her concerns. The proof could include explicit threats to subject them to criminal prosecution if the action is filed, as well as indirect threats, namely, carrying out investigative measures in companies under the applicant's control, engaging law enforcement officers in negotiations on a hostile takeover of the business, etc.

2.8. Reviving statutes of limitations for trial motions that expired due to violence or threats

An amendment similar to the one proposed in the previous section should be made to Codes of Civil, Commercial and Administrative Procedure to allow for extending the missed deadlines for filing trial motions, if the failure to file a motion on time was due to violence or threats. Instead of amending the codes of procedure, the Supreme Court could issue clarifications to formalise this exception.

2.9. Additional grounds for review of judgments based on newly discovered evidence

We recommend adding to the grounds for review of judgments based on newly discovered evidence, envisaged by the Russian codes of procedure (Article 311 § 2 of the Commercial Procedure Code, Article 392 § 3 of the Civil Procedure Code, Article 350 § 2 of the Administrative Procedure Code). Accordingly, newly discovered evidence could include not only facts established in a judgment, as the Codes currently provide for, but also in a court ruling or decision, a decision of an investigator or an inquiry officer to terminate criminal proceedings upon expiration of the statute of limitations, an act of amnesty or pardon, or upon recognition of the death of a suspect or an accused.

2.10. Resetting deadlines for appealing against election results

In order to circumvent procedural obstacles allowing to appeal election results (see section 1.6 of Chapter 7), transitional justice bodies should have the right to file administrative lawsuits to cancel election results regardless of the time limitations stipulated by the election legislation and the Administrative Procedure Code. For this purpose, amendments should be made to Article 78 § 3 of the Federal Law "On Basic Guarantees of Electoral Rights and the Right of Citizens to Participate in a Referendum" and Articles 239-240 of the Administrative Procedure Code. Within the framework of transitional justice, the right to appeal against election results should apply for a certain period of time, e.g. for a year after the right is granted. This right should apply only to elections taking place before the end of the policy of impunity.

As mentioned above, the consequences of election fraud and obstruction of the free exercise of electoral rights can also be addressed without going to court, namely, by holding new elections and referendums. The creation of a necessary regulatory framework or political conditions to address this issue (including self-dissolution of representative authorities and voluntary resignation of officials) goes beyond the scope of transitional justice.

3. Criminal prosecution

In the context of criminal prosecution and from the perspective of transitional justice, special provisions should be introduced for the (non-)application of statutes of limitations and amnesties to individuals who are protected from prosecution as a result of a policy of systemic impunity, and time limits should be removed for criminal judgments' revision by way of aggravation of the defendant's situation (*reformatio in pejus)*.

3.1. Extension and revival of statutory limitations

Statutes of limitations in criminal cases within the context of transitional justice were discussed in detail in the previous chapter (section 1.1).

In foreign legislation, there are two main ways to address statutory limitations as an obstacle to restorative justice: Extending limitations that have not yet expired or reviving those that have. A complete revocation of retroactive limitations in criminal cases can be an alternative to both.

In Russia, the mere extension of unexpired statutory limitations would be obviously insufficient for the purpose of transitional justice as many large-scale crimes have already become time-barred and under the current provisions cannot be investigated and prosecuted (Article 24 § 1.3 of the Criminal Procedure Code). Therefore, along with the extension of unexpired limitations, it is necessary to revive the expired ones.

Retroactive revival or cancellation of statutory limitations is usually carried out through judicial interpretation or by a law having a retroactive effect. In the first case, the legal provisions in force at the time of the crime are interpreted as if they originally provided for the suspension of statutory limitations (even if contrary to their literal meaning). For example, under the criminal codes in force in socialist East Germany, the statute of limitation was suspended for the time when criminal proceedings could not be instituted or continued for a valid reason. After German reunification, the courts recognised the political will of the German Democratic Republic (hereinafter – the GDR) leadership not to prosecute certain crimes as legal grounds for this suspension, despite the fact that the Socialist Unity Party of Germany (SED) obviously did not enshrine this will in the law.[480]

It is more common to revive expired limitations by enacting a special retroactive law that usually indicates the types and time of the crimes, as well as the starting date for re-counting the statute of limitations. In case of complete revocation of limitations with retroactive effect, there is no need to establish a new starting date. Thus, in 2011, Croatia legislated not to apply statutory limitations to illicit enrichment during the war for independence and to crimes committed during the property transformation and privatisation process.

In Russia, revival of expired statutory limitations through judicial interpretation is possible in theory, but appears to be ineffective in practice. We see no provisions in criminal legislation that could be used as a basis for suspending the statute of limitations for the period of actual non-prosecution for political reasons. The sole basis for such an interpretation that could be considered is the suspension of the limitation

480 See: *Бобринский Н.* Изменение сроков давности привлечения к публично-правовой ответственности с обратной силой: Постановление Конституционного Суда России от 19 января 2017 года №1-П в европейском контексте // Сравнительное конституционное обозрение. 2019. No. 5 (132). p. 72–89, 76.

period where the perpetrator evades the investigation or trial (Article 78 § 3 of the Criminal Code). Theoretically, the perpetrator's interference in the activities of the law enforcement agencies, in order to impede the investigation and the prosecution, can be regarded as such evasion. However, such interference can be assumed only in relatively rare criminal cases, involving senior Russian politicians and some other categories of individuals, who have similar leverage over law enforcement agencies. Situations where those in power interfere in law enforcement activities to protect third parties from criminal prosecution can hardly be regarded as evasion of investigation. At least it should be proven that these third parties solicited impunity. The passive failure of a perpetrator to report an offence committed by him/her is not considered as evasion of investigation.[481] Rejecting this interpretation of Article 78 § 3 of the Criminal Code and applying this statutory provision to individuals who fail to turn themselves in on time would be disproportionate to the goals of transitional justice. Such interpretation has nothing to do with politically motivated impunity and would adversely affect the situation of any individual brought to criminal responsibility.

Therefore, courts would have to derive the fiction of suspending statutory limitations from general principles of criminal law and constitutional norms. In any case, it would take time for such an interpretation to be developed at the level of the highest courts. To avoid this problem, the plenum of the Supreme Court of the Russian Federation could adopt a resolution with relevant clarifications. Such clarifications are of a general nature and would substitute for a retroactive law, yet could have very similar legal consequences.

Revival of expired limitation periods in criminal cases must be subject to strict preconditions. It should meet the goals of transitional justice; should be sufficiently definite; and should not create unjustified inequality. Due to the retroactive nature of such a provision, it should be formulated with due consideration given to arguments about possible contradiction of the Russian Constitution and international law.

This provision is central to the entire concept of transitional justice in Russia, and other constituent parts of the concept are anchored to it. It has technical as well as ideological significance, as it is designed to embody the essence of transitional justice, to show the problem or, to put it figuratively, the social disease, which is supposed to be remedied by application of this and other extraordinary measures.

In foreign practice, a provision aimed at reviving expired statutory limitations for crimes may consist of the following elements:

- A mechanism for changing the general rule of the course of statutory limitations, that is, either suspending them for a certain period in the past or identifying a date from which they should be counted. Both mechanisms are substantively close to one another. They exclude a certain period of time from statutory limitations for crimes, and the limitations period is then counted without taking this period into account. Unexpired periods can be also extended, i.e. prolonged in time. As noted above, in the context Russian transitional justice, a mere extension of statutory limitations would be insufficient, as a lot of unpunished crimes are already time-barred;
- The period of time when the crime was committed, which usually coincides with the period of systemic impunity; and
- A description of crimes covered by the exception.

481 Resolution No. 19 of the Plenary Session of the Supreme Court of the Russian Federation dated 27 June 2013 "On the courts applying the legislation regulating the grounds and procedure for a release from criminal liability," § 19.

The choice of the mechanism for changing statutory limitations is more of terminological nature. Thus, a suspension of statutory limitations from, say, 1 January 2010 to 1 January 2025, or alternatively setting 1 January 2025 as the starting point for counting the period of limitations for crimes committed since 1 January 2010 would have substantively the same meaning. The Criminal Code already uses the term "suspension" in relation to statutes of limitations, so it would be reasonable to opt for it.

The period of time when the crime was committed should be identified in a way to cover all the encroachments that transitional justice is supposed to address. The end of this period lies in the future. It can only be assumed that it would be an event that would mark the end of the policy of "tolerance" of systemic crimes. The start of the suspension period could be linked to the maximum age at which the defendant can still stand trial. This age could be, for example, 100 years,[482] and the suspension could cover the 80 years preceding the effective date of the relevant statutory provision.[483] If the law suspending statutory limitations entered into force, say, on 1 January 2025, it would cover offences committed since 1 January 1945. Alternatively, it would be possible not to pre-determine this matter in the law, but to link the beginning of the suspension to the seizure of power in Russia by the Bolshevik party on 25 October (7 November) 1917, by analogy with the definition of political persecution in the 1991 Law on Rehabilitation (see section 1 of Chapter 6).

Describing the crimes that are subject to suspension is the most complex element of the limitations provision. The description should accurately identify the political goals of transitional justice (those of overcoming the consequences of systemic impunity), but at the same time should not be overly broad so as not to create conditions for arbitrary prosecution of time-barred "ordinary" crimes.

In foreign legal practice, there are two approaches to address this problem with laws reviving statutory limitations; these could conditionally be referred to as the formal option and the analytical one. Under the first option, the list of crimes covered by revived statutory limitations is determined by the legislator. Specific elements of crimes or groups of crimes united by a common generic target are listed in combination with certain characteristics (for example, crimes committed by public officials). Such an approach to this norm stems from the assumption that all acts specified therein and committed during a specified period of time remained unpunished for reasons that the legislator finds unacceptable. This approach is illustrated by a provision of the Introductory Act to the Polish Penal Code adopted in 1995:

> "The statute of limitations for criminal prosecution for intentional crimes against life, health, liberty and justice, committed by public servants in the performance of or in connection with their official duties between 1 January 1944 and 31 December 1989, punishable by imprisonment for a term exceeding 3 years, shall be counted as of 1 January 1990."[484]

482 For example, a 101-year-old man was jailed for 13 years in the UK in 2016: https://www.dailymail.co.uk/news/article-4047846/Britain-s-oldest-convict-101-jailed-13-years-sex-attacks.html (accessed on 01.07.2020).

483 Under the current Criminal Code, the age of criminal responsibility in Russia is 16 years. Moreover, one should take into account the time required for the preliminary investigation and the trial.

484 See.: Ustawa o zmianie Kodeksu karnego, Kodeksu karnego wykonawczego oraz o podwyższeniu dolnych i górnych granic grzywien i nawiązek w prawie karnym z dnia 12 lipca 1995 roku // Dziennik Ustaw. 1995. Nr. 95. Poz. 475. Art. 1, §25(b).

As part of the analytical approach, the legislator only describes the causes and circumstances of impunity for crimes, while their presence in a particular criminal case is determined by court. In particular, this approach was used in the law on suspending statute of limitations for crimes under the SED's lawless regime (the so-called first law on the statute of limitations):

> "For calculation of the limitation period for the prosecution of acts committed under the unjust regime of the Socialist Unity Party but in respect of which no prosecution was brought, by the express or implied will of the State or Party leadership of the former German Democratic Republic, for political reasons or reasons incompatible with the essential principles of a liberal order governed by the rule of law, the period between 11 October 1949 and 2 October 1990 shall not be taken into account. During that period limitation was suspended."[485]

The Federal Supreme Court of Germany had to clarify which causes of impunity met the characteristics specified in the law. For example, the ruling regime's unwillingness to punish border guards for killing refugees who tried to enter West Berlin or the Federal Republic of Germany (FRG) was confirmed by orders from the National Defence Council "to arrest or destroy" such people. In prison abuse cases, politically motivated impunity was proven by prison incident reports and prosecutorial oversight documents, which showed that the supreme authorities knew about the systematic violence, but did not stop it in order to avoid the negative impact of the inevitable publicity of the GDR on the international prestige. In a doping-related health injury case, political impunity was evidenced by the secrecy of the doping programme maintained by the authorities: Parents of underage athletes were unaware of the drugs that coaches gave their children.[486]

The formal and analytical approaches to describing the crimes covered by suspended statutes of limitations are not mutually exclusive. Rather, they can be used in conjunction with each other. At first glance, the formal approach ensures greater certainty of the norm and protects against its arbitrary application by courts. In addition, it relieves the transitional justice authorities from disputes over the legality of criminal prosecution, which are inevitable when evaluative criteria are used. However, this approach has a significant drawback. As discussed above, there is a long list of crimes to which transitional justice could be applied, including crimes against life and health; crimes against constitutional rights, human rights, and civil rights; crimes against the interests of service in commercial and other organisations; crimes against the foundations of the constitutional system and state security; crimes against state power and interests of state service; and crimes against justice (also crimes against peace and security of mankind, though statutes of limitations do not apply to some of them). We cannot assert that impunity for all these crimes committed over such a long period was due exclusively or predominantly to political, corrupt, or other systemic reasons. Therefore, reviving statutory limitations for all these crimes without identifying the reasons for impunity would affect a large number of criminal cases that have gone unnoticed by law enforcement agencies or remained prosecuted for non-political reasons. Resuming criminal prosecution in these cases would not be justified by any legitimate purpose and would lead to unacceptable arbitrariness.

485 See.: Gesetz über das Ruhen der Verjährung bei SED-Unrechtstaten vom 26. März 1993 // BGBl. 1993. I. S. 392.

486 See: *Бобринский Н.* Изменение сроков давности привлечения к публично-правовой ответственности с обратной силой: Постановление Конституционного Суда России от 19 января 2017 года №1-П в европейском контексте. p. 83.

The analytical approach better protects the statute of limitations revival provision from accusations of groundlessness and excessiveness. However, its direct content would have to be clarified by the courts. Of the available foreign examples, Germany's law on the statutes of limitations was the most widely used and successful, so we would rely on it for further analysis.

At first glance, in the analytical approach, political reasons would be the simplest way to explain persisting impunity for crimes. However, this wording is poorly defined and could be broadly interpreted. Moreover, as discussed in this paper, many patterns of unlawful behaviour were not duly prosecuted for reasons of corruption, or for institutional reasons rather than political ones (e.g. violence by low-ranking police officers covered up by their superiors). This may be an argument in favour of leaving the list of reasons for impunity open.

Based on the German law on suspension of statute of limitations, reasons for impunity could also be characterised qualitatively. With regard to political reasons, such a characterisation is necessary to separate intentional non-prosecution of certain crimes sanctioned by the state leadership from unintentional flaws in criminal prosecution policy, such as poor organisational decisions that prevent law enforcement agencies from detecting and investigating certain crimes. It appears that the qualitative characteristic may be a reference to the constitutional principle of the rule of law, which implies, inter alia, that in their activities, the authorities shall be governed by the Constitution and the law and may not knowingly ignore their provisions (in this case, the provisions of the criminal law and law of criminal procedure).

An alternative characteristic could be a reference to violation of the duty to prosecute under Article 21 § 2 of the Criminal Procedure Code (previously, Article 3 of the 1960 Criminal Procedure Code of the RSFSR contained a similar provision): "In every case in which signs of a crime are revealed, the prosecutor, the investigator, the body of inquiry and the inquirer shall take measures stipulated by this Code to establish the event of the crime and to expose the person or the persons guilty of committing the crime."

This is a significant provision, as whenever the prosecutor and investigator receive information revealing signs of a particular crime (public charges), they may not refuse to institute criminal proceedings and conduct preliminary investigations. It is their duty. After the institution of criminal proceedings, there are various legal possibilities for terminating prosecution – for example, effective regret, reconciliation with the victim, or an act of amnesty (see a full list in Article 28 of the Criminal Procedure Code). However, the very principle of mandatory prosecution is still there. If there are no grounds for termination, the state as represented by the investigator and prosecutor must seek to expose and convict the perpetrator. Therefore, violation of the obligation to prosecute could manifest itself in a failure to initiate criminal proceedings on a substantiated allegation or report of a crime, as well as ineffective investigation, including the failure to prosecute persons whose involvement in the crime is known to the investigation. However, the reference to a violation of Article 21 of the Criminal Procedure Code has its drawbacks as well, as it apparently does not cover criminal cases of which the preliminary investigation and prosecution officials did not or could not know.

Another attribute used in the German law on statute of limitations is the refusal to prosecute as a result of the directly expressed or implied will of the state or party leadership. In the Russian context, a reference to non-prosecution of a crime as sanctioned by the Soviet or Russian state leadership seems to explain the purpose of

the provision suspending statutes of limitations. Nevertheless, this additional criterion is likely to trigger numerous legal disputes, as the investigative authorities would have to prove the sanctioning by the state leadership in each specific case. In many cases it would be impossible to find direct evidence of such a sanctioning (documents or witness testimony), so they would have to establish its existence by circumstantial evidence (for example, Russian top leadership's awareness of a crime that is left unprosecuted or, if prosecuted, is investigated solely for the sake of appearances). Furthermore, impunity resulting from political interference may stem not so much from the will of the supreme state leadership, but rather from those lower in the bureaucratic hierarchy (e.g. regional officials[487]). In any case, the criterion of impunity sanctioned by state leadership is completely subsumed within the broader criterion of politically motivated impunity.

In view of the above, the provision stipulating the revival of expired statutory limitations for the purposes of transitional justice could be formulated as follows (Article 78 § 3.1 of the Criminal Code):

> 3.1 The course of the statute of limitation for criminal prosecution of persons who committed crimes under Articles [numbers of the Articles] of this Code during the period from DD.MM.YYYY to DD.MM.YYYY [period of impunity] shall be considered suspended until the end of that period, if these persons have not been prosecuted for [reasons of impunity] [legal characteristic of reasons of impunity].

As mentioned above, it is currently impossible to determine the end point of the impunity period: it obviously continues to date. Its starting point could be identified as 80 years before its end (e.g. from 1 January 1944 to 31 December 2024) or it could be set as 25 October (7 November) 1917.

Based on the primary classification of unpunished crimes (see examples in Chapters 2-6), the following Articles of the Criminal Code could be included in the norm suspending statutory limitations:

- 105 (Murder);
- 110 (Incitement to Suicide);
- 111 (Intentional Infliction of a Grave Injury);
- 112 (Intentional Infliction of Injury to Health of Average Gravity);
- 119 (Threat of Murder or Infliction of Grave Injury to Health);
- 126 (Abduction);
- 127 (Illegal Deprivation of Liberty);
- 131 (Rape);
- 132 (Violent Actions of a Sexual Nature);
- 136 (Violation of the Equality of Human and Civil Rights and Freedoms);
- 137 (Invasion of Personal Privacy);
- 138 (Violation of the Secrecy of Correspondence, Telephone Conversations, Postal, Telegraphic and Other Messages);
- 139 (Violation of the Inviolability of the Home);
- 141 (Obstruction of the Exercise of Electoral Rights or of the Work of Electoral Commissions);

487 See for example: *Дмитриевский С.М., Казаков Д.А., Каляпин И.А., Рыжов А.И., Садовская О.А.,* Хабибрахманов О.И. / 2-., испр. и доп. Нижний Новгород: Нижегородская Радиолаборатория, 2015. pp. 155–167.

- 141.1 (Breaking the Procedure for Financing the Election Campaign of a Candidate, of an Election Association, for the Activities of a Referendum Initiative Group, of Other Group of Referendum Participants);
- 142 (Falsification of Election Documents and Referendum Documents);
- 142.1 (Falsification of Voting Results);
- 142.2 (Illegal Issuance and Receipt of a Ballot for Voting in Elections or in a Referendum);
- 144 (Obstruction of the Lawful Professional Activity of Journalists);
- 148 (Obstruction of the Exercise of the Right of Liberty of Conscience and Religion), § 3 and 4;
- 149 (Obstruction of a Meeting, Rally, Demonstration, March, Picketing, or Participation in Them);
- 159 (Fraud), § 2–4;
- 160 (Misappropriation or Embezzlement), § 2–4;
- 163 (Extortion);
- 169 (Obstruction of Legal Business or Other Activity);
- 174 (The Legalisation (Laundering) of Funds and Other Property Acquired by Other Persons Illegally);
- 174.1 (The Legalisation (Laundering) of Monetary Funds or Other Property Acquired by a Person as a Result of an Offence Committed by Them);
- 175 (Acquisition or Sale of Property, Knowingly Obtained in a Criminal Manner);
- 178 (Restriction of Competition), § 2 and 3;
- 179 (Compulsion to Complete a Transaction or Refuse to Complete It);
- 185.3 (Market Manipulation), § 2;
- 185.6 (Illegal Use of Insider Information);
- 198 (Evasion of Taxes and (or) Fees by an Individual);
- 199 (Evasion of Taxes and (or) Fees by an Organisation);
- 201 (Abuse of Authority);
- 204 (Commercial Bribery), § 3–4, 7–8;
- 204.1 (Mediation in Commercial Bribery), § 2–3;
- 208 (Organisation of an Illegal Armed Formation or Participation in It);
- 210 (Organisation of a Criminal Community (Criminal Organisation) or Participation in It);
- 237 (Concealment of Information About Circumstances Endangering Human Life or Health);
- 277 (Encroachment on the Life of a Statesman or a Public Figure);
- 285 (Abuse of Official Powers);
- 286 (Excess of Official Powers);
- 289 (Illegal Participation in Business Activity);
- 290 (Bribe-Taking), § 5–6;
- 291 (Bribe-Giving), § 4–5;
- 291.1 (Mediation in Bribery), § 3–4;
- 294 (Obstruction of Justice and Preliminary Investigation);
- 299 (Knowingly Bringing an Innocent Person to Criminal Responsibility);
- 300 (Illegal Release from Criminal Liability);
- 301 (Illegal Detention, Taking into Custody, or Keeping in Custody);
- 302 (Compulsion to Give Evidence);
- 303 (Falsification of Evidence or Results of Investigative Activity);
- 305 (Knowingly Giving an Unjust Judgement, Decision, or any Other Juridical Act);
- 316 (Concealment of Crimes);
- 354 (Public Appeals to Unleash an Aggressive War).

Among the reasons for non-prosecution, it is necessary to specify political and corruption motives. One can either limit oneself to them, or leave their list open ("other reasons").

An additional evaluative criterion of the reasons for impunity is needed as a guarantee against arbitrary expansion of the provision in question, which would be particularly important if the list of reasons was left open. Two potential criteria suggested above include non-prosecution "in violation of the duty to prosecute" or for reasons "incompatible with the constitutional principle of the rule of law."

Using this "construction set" (to which more "pieces" can be added if necessary), one can draft several variants of the norm. As an example:

> 3.1. The course of the statute of limitations for criminal prosecution of persons who committed crimes during the period from 25 October (7 November) 1917 to 31 December 2024 shall be considered suspended until the end of this period, if these persons have not been prosecuted for political, corruption, or other reasons incompatible with the constitutional principle of the rule of law.

In addition to Article 78, it is necessary to amend Article 10 of the Criminal Code setting out rules for applying criminal law retroactively. In order to avoid internal contradictions between the provisions of the code, the proposed Article 78 § 3.1 should not be subject to Article 10, by supplementing the latter with the following clause (§ 3):

> 3. In derogation from § 1 of this Article, the provisions of Article 78 § 3.1 of this Code shall have retroactive effect.

Compliance of the proposed revival of expired statute of limitations with the Russian Constitution and norms of international law requires a separate analysis. At first glance, it can be argued that the constitutional prohibition on the law aggravating responsibility for an offence (Article 54 § 1 of the Russian Constitution) does not cover the statute of limitations, which, in particular, follows from a relevant comment of the Russian Constitutional Court in Ruling No. 1-P of 19 January 2017.[488] The ECtHR's conclusions in its judgement on *K.-H. W. v. Germany* and decisions on the admissibility of the applications of *Glassner v. Germany* and *Polednova v. the Czech Republic* also indicate that restoration of the expired limitation periods within the framework of transitional justice does not violate Article 7 of the Convention on the

488 "Essentially, without abolishing the rules regarding time limits for sanctioning tax evasion, the Constitutional Court of the Russian Federation has revealed the only possible meaning of these rules in terms of the Russian Constitution in order to ensure their reasonable and fair application to taxpayers who have acted improperly… The procedure for the temporal application of laws establishing liability for tax offenses and regulating proceedings in cases of such violations, are not covered by the given constitutional norm, but are subject to prescriptions of Article 54 of the Constitution that are universal for public legal responsibility. According to this Article, a law introducing or aggravating responsibility shall not have retrospective effect (§ 1); no one may bear responsibility for the action which was not regarded as a crime when it was committed; if after violating law the responsibility for that is eliminated or mitigated, a new law shall be applied (§ 2). These provisions also have a limited substantive effect." An opposite point of view is reflected in the relevant comment of the Russian Constitutional Court in Ruling No. 4-P of 14 February 2013 "On Constitutional Review of the Federal Law 'On Amendments to the Administrative Offences Code of the Russian Federation' and the Federal Law 'On Meetings, Rallies, Demonstrations, Marches and Pickets' in connection with the inquiry of a group of deputies of the State Duma and the complaint of citizen E. V. Savenko."

Protection of Human Rights and Fundamental Freedoms, which bans any punishment without law.[489]

3.2. Non-application of amnesty

In the context of transitional justice, non-application of amnesty can be justified by the same arguments as the revival of expired statutes of limitations. As defined by the Constitutional Court, amnesty is an act of mercy carried out according to faith in goodness and justice.[490] It is obvious that the State Duma deputies who passed the amnesty resolutions did not intend to show mercy to those who did not need it, as they were effectively protected from prosecution by the policy of impunity for crimes committed.

Application of amnesty in the context of transitional justice could be prevented by changing the acts of amnesty, supplementing the Criminal Code with a provision of non-application of amnesty for crimes that were not actually prosecuted, or by judicial review of the constitutionality of Article 84 of the Criminal Code and the acts of amnesty.

In the first case, the list of crimes that are not covered by the amnesty acts of 18 December 2013 and 24 April 2015 should be extended by adding all the crimes addressed in Chapters 19, 30, and 31 of the Criminal Code. These chapters warrant attention as they include a long list of crimes of low-to-medium severity that may be subject to amnesty, and many unpunished crimes against citizens' electoral rights, against the government and justice could be classified as belonging to the same list.

Provisions of the Criminal Code on non-application of amnesty in the context of transitional justice could be modelled after the provision on retroactive suspension of statute of limitations, specifically, worded as follows (Article 84 § 3 of the Criminal Code):

> 3. Amnesty acts adopted prior to 1 January 2025 shall not apply to crimes committed between 25 October (7 November) 1917 and 31 December 2024 that were not prosecuted for political, corruption or other reasons incompatible with the constitutional principle of the rule of law.

It should be noted that amnesty acts have already been amended retroactively. Thus, in 2000, an amnesty was retroactively cancelled for disabled persons and persons awarded orders and medals who had committed grave or especially grave crimes (they were mistakenly included in the original version of the act).[491] The Constitutional Court, it should be noted, stated that "acts should not be issued that have a negative impact on the conditions of the announced amnesty for amnestied persons, since

489 For more information, see: *Бобринский Н.* Изменение сроков давности привлечения к публично-правовой ответственности с обратной силой: Постановление Конституционного Суда России от 19 января 2017 года №1-П в европейском контексте.

490 See: Ruling of the Constitutional Court of the Russian Federation No. 11-P of 5 July 2001 "On Constitutional Review of the State Duma Resolution No. 492-III DG of 28 June 2000 'On Amending the Resolution of the State Duma of the Federal Assembly of the Russian Federation 'On Amnesty in Connection with the 55th Anniversary of Victory in the Great Patriotic War of 1941-1945' at the request of the Soviet District Court of Chelyabinsk and the complaints of a group of citizens."

491 Resolution of the State Duma No. 492-III DG of 28 June 2000 "On Amending the Resolution of the State Duma of the Federal Assembly of the Russian Federation 'On Amnesty in Connection with the 55th Anniversary of Victory in the Great Patriotic War of 1941-1945'."

adopting such a new act not only contradicts the prohibition on making a citizen's position worse with regard to criminal responsibility and the serving of a sentence, but is also inconsistent with the nature of amnesty as an act of mercy and constitutional responsibility of state power." At the same time, the Court annulled the original version of the amended amnesty act, stating that the State Duma had misrepresented the "goals and objectives of the institute of amnesty," and that the extension of amnesty to grave and especially grave crimes was incompatible with the constitutional responsibility of the state to ensure public safety, the rights and lawful interests of citizens and to prevent arbitrariness in addressing issues of criminal responsibility.[492] These arguments, with respective amendments, can also be applied to the provisions of amnesty acts, which "cement" the impunity of criminals, shielded from prosecution for political reasons.

3.3. Implementation of international legal norms on international crimes

The incorporation of norms on international crimes into Russian law would make it possible to properly evaluate, from the standpoint of international law, crimes committed during the armed conflict in the North Caucasus and during the international armed conflicts involving the Soviet Union and Russia. In addition, the inclusion of crimes against humanity in the Criminal Code would allow classifying as such the most brutal manifestations of political persecution.

The implementation model that was developed by G. I. Bogush, G. A. Esakov and V. N. Rusinova and published in 2017 could be used as a basis.[493] For the purposes of transitional justice, consideration should be given to the authors' opinion on the temporal scope of norms relating to international crimes that they offer to implement:

> "At the same time, *arguendo* the issue of the retroactive effect of Draft Article 357.1 of the Criminal Code [crimes against humanity – *authors' comment*] is not that simple. On the one hand, Article 54 of the Constitution of the Russian Federation and Articles 1, 3 of the Criminal Code can be applied here in their direct meaning. On the other hand, liability for acts constituting crimes against humanity is a norm of customary international law. At the very least, the customary nature of liability for crimes against humanity can be traced back to the 1946 Nuremberg Principles (Principle VI); this was subsequently confirmed by the Preamble and Article I of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. In the case law of the ICTY, the prohibition to commit war crimes, crimes against humanity is considered as *jus cogens* … Therefore, taking into account the absence of criminal responsibility for crimes against humanity in the Criminal Code and the possibility of committing such crimes that fall under the criminal jurisdiction of the Russian Federation, over time there may arise the question of either direct prosecution of the persons concerned under customary international law, or their punishment *ex post facto* under a subsequent criminal law, prosecuting crimes against humanity and applicable to events that occurred prior to its publication date.

492 Ruling of the Constitutional Court of the Russian Federation No. 11-P of 5 July 2001.
493 Op.cit., *Богуш Г.И., Есаков Г.А., Русинова В.Н.*

> The first option would be hardly possible, since, while recognising crimes against humanity as such, customary international law provides neither a sanction nor a definition of elements of these crimes.
>
> As for the second option, the situation looks more complicated. If we assume that crimes against humanity were included in the Criminal Code in 2020, would the new norm allow prosecution for acts committed, say, in 2015? A direct answer to this question, based on Article 54 § 1 of the Russian Constitution and Articles 9-10 of the Criminal Code, is too 'straightforward' to be the only true one. A nuance is related to the fact that Article 54 § 2 of the Constitution, reading that "no one may bear responsibility for the action which was not regarded as a crime when it was committed," actually nullifies the first § of the same Article, since the new norm of the Criminal Code does not establish responsibility, but only declares it, introducing punishment for an act that was (should have been) a crime in Russia under Article 15 § 4 of the Constitution.
>
> Another nuance is Article 7 § 1 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, according to which 'no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed....' In other words, it allows for the limited existence of a 'declaratory' criminal law applicable *ex post facto*.
>
> […]
>
> An additional argument in support of the retroactive effect of criminal law in relation to crimes against humanity could be that acts constituting this kind of crimes are actually covered by the norms of 'ordinary' criminal law (on crimes against life and health (Chapter 16 of the Criminal Code), against property (Chapter 21 of the Criminal Code), etc.). Therefore, (as an option) a symbolic classification of relevant actions (if committed in the past) as crimes against humanity would be hypothetically acceptable, provided that the possible maximum punishment of the existing sanctions of the 'ordinary' criminal law is not exceeded."[494]

In two decisions,[495] the ECtHR recognised that prosecution for crimes against humanity committed by Estonian state security officers in the late 1940s and early 1950s was not contrary to Article 7 of the European Convention.[496] Therefore, norms on international crimes, if included into the Russian domestic criminal law, can be *prima facie* applied retroactively to the events that took place prior to such incorporation.

494 *Ibid.* pp. 171-173.

495 ECtHR. *Kolk and Kislyiy v. Estonia.* Applications nos. 23052/04 and 24018/04. Decision of 17 January 2006; *Penart v. Estonia.* Application no. 14685/04. Decision of 24 January 2006.

496 On the possibility of classifying Soviet political persecution as crimes against humanity, see: *Бобринский Н.* Постсоветское переходное правосудие в России: достижения и упущенные возможности. pp. 149–150.

3.4. Cancellation of the preclusive term for *reformatio in pejus* when reviewing criminal judgments

In order to enable review of unjustly lenient criminal sentences that can be viewed as a manifestation of impunity (Chapter 5 mentioned an example of the widespread practice of suspended prison sentences for those convicted of torture), as well as court decisions to terminate a criminal case or criminal prosecution, Article 401.6 of the Criminal Procedure Code should be amended to set out a one-year period for reviewing these sentences by way of aggravation of the defendant's situation (*reformatio in pejus*).

It seems sufficient to exempt transitional justice bodies from this rule, thus authorising them to file cassations for revising judgments in favour of tougher penalties without any time limitations.

The Constitutional Court also pointed to the possibility in principle of changing the deadline for reviewing judgments by way of aggravation of the defendant's situation (albeit within the framework of the review procedure).[497]

4. Guarantees of non-recurrence of violations

4.1. Lustration

Lustration is commonly referred to as a system of measures used, as a rule, in the course of political transformation and aimed at identifying politically unreliable persons, as well as at restricting their access to public office. The circle of citizens who are subject to lustration may be limited to public officials and civil servants or may include certain private sector professions (e.g. journalists, lawyers, notaries, heads of financial institutions). Depending on the legal mechanism, there are three types of lustration. One mechanism uses two registers, one of which includes positions and professions "protected" from compromised individuals, while the other includes grounds for classifying them as compromised. Under the second mechanism, an individual holding or nominated for a "protected" position is obliged to declare whether he/she meets any unreliability criteria (e.g. whether he/she collaborated with the security services of the former regime). False declarations are punishable by a ban on holding "protected" positions. The third type of lustration consists in identifying compromised citizens and compiling and publishing their lists without any other legal consequences for those being listed.

Application of lustration laws is often the subject of complaints to the ECtHR and other international mechanisms for the protection of human rights. Without challenging the admissibility of lustration in principle, the ECtHR formulated several general requirements: Lustration should pursue a legitimate aim (for example, restoration of trust in the government); it should not be used as a punitive measure; and it should be applied on a differentiated basis, taking into account the conduct of each vetted individual. Furthermore, lustration bans and restrictions can only be temporary.[498]

497 Ruling of the Constitutional Court of the Russian Federation No. 11-P of 11 May 2005 "On Constitutional Review of Article 405 of the Russian Code of Criminal Procedure at the request of the Kurgan Regional Court, complaints from the Commissioner for Human Rights in the Russian Federation, Production and Technical Cooperative Sodeistvie, Karelia LLC, and a group of citizens."

498 For more retails see: *Бобринский Н.* Международные стандарты в области люстрации: реальность или благопожелание? // Сравнительное конституционное обозрение. 2015. No. 6 (109). pp. 13–29. The above approaches are reproduced in the recent ruling of the European Court of Human Rights on complaints against the Ukrainian Law on Government Cleansing, see: ECtHR. *Polyakh v. Ukraine.* Applications nos. 58812/15, 53217/16, 59099/16, 23231/18, 47749/18. Judgment of 17 October 2019.

We do not share a popular opinion that lustration is a universal means of redressing the crimes of a repressive regime. This approach shifts the focus from criminal justice as the state's main tool for combatting crime, to administrative deprivation of rights, without establishing both the circumstances of the crimes and the guilt for their commission. In other words, why should we vet when we can prosecute?

In the context of transitional justice, lustration is usually seen as a way of guaranteeing non-recurrence of violations. Firstly, lustration procedures and bans are designed to help eradicate the established culture of unlawful behaviour inherent to officials of the former regime agencies that were involved in systematic human rights violations and unconstitutional retention of power. Secondly, they help interested persons, in particular employers, obtain information about applicants' previous affiliations with such agencies and thus make informed hiring decisions.

4.1.1. Criteria for lustration

The following can be suggested as criteria for applying lustration bans and restrictions:

1. Membership in structures responsible for unlawful retention of power or systematic violation of human rights:

    1.1. Heads and deputy heads of the Presidential Administration; heads, deputy heads, and chiefs of structural subdivisions of the Presidential Domestic Policy Directorate, the Presidential Public Relations and Communications Directorate, and legal predecessors of these subdivisions.

    1.2. Deputies of the governors of Russia's regions in charge of domestic policy.

    1.3. Editors-in-chief of TV channels with social and political programmes, whose editorial policies were coordinated from the Russian Presidential Administration.

    1.4. Heads and deputy heads of the Russian Interior Ministry's counter-extremism departments; persons who covertly cooperated with these departments.

    1.5. Heads and officials of subdivisions of the Federal Security Service of Russia for protection of constitutional order; persons who covertly cooperated with these subdivisions.

    1.6 Officers and unofficial informants of the KGB of the USSR (excluding border troops).

2. Personal participation in anti-constitutional repression:

    2.1. Investigators, heads of investigative agencies, and prosecutors who participated in criminal prosecution of victims of anti-constitutional repression (see section 2.1 of this chapter).

2.2. Police officers who detained participants of peaceful public rallies or filed reports on administrative offenses against persons subjected to administrative rehabilitation (see section 2.2 of this chapter).

2.3. Those released from criminal liability under amnesty for perpetrators of crimes against citizens' electoral rights (see section 1.1 of this chapter).

3. Leadership of bodies that facilitated systematic violations of the citizens' rights and unlawful retention of power.[499]

- 3.1. The Prosecutor General of the Russian Federation, the Chairman of the Russian Investigative Committee, and officials who were members of the Boards of Prosecutor General's Office and the Investigative Committee.

- 3.2. Members of the Central Election Commission of Russia (hereafter, the CEC).

For criteria 1.1 and 3.1-3.2, it is also necessary to specify the period of time during which the persons are restricted from holding the respective public offices. It may be different for each of the agencies and depends on the assessment of the unlawful nature of their activities, as made by the Commission for Investigating the Usurpation of Power, another body of transitional justice, or the legislature. In our opinion, there are no reasons for considering the activities of the Prosecutor General's Office or the CEC anti-constitutional from the very moment of their establishment (unlike, for example, the activities of the departments and officials responsible for domestic policy).

4.1.2. Content of lustration bans and restrictions

Individuals who meet the lustration criteria may for a certain period of time (for example, from five to ten years) be banned from all public offices or from those listed by the lustration body, including law enforcement agencies, boards of state corporations, public-law companies, business entities with majority equity stake of state corporations or public-law entities, budget-funded institutions, state unitary enterprises, as well as from positions of editors-in-chief of media outlets.

For individuals who meet the above criteria but have no intention to occupy the secured positions, the controls would boil down to merely entering their data into the public lustration register.

Lustration does not necessarily aim at unconditionally imposing harsh prohibitions, such as blanket and lifetime deprivation of access to public service. For the purposes of lustration, it would be sufficient, for example, to remove lower-ranking officials

499 After the Constitutional Court, following the Russian President's request, passed Opinion No. 1-Z of 16 March 2020, stated that proposed provisions of the law "On constitutional amendment concerning improvement of the regulation of certain issues of organisation and functioning of public authority" were in compliance with Chapters 1, 2 and 9 of the Constitution of the Russian Federation and that the procedure for enacting Article 1 of this Law corresponded to the Constitution of the Russian Federation, this section with the list of criteria for lustration would be incomplete without mentioning the Constitutional Court judges, who adopted the Opinion (see section 4.2 of this chapter for details).

from the vicious "corporate" environment and to re-assess their commitment to the values of constitutional democracy and human rights after a certain period. The officials could be banned from holding public offices conditionally, with mandatory monitoring of their future professional behaviour. In contrast, senior executives should probably be banned for longer periods, and unconditionally.

Bodies authorised to apply lustration bans and restrictions include:
- Commission for Investigating the Usurpation of Power, for criteria 1.1-1.5, 2.3, 3.1-3.3;
- Institute for Public Memory, for criteria 1.6;
- Courts, for criteria 2.1-2.2.

4.1.3. Lustration procedure

Decisions to apply lustration bans and to include an individual on the lustration register should be made by an authorised body based on information indicating that the individual falls under the lustration ban. The individual should be notified of the pending lustration; they should also be given the right to state his/her position and provide evidence of non-involvement in the policy of unlawful retention of power or systematic human rights violations, or in the connivance with the policy or violations. For example, members of the CEC may justify themselves by demonstrating that they presented dissenting opinions to the CEC protocols on election results. The authorised body would make a decision taking into account the received explanations and evidence, and it may choose not to apply a lustration ban after finding that the individual was not personally involved in the employer's unlawful activities, or to impose a conditional ban, or to limit the ban to certain areas of public service only.

Lustration of persons who participated in anti-constitutional repression should be based on files of the criminal and administrative cases, on which rehabilitation decisions were made. As part of separate proceedings and upon request of a transitional justice body, a judge should establish the fact of the official's participation in criminal or administrative prosecution, previously recognised by the same body as an act of anti-constitutional repression, and should apply a lustration ban to this individual. Decisions to apply or not to apply a lustration ban and to list a person in the register may be appealed in court.

4.2. Suspension of judges

Lustration of judges contradicts the constitutional principle of their irremovability (Article 121 § 1 of the Constitution of the Russian Federation).[500] However, there is no need to vet judges as the existing mechanisms for holding them accountable using disciplinary and criminal procedures would be sufficient. The only significant obstacle that the transitional justice bodies may face is practices of reciprocal cover-up within the judiciary, whose members may seek to protect their colleagues from accusations out of corporate solidarity.

However, transitional justice must address the legitimate outrage against those judges who have engaged in unconstitutional repression and should not and cannot be

500 It should be noted that amendments introduced into the Constitution of the Russian Federation in 2020 provide for a lustration-like system of removal of judges from office "if they commit an act discrediting the honor and dignity of a judge, as well as in other cases stipulated by the federal constitutional law, indicating the inability of a judge to exercise judicial power."

allowed to continue "poisoning" justice as if nothing has happened. They cannot be removed from office by a federal law or a presidential decree (we are not discussing a broader judicial reform of abolishing old courts, creating new ones, etc). Therefore, as a preliminary measure, we suggest that all judges who adjudicated in politically motivated criminal cases (see section 2.1 of this chapter) and gave "political" rulings in administrative cases (see section 2.2 of this chapter) should be suspended from office for a period from six months to a year. This is necessary to give some time to transitional justice bodies to annul repressive judicial acts (as one of the preconditions for criminal prosecution of judges, see Article 448 § 8 of the Criminal Procedure Code) and to collect and prepare materials for filing disciplinary complaints or criminal charges against the judges. If no complaint or charges are filed not before the expiry of the suspension period, the judges may return to their duties.

Chapter 9. Structure of transitional justice agencies

1. General principles

In developing the proposed structure, we proceeded from the following principles:

1. Transitional justice institutions should comprise a unified system of state bodies with clearly defined and distributed functions, and their interaction should be coordinated;

2. No government agency can effectively reform itself;

3. Tasks which are identical in terms of content and methods should not be assigned to different bodies of the system;

4. The investigation of human rights violations and the rehabilitation of victims of such violations cannot be entrusted to the violators.

From the last general principle three other subordinate special principles emerge:

4.A No investigator or prosecutor implicated in unconstitutional repressions may investigate and support the prosecution of others suspected of serious human rights violations and abuses of power;

4.B No judge implicated in unconstitutional repressions may review the cases of victims of unconstitutional repression or pass sentence on others suspected of serious human rights violations or abuses of power;

4.C No institution with a history of involvement in serious human rights violations and abuses of power may investigate or prosecute cases of serious human rights violations and abuses of power until it has been reformed so that principles 4.A and 4.B are not violated.

The implementation of these principles will require the creation of a number of special bodies and the modification of existing ones. Institutional reform is undoubtedly a long and multistage process, yet it would be highly unjust to postpone the introduction of measures to overcome impunity until its final completion. In light of these circumstances, and of the above-listed Principle 4 and the special principles that derive from it, the design of transitional justice bodies will most probably be largely an *ad hoc* system. Otherwise, the investigation and legal prosecution of human rights violations would fall on the perpetrators themselves.

Therefore, the authors of this report suggest creating transitional justice bodies within the structures the following existing state institutions on condition that they would be reformed: courts, prosecutors' offices, the Investigative Committee, the Interior Ministry, and the Ministry of Justice. It is anticipated that, in addition to fulfilling

their own immediate objectives, transitional justice bodies would have a beneficial effect on the institutions being reformed and could become a positive example for their renewal.

However, as a possible alternative to "embedding" transitional justice bodies into existing state institutions, we propose the creation of two new structures: a hybrid judicial body and a federal agency for the detection and preliminary investigation of crimes related to areas of systemic impunity and for the operation of extrajudicial fact-finding missions and reparation mechanisms.

2. Selection of titles

It is necessary to clarify what is meant by the names of the transitional bodies proposed below. This issue is by no means an afterthought. The choice of names of any state structures, and even more so of extraordinary ones, should reflect their main purpose, so that their employees, as well as any citizens, can understand what they have been created for.

As a rule, the names of law enforcement bodies and their subdivisions indicate the target and nature of their activities. Thus, the purpose of criminal intelligence and investigative units is revealed through the verbal nouns "combatting" (Department for Combatting Organised Crime), "counteracting" (Department for Counteracting Corruption), "detecting", (Department for Detecting Crime) or "investigating" (Department for Investigating Especially Important Cases). However, while it is possible to "counteract" something that is currently happening, transitional justice deals with the events that occurred in the past (albeit often the recent past). In the present, all that is left of the past is a state of impunity for the crimes that have been committed. Nevertheless, impunity itself can be a target of "overcoming" or "combatting." For example, in Germany the term "legal processing" (German: *juristische Aufarbeitung*[501]) is used to broadly characterise legal measures aimed at overcoming the consequences of the unlawful practices of totalitarian regimes.

Defining the target of activity is also challenging. The most obvious way to address this is to relate the transitional justice body to the former political regime which committed and turned a blind eye to serious crimes. The Office for the Documentation and the Investigation of the Crimes of Communism, which functioned in the Czech Republic as a division of the Interior Ministry,[502] may serve as an example of this kind of definition. However, in our case referring to the former regime is problematic because it does not have (yet, at least) a well-established descriptor, and is typically identified only by the name of the politician at its head.

A possible alternative is to describe the target of the activities of transitional justice bodies by characterising the crimes they are meant to combat: the social domains affected, the general target, or the specific perpetrator of the crimes. For example, in Germany, the target of the activities of several bodies tasked with investigating SED regime crimes was designated as "government criminality." Notably, such was the name of the Berlin police's Central Investigating Agency for Government Criminality

501 This is, for example, the name of the corresponding section on the official website of the Federal Foundation for the Study of the Communist Dictatorship in Eastern Germnay. URL: https://www.bundesstiftung-aufarbeitung.de/juristische-aufarb-2302.html (accessed: 25.06.2020).

502 Czech: Úřad dokumentace a vyšetřování zločinů komunismu (ÚDV).

and Criminality Connected to Reunification.[503] Although the term "government criminality" is not used in Russian, its use in the names of transitional justice bodies may be a good choice if such crime is understood to be a social phenomenon stemming from a policy of impunity that came to an end. Of course, this interpretation is not obvious, because the creation of a search or investigation service for government crimes would inevitably create public expectations that the service will direct its efforts at contemporary criminal manifestations as well. In addition, in post-Soviet Russia, the word "government" is usually taken to mean a specific body of state power – the Government of the Russian Federation – rather than state authorities (or the executive branch) as a whole.

Referring to a general target (for example, crimes against the constitutional rights of citizens) or a specific perpetrator (officials) is also misleading. Without additional clarification it is not at all clear why an agency called, for example, the Office for Investigating Crimes in Office, would limit its activities to only a certain period in the past.

It would seem that the natural choice for naming transitional justice bodies should be to include this term itself in the title. However, as was discussed earlier (see section 3 of the introduction), this term – rather academic in origin – in the broadest sense describes a set of political and legal decisions sharing a common context and content, and its applicability to individual components is questionable. For example, it is not clear what a Special Tribunal for Transitional Justice or the Transitional Crimes Investigation Service are for, without a detailed explanation.

In our view, the names proposed below are a combination of appropriate borrowings and descriptors that make reference to features of transitional justice without causing difficulties in comprehension.

3. Brief description of possible transitional justice bodies that could be introduced in Russia

3.1. Judiciary

Option I

Special Court for the Prosecution of Persons Responsible for Gross Violations of Human Rights, International Humanitarian Law, and Grave Abuses of Power

Type of body: Ad hoc hybrid (national/international) criminal court established on the basis of an agreement between the UN and the Government of Russia.

International counterparts: Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea; the Special Court for Sierra Leone; the Dili District Court Panel with exclusive jurisdiction over serious criminal offences in East Timor; the Special African Tribunal.

Structure: Court of Justice (pre-trial chamber, three trial chambers, and one appeal chamber) with a mixed composition of judges (Russian and international, appointed by the Russian authorities from candidates proposed by the UN Secretary General);

503 German: Zentrale Ermittlungsstelle Regierungs- und Vereinigungskriminalität (ZERV).

Office of Investigating Judges with a mixed composition of judges (Russian and international); Prosecutor (prosecutor appointed by the Russian authorities from candidates proposed by the UN Secretary General); Administrative Department; Defence Support Section; Victim and Witness Support Section.

Subject-matter jurisdiction: 1) International crimes: war crimes, crimes against humanity, genocide, aggression. 2) Crimes under the legislation of the Russian Federation: a) committed for the purpose of illegal appropriation or retention of power; b) accompanied by large-scale and systematic violations of human rights and freedoms or systematic unlawful discrimination; c) large-scale corruption crimes; d) crimes against the peace and security of mankind.[504]

Personal jurisdiction: Initial and appellate criminal trials of individuals (including military personnel) bearing the greatest responsibility for gross violations of human rights, international humanitarian law, and grave abuses of power. These generally include high- and mid-level masterminds, as well as perpetrators and other accomplices in the most inhumane and large-scale crimes.

Additional powers: Preparation of advisory opinions requested by public authorities.

Complementarity: In the interests of justice, the Special Court may, at its own discretion, take over cases from, and refer cases to, domestic courts of general jurisdiction.

Option II[505]

Collegia for criminal cases of special jurisdiction, rehabilitation of victims of anti-constitutional repression, and lustration (in courts of constituent entities of the Russian Federation and general jurisdiction courts of appeal and cassation)

Composition: Individuals of high professional and personal standing with no experience serving in the judicial and law enforcement system of the Russian Federation are appointed as Judges of the Collegia.

Subject-matter jurisdiction: Hearing criminal cases having to do with crimes, the preliminary investigation of which was carried out by transitional justice bodies (hence the term "special jurisdiction"). In addition, the Collegia review verdicts and rulings on administrative offences against persons subjected to anti-constitutional criminal and administrative repressions; rehabilitates these individuals; and conducts lustration of officials involved in anti-constitutional repression.

Personal jurisdiction: Criminal cases against any persons (including military personnel) except those falling under the jurisdiction of the Special Court or accepted for consideration by the Special Court (if the court has been created).

504 When discussing the proposal to create a hybrid criminal court, the authors could not come to a consensus on its subject-matter jurisdiction as relates to crimes under Russian criminal law. The option proposed by S.M. Dmitrievsky is outlined here.

505 The collegia proposed under this option would be created alongside the Special Court (option I), but with limited personal jurisdiction.

3.2. Search and investigation

As in the case of judicial bodies, we see two possible designs for transitional justice as it relates to the investigation and prosecution of crimes. The first involves integrating transitional justice bodies into existing institutions, such as the Prosecutor's Office, Investigative Committee, and Interior Ministry. The second involves the creation of a new agency whose duties include investigating unpunished crimes and conducting searches (surveillance) relating to such crimes.

Option I

Main Department of the Investigative Committee of Russia for Investigating Unpunished Crimes (hereafter MDIUC)

Type of body: Investigative body of the Investigative Committee of Russia (as a subdivision of the central office).

Structure: Headquartered within the central apparatus of the Investigative Committee, with subdivisions in federal districts and a special department within the structure of the Main Military Investigative Department.

Subordination: The Head of the Main Department follows the instructions of the Prosecutor of the Special Court (if the Special Court is established). The Chairman of the Investigative Committee of the Russian Federation organises the activities of the Main Department but may not give its Head any guidance regarding investigations carried out by the Head and his subordinates.

Jurisdiction: Investigators of the Main Department investigate criminal cases of unpunished crimes (see section 6 of this chapter for details on investigative jurisdiction).

Subdivisions of the Interior Ministry of Russia for countering state crime

Type of body: Police subdivisions.

Structure: Main Department at the central office of the Interior Ministry, with territorial subdivisions in federal districts.

Subordination: The Head of the Main Department follows the instructions of the Prosecutor of the Special Court (if the Special Court is established). The Interior Minister of the Russian Federation organises the activities of the Main Department and its subordinate subdivisions but may not provide any work-related guidance to its Head.

Authority: a) Conducting criminal intelligence operations into crimes involving gross violations of human rights and international humanitarian law and abuses of power, as well as providing operational support for investigations of criminal cases conducted by the Main Department; b) Conducting detention and convoy operations for persons suspected or accused of having carried out gross violations of human rights and international humanitarian law, and abuses of power; c) Ensuring the safety of persons involved in the implementation of state policy on transitional justice, including civil servants and participants of criminal proceedings (victims, witnesses, defence attorneys, prosecutors, investigators, judges, and others); d) Conducting operational and investigative activities on behalf of fact-finding commissions.

Option II

Combatting Impunity and Victims Protection Service

Type of body: Newly created federal agency.

Jurisdiction: Same as described above for the MDIUC of the Investigative Committee of Russia and subdivisions of the Interior Ministry for countering state crime, as well as providing organisational support for the activities of extrajudicial fact-finding and reparation bodies.

Structure: Central apparatus with subdivisions in federal districts.

Subordination: The Head is independent within the jurisdiction of the agency and follows the instructions of the Prosecutor of the Special Court (if the Special Court is established).

Common characteristics of options I and II

Personnel: The staff of the MDIUC and the Interior Ministry or the Combatting Impunity and Victim Protection Service must be freshly recruited after a background check for past involvement in anti-constitutional repression and should not include, whenever possible, personnel from "old" investigation and criminal intelligence units.

3.3. Prosecutor's Office

Main Department for Transitional Justice of the Prosecutor General's Office of the Russian Federation

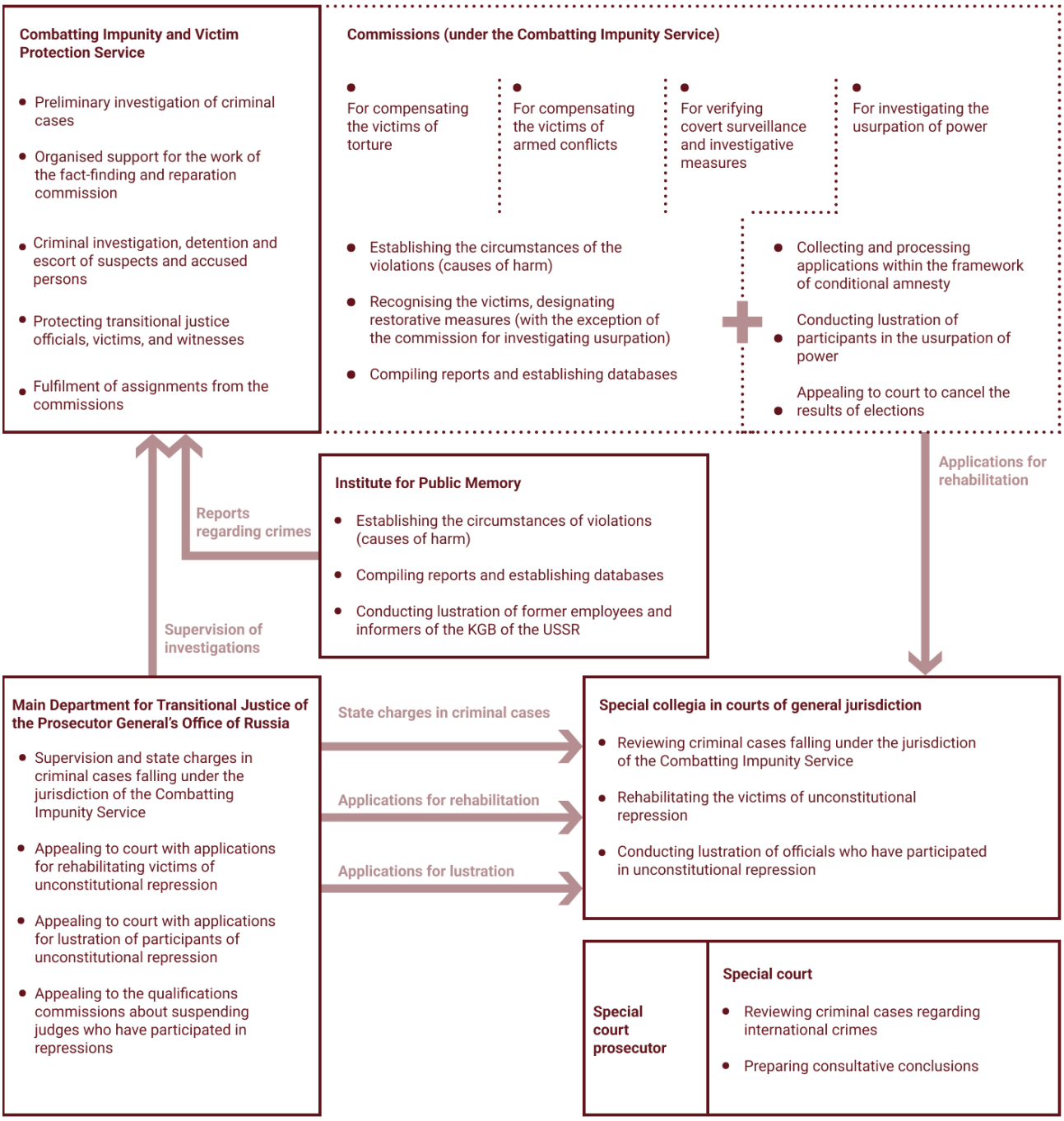
Type of body: Subdivision of the Prosecutor General's Office.

Structure: Headquartered within the central apparatus of the Prosecutor General's Office with subordinate departments in federal districts.

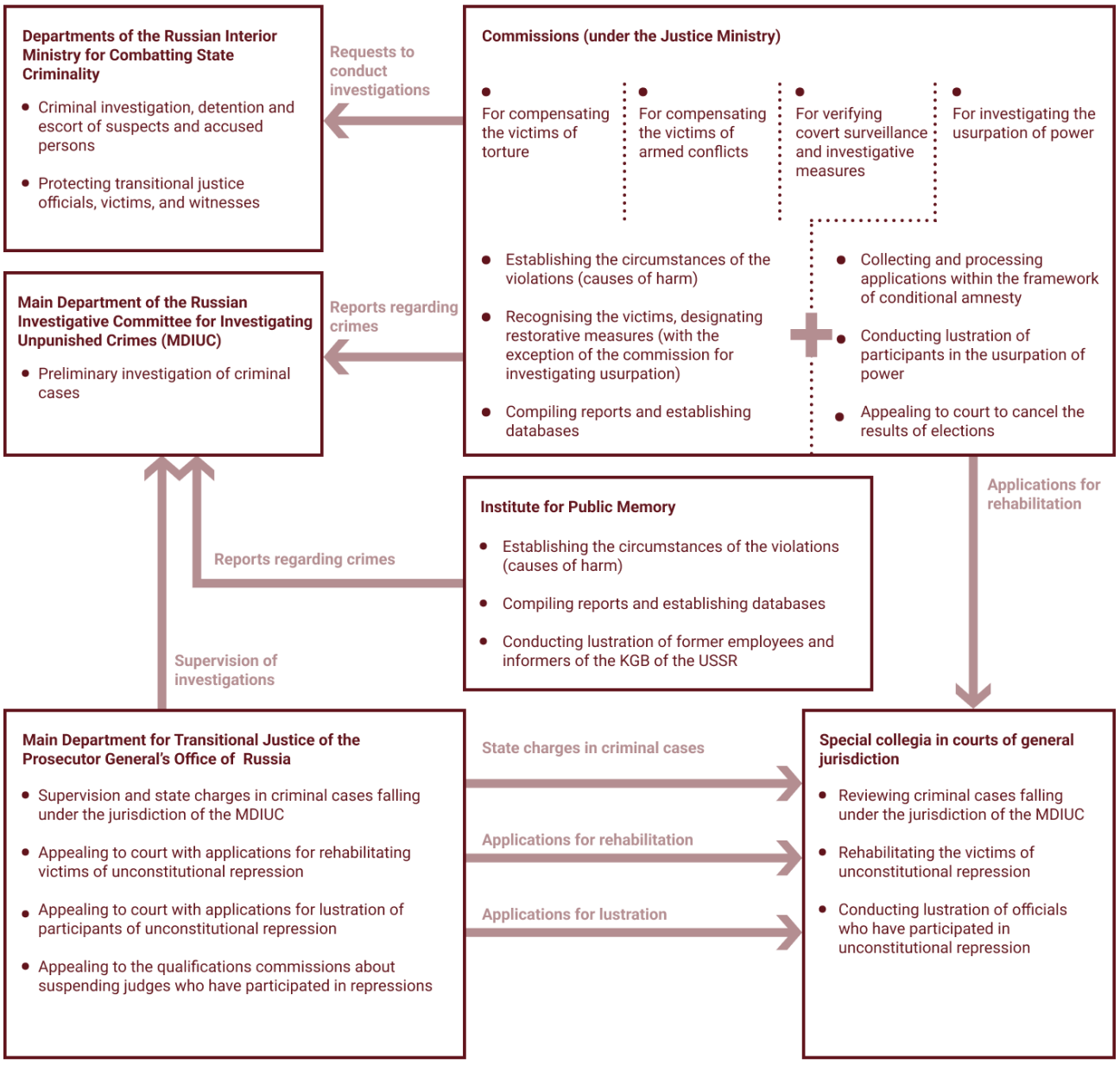
Subordination: The Head of the Main Department (with the rank of Deputy Prosecutor General of the Russian Federation) is independent in the exercise of his powers, and department heads answer to him. The Prosecutor General of the Russian Federation organises the activity of the Main Department but may not give it any work-related guidance.

Authority: Carrying out prosecutorial supervision and prosecution in the criminal cases of special jurisdiction; petitioning courts to rehabilitate victims of anti-constitutional repression; suing for transactions to be recognised as invalid, for enforcement of the consequences of their invalidity, and for the recovery of state and municipal property from others' illegal possession (Article 52 of the Code of Arbitration Procedure of the Russian Federation); filing petitions for the protection of the interests of the Russian Federation, its subjects, or municipal entities (Article 45 of the Code of Civil Procedure of the Russian Federation); and petitioning for the conversion of property to state revenue on the basis of Federal Law No. 230-FZ "On Monitoring the Correlation of Expenses by State Officials with their Incomes," dated 3 December 2012.

The system of transitional justice bodies. Option 1



The system of transitional justice bodies. Option 2



3.4. Non-judicial fact-finding and redress mechanisms

It would not be advisable to create non-judicial fact-finding commissions as independent authorities: This contradicts the temporary nature of the tasks given them, as well as the societal (non-bureaucratic) principle guiding their formation. However, in any case, commissions will require an organisational footing. Moreover, they will need the authority to perform their functions. With this in mind, we see two possible solutions: entrust responsibility for supporting the work of the commissions to a newly created transitional justice search and investigation body (Combatting Impunity and Victim Protection Service) or, in the absence of a special transitional justice body, create a division within an existing body of executive power (for example, the Ministry of Justice) that provides the commissions with organisational support, and collects evidence by giving assignments to relevant investigative units of the Interior Ministry.

Commissions for investigating the usurpation of power, reparations to victims of torture, reparations to victims of armed conflicts in the North Caucasus, and verification of covert surveillance activities and investigative actions

Type of body: Special collegial public bodies with public powers.

Structure: Commission with an administrative apparatus (within an executive branch "anchor" authority – the Ministry of Justice or the Combatting Impunity and Victim Protection Service) including documentation, victim and witness protection, and judicial departments. Within the Combatting Impunity and Victim Protection Service (if created) or the Main Department for State Crime of the Interior Ministry there should be a division for coordinating searches requested by the commissions.

Jurisdiction: Establishing the circumstances in which violations of law or wrongdoing occurred by providing conclusions regarding individual cases; preparing synthesis reports; maintaining databases; prescribing individual restorative measures; and coordinating collective restorative measures (with the exception of the Commission for Investigating the Usurpation of Power). For more details, see Chapter 8, section 1.1–1.4.

Authority: Hearing witnesses, issuing surveillance requests.

Composition: Commissions are formed by legitimate political bodies (e.g. the State Duma) from representatives of civic institutions of high professional standing with experience monitoring human rights violations in relevant areas.

Features of individual commissions: Commissions for investigating the usurpation of power are established at two levels – national and interregional. The commissions are authorised to collect, analyse, and summarise the statements of participants of crimes against citizens' electoral rights as part of the amnesty process. In addition, commissions for investigating the usurpation of power petition courts to rehabilitate victims of anti-constitutional repression; file administrative lawsuits to cancel election results; conduct lustration; and apply lustration bans. The commission for verification of covert investigative actions and surveillance coordinates the creation of a common database of persons subjected to covert monitoring.

Institute for Public Memory

Type of body: State academic institution.

Objectives: See section 1.5 of Chapter 8.

Competence: Declassifying Soviet secret service archives; organising access to them; conducting scientific research; lustration; and designating lustration bans.

4. Hybrid court: arguments for and against

The essence of the problem that led us to the idea of an *ad hoc* court is as follows. A significant number of persons responsible for gross violations of fundamental human rights **have committed crimes both under Russian law and under international law** (war crimes, crimes against humanity, and the crime of aggression). This is particularly true of high-ranking suspects who held top positions in the state and military hierarchy. These international crimes appear to be exclusively or overwhelmingly related to armed conflicts: in the North Caucasus (Chechnya and adjacent regions), Georgia, and Ukraine (including the episode of the annexation of Crimea). Hence, it would seem logical, at first glance, to propose handing over the prosecution of at least the main suspects accused of international crimes to an **international judicial mechanism** (such as the International Criminal Court), leaving the prosecution of crimes under domestic law – illegal appropriation and retention of power, corruption, torture, and the like – to the Russian judicial system.

However, this raises two groups of obstacles. **The first group of obstacles** relates to the limited jurisdiction of the International Criminal Court. The Court's temporal jurisdiction is limited to 1 July 2002. Crimes committed before this date cannot be considered by the Court. However, most large-scale, systematic crimes in Chechnya were committed earlier: massacres of the civilian population; bombings of civilian objects (including the use of indiscriminate weapons in densely populated areas); the creation of a network of illegal places of detention; mass "mop up" operations (when the entire civilian population, or large age and sex segments thereof were targeted, not just individual civilians); the activities of "death squads"; and other acts. This also includes the mysterious bombings of apartment buildings in Moscow and Volgodonsk, the investigation of which is of paramount importance in determining the causes of the Second Chechen War and understanding the genesis of the Russian authoritarian regime as a whole. Moreover, the International Criminal Court is not competent to hear criminal cases of acts of aggression committed before 17 July 2018,[506] which rules out the possibility of investigating in this vein the annexation of Crimea and the actions of Russian officials and Russian citizens as a whole in south-eastern Ukraine.

If we keep to the strict framework of the concept of an international judicial body, these obstacles can be removed by the establishment of a special international tribunal through a UN Security Council resolution under Article 29 and Chapter VII of the UN Charter, as was done for the former Yugoslavia and Rwanda. International tribunals of this type can deal retroactively with all international crimes that were

506 International Criminal Court. Crime of Aggression – Amendments Ratification. URL: https://asp.icc-cpi.int/en_menus/asp/crime%20of%20aggression/Pages/default.aspx (accessed: 25.06. 2020).

criminalised under customary international law at the time of their commission, including the crime of aggression.

This step, however, does not eliminate the **second group of obstacles** having to do with the fact that **the same suspects** from the highest echelons of Russian government appear to have been **involved in the commission of both international crimes and crimes under Russian law**. Moreover, some of the most important crimes have both an international and a national legal dimension. Regardless of who organised them, the Moscow and Volgodonsk bombings are undoubtedly tied to the context of armed conflict; they were used by the federal side of the conflict as a *casus belli* and in any event facilitated the escalation of the conflict. Thus, they may (and must) be regarded as a war crime in the form of terrorising the civilian population, as well as (considering the number of victims and the repetition of the same pattern of criminal behaviour in all terrorist attacks) a crime against humanity in the form of terrorism. However, if it is proven that Russian special services were involved in planning and organising these terrorist attacks, or were guilty of connivance, then these attacks can be considered part of a criminal plan to seize power – a different crime sanctioned only under national law.

In these circumstances, it would be unacceptable for the same group of "first-tier" defendants to be tried by two courts – international and national – at the same time.

The best way out of both dilemmas appears to be the creation of a hybrid, national-international court along the lines of the Special Court for Sierra Leone; the Extraordinary Chambers in the Courts of Cambodia for Prosecution of Crimes Committed during the Period of Democratic Kampuchea; the institution of International Judges in the Autonomous Province of Kosovo; and the Dili District Court Panel with exclusive jurisdiction over serious criminal offences in East Timor. These courts were established by a treaty between the UN and the governments of the countries that have territorial jurisdiction over crimes falling under the jurisdiction of the courts. Most importantly, their statutes include both crimes under international law and selected crimes under domestic law, and the composition of these courts is also hybrid, with some judges, prosecutors, and clerks recruited through an international competition (similar to the procedure adopted by *ad hoc* international criminal tribunals and the ICC) and others recruited locally. The latter circumstance is particularly important for increasing the legitimacy of the court's decisions in the eyes of Russian citizens.

Under such an arrangement, the personal jurisdiction of the Special Court can include the power to determine the guilt of persons bearing the greatest responsibility for crimes against universally recognised human rights and freedoms and the international legal order. Such a flexible formulation would allow the Prosecutor of the Court to handpick the most important cases, both in terms of the position of the accused within the state hierarchy and in terms of the nature of the crimes (their widespread and systematic nature, degree of cruelty, and so forth). For example, responsibility for organising and carrying out the massacre in the village of Novye Aldy can hardly be assigned to a person above the level of the commander of the 245th Motorised Rifle Regiment and the commander of the OMON (special police force) of St Petersburg and the Leningrad Region. However, the extreme brutality of the deeds (the methodical killing of at least 46 people, including elderly and infants, rape, looting, and burning of houses over the course of several hours) justifies hearing the cases of those accused of these and similar crimes within the "main" trial.

The Special Court itself may be treated:

- Either as a fully-fledged international court (like the Special Court for Sierra Leone), which would give it the power to issue arrest warrants which are binding on all UN member states and a number of other advantages (for example, overriding the bulk of international immunity from criminal prosecution);

- Or as part of the domestic judicial system (as in Cambodia, Kosovo, and East Timor), which, among other advantages, eliminates the issue of the constitutional ban on the extradition of Russian citizens (however, this obstacle can be overcome under the first option if the court is located in Russia).

The Special Court would try the "main suspects" and hear the most important cases, while general jurisdiction courts would try most low- and mid-level perpetrators and organisers, as well as those who have committed isolated and minor crimes (for which it is proposed to create collegia of specially trained judges within their structure – see section 3.1 of this chapter). The Special Court would rely on precedents established by other international and hybrid criminal courts and tribunals. Special jurisdiction criminal panels in the general jurisdiction courts would also be bound by the approaches developed through the Special Court's case law.

Nonetheless, several valid arguments can be made against the hybrid (national-international) tribunal model. Bearing in mind that such courts are meant to fulfil a complementary role, the choice of this model assumes that Russia itself is incapable of setting up a court to hear trials for the gravest crimes committed by its former leaders. But it would be unfair to take this assumption for granted. At first glance, there are no insurmountable obstacles that would prevent our country from handling this task on its own. A final conclusion can be made only when the necessary political conditions for launching transitional justice are in place. Moreover, international and hybrid criminal tribunals are often criticised for their very slow processing of cases, as well as for the generally low public confidence in their decisions and factual conclusions in the countries where the crimes under their jurisdiction were committed. For this reason, attention must also be given to the constitutional obstacle of a ban on the creation of extraordinary courts (Article 118 § 3 of the Constitution of Russia).

5. Judicial staffing and connection to judicial reform

The involvement of Russian general jurisdiction courts in the transitional justice system raises the issue of the connection of the proposed measures to judicial reform – at the very least because courts play a significant role in human rights violations and the system of impunity, and because of the well-known principle that no one can be a judge in their own case (*nemo judex in causa sua*).

We see three possible approaches to solving the problem of renewing and purging the judiciary. The first is to increase the number of judges (starting first and foremost at the level of courts of the constituent entities of the Russian Federation and above) and attract new people to the vacant positions who have no connection to the existing court system and to the current law enforcement structures. This principle is proposed for staffing the newly created criminal case panels of special investigative jurisdiction. The second approach is to lustrate the judiciary and exclude from it individuals who took part in anti-constitutional repression and other human rights violations. The third approach is to criminally prosecute judges who have committed obstruction of justice.

These approaches are not mutually exclusive but can be used in combination. From the perspective of restoring justice, precedence should be given to criminal justice. For these reasons, in the list of proposed measures, we have limited ourselves to the suspension of judges' powers for the time necessary to overturn any unconstitutional, repressive judicial acts they passed and to decide whether to bring charges against them.

However, the possibilities of criminal justice are limited, so the introduction of independent lustration of judges may also be considered appropriate. At first glance, it would seem that there are no irrefutable legal arguments against such a solution, if it pursues a legitimate goal (e.g. restoring confidence in the court). The existing institution of disciplinary responsibility of judges may be used for the purposes of lustration. Furthermore, it should be noted that the closure of the Supreme Arbitration Court and reestablishment of the Supreme Court of Russia in 2014 was accompanied by de facto lustration of the judges of these courts: In order to move to the "new" Supreme Court, judges of the "old" higher courts had to apply on general grounds to the Special Qualification Committee for selecting candidates to the position of judge in the Russian Supreme Court, and they were reappointed only if this committee and the presidential commission for preliminary review of candidates for judges positions in the federal courts issued a positive decision.[507]

An assessment of the feasibility of these approaches to judicial renewal and the development of specific solutions is beyond the scope of this paper.

6. Jurisdiction of transitional justice bodies

When designing transitional justice bodies dealing with criminal proceedings, special attention must be given to their investigative jurisdiction. Clarity in this matter is needed, first of all, in order to ensure that the extraordinary legal instruments (described in section 3.1-3.4 of Chapter 8) do not end up in the hands of those for whom they are not intended – general criminal intelligence, investigation, and prosecution authorities and "ordinary" criminal judges. This distinction will serve as an additional safeguard against the abuse of these tools by officials who are unscrupulous or simply unprepared to meet the challenges of transitional justice.

Article 151 of the current Code of Criminal Procedure of the Russian Federation (hereafter, Criminal Procedure Code) allocates criminal cases among the various agencies authorised to investigate them according to two criteria: target (the crimes) and personal (who committed the crimes or against whom they were committed). For transitional justice bodies, whether it be the Prosecutor of the Special Court, the Combatting Impunity and Victim Protection Service, or the MDIUC, two special investigative jurisdiction criteria must be introduced: crimes must have been

507 See: RF Law No. 2-FKZ of 5 February 2014 "On the Supreme Court of the Russian Federation and the Prosecutor's Office of the Russian Federation" on the amendment to the Constitution of the Russian Federation. Article 2. Several judges of the Supreme Arbitration Court of the Russian Federation who applied for transfer to the Supreme Court of the Russian Federation were refused by the Special Committee or presidential commission. See: *Занина А., Хамраев В., Пушкарская А.* ВАС ограничили в Верховном суде // Коммерсантъ. 2014. 23 May. URL: https://www.kommersant.ru/doc/2476834 (accessed: 25.06.2020); *Занина А., Пушкарская А.* Соратников Антона Иванова отфильтровала президентская комиссия // Коммерсантъ. 2014. June 20. URL: https://www.kommersant.ru/doc/2494631 (accessed: 25.06.2020). The authors have a strongly negative view of the liquidation of the Supreme Arbitration Court of the Russian Federation and consider it a shameful episode aimed at subordinating judiciary to presidential power in violation of the constitutional principle of separation of powers (see in this regard section 2.1 of Chapter 2). This event is mentioned here only as an example of one of the possible mechanisms of lustration of the judiciary.

committed no later than a certain date in the past ("under the previous regime") and there must be the possibility of retroactively suspending statutes of limitations for crimes whose statutes have passed. The significance of the second criterion is that only transitional justice bodies can investigate criminal cases of crimes whose statutes of limitations have expired but for which there are grounds for their revival (see section 3.1 of Chapter 8).

The target and personal jurisdiction of transitional justice bodies ultimately depends on their mission, whether their purview will be narrowly retrospective (investigating crimes of the "former regime") or broad, covering certain categories of crimes independent of their connection to a policy of impunity or the time they were committed. In the first case, it is advisable to let investigative bodies of transitional justice choose for themselves which crimes committed before day X to investigate. This requires authorising them to conduct preliminary investigations of crimes that they themselves have identified (such a provision is already included in Article 151 § 5 of the Criminal Procedure Code) and to take over criminal cases initiated by investigators from other agencies. Notwithstanding, there is no need to completely exclude any corpus delicti from the investigative jurisdiction of the latter and transfer them to the investigative bodies of transitional justice. Investigators from the Investigative Committee of Russia (or its institutional successor, which may emerge in the process of law enforcement reform) will continue to investigate crimes against life or crimes in public office, with the exception of those that are discovered or taken over by their colleagues from the transitional investigative bodies.

The alternative to this narrow approach is the creation of a fully-fledged agency that is not temporally restricted and can investigate crimes in public office. Strictly speaking, this solution falls outside the scope of transitional justice and is therefore not analysed here in detail.[508]

The jurisdiction over criminal cases exercised by special criminal collegia of courts of subjects of the Russian Federation, in turn, is determined by the competence of transitional justice bodies: The collegia consider criminal cases whose preliminary investigation was carried out by investigators of transitional justice bodies. We must admit that this jurisdictional framework contains a certain element of arbitrariness, since transitional investigative bodies, as mentioned above, must themselves choose which crimes to investigate. It appears, however, that this discretion does not contradict constitutional principles (including Article 47 § 1 of the Russian Constitution: "No one may be deprived of the right to have his case heard by the court and the judge under whose jurisdiction it is placed by law").

508 A proposal for the creation of such an agency was given in the Concept for the Reform of Law Enforcement Bodies of the Committee of Civil Initiatives. See: Концепция комплексной организационно-управленческой реформы правоохранительных органов РФ. СПб. : Институт проблем правоприменения при Европейском университете в Санкт-Петербурге, 2013.

Conclusion

This report took nearly four years to prepare – from early 2016 to late 2019, with considerable interruptions. The political conditions for overcoming systemic impunity for crimes are just as absent now as they were at the time when the report was conceived. In January 2020, the President of the Russian Federation announced his intention to amend the Constitution of Russia, which can be viewed as a continuation of the policy of unlawful – and hitherto unpunished – retention of state power.

Nevertheless, we conclude this report with our thoughts towards the future. It is not predetermined and may therefore offer opportunities to realise the objectives inspiring our work: to overcome social injustices born of impunity; to restore justice; and to establish respect for the law in Russia. The experience of other countries shows that such "windows" tend to open suddenly, and when they do, we must act quickly. After all our country has gone through, it would be a terrible shame if the public were to face this moment completely unprepared. Realising that our intellectual capabilities hardly match the scope of the task, and that this report's impact on public awareness is limited both by its unavoidable (in the current political circumstances) marginality and its specialised legal genre, as well as rather substantial size, we nonetheless felt it our duty to contribute to preparing for the work whose time, sooner or later, must come.

In the context of systemic impunity for crimes, an individual's decision whether or not to commit such a crime is primarily a matter of his/her moral choice. And still we would like to believe that readers of this report who are themselves involved in unlawful activities permitted by the authorities will find therein some useful food for thought about the potential consequences of their deeds and consider whether it is worth taking the additional risk.

Many practical questions of transitional justice are not answered in the report. In real life, transitional justice, which deals with events of the past, is inseparable from future institutional reforms. For example, lustration of judges and law enforcement officials makes only limited sense without a transformation of the courts, the police, and the intelligence services. Safeguards to protect the rights of persons subjected to covert surveillance cannot only be retrospective, because even democratic states governed by the rule of law cannot afford to abandon surveillance altogether. The same applies to the rules and practices of awarding compensation for violations of the right to trial within a reasonable time frame, as well as several other legal institutions required by transitional justice. Nevertheless, we have chosen to limit the scope of this report to actions of the past in order to focus on the special legal problems they entail. One of the topics that was not included in the report, which we ourselves were eager to explore, is the recruitment and training of transitional justice personnel. The specifics of these bodies' work also remain an open issue – what charges should be brought forth and against whom,[509] or how to organise the process of returning criminally expropriated property to the state. These details can only be assessed in the specific

509 On the choice of priorities, see: UN Human Rights Council. Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff. 27 August 2014. UN Document A/HRC/27/56.

socio-political context in which the transitional justice programme would be carried out.

The report remains silent on perhaps the largest (in terms of the number of persons involved and the scale of its consequences) systemic offense in post-Soviet history – the illegal annexation of the Crimean Peninsula to the Russian Federation. Without questioning the conclusions of UN General Assembly Resolution 68/262 on the illegitimacy of this act, we nevertheless chose not to include recommendations for remedial measures in this report. This wrongdoing cannot be remedied except at the international level, through negotiations between the governments of Russia and Ukraine. For this reason, the "ideal model" approach we have adopted, which excludes political and other attendant circumstances (which will inevitably affect the contents of these negotiations and the stances of their participants), is manifestly inapplicable to the settlement of the status of Crimea.

Despite the current troubling political climate, we would like to see this report generate opportunities for debate both among experts and in the broader civic arena. Results of such discussions might include: the dissemination of ideas underpinning transitional justice within the professional legal community; the clarification and possibly rejection of certain of its provisions; the promotion of civilised methods of overcoming impunity for crimes; and the debunking of false stereotypes common in this domain (for example, the perception that lustration is a panacea against all the atrocities of the former regime).

We would like to conclude this report with words of hope for a better future for Russia in which the people of our country will find the strength within them to restore justice after decades of impunity; to uncover and accept the truth about the difficult past; and to pay homage to the victims.

List of key abbreviations and documents

- ARC – Autonomous Republic of Crimea.
- CACP, or Code of Administrative Offences – Code of Administrative Offences of the Russian Federation of December 30, 2001, No.195-FZ.
- ChRI – Chechen Republic of Ichkeria.
- Commercial Procedure Code – Commercial Procedure Code of the Russian Federation of July 24, 2002, No. 95-FZ.
- Civil Code– Civil Code of the Russian Federation (parts one, two, three, and four).
- Civil Procedure Code – Civil Procedure Code of the Russian Federation of November 14, 2002, No.138-FZ.
- CPI – Corruptions Perceptions Index.
- Criminal Code – Criminal Code of the Russian Federation of June 13, 1996, No. 63-FZ.
- Criminal Procedure Code – Criminal Procedure Code of the Russian Federation from December 18, 2001, No. 174-FZ.
- Code of Administrative Procedure – Code of Administrative Procedure of the Russian Federation of March 8, 2015, No. 21-FZ.
- CPSU – Communist Party of the Soviet Union.
- DPR – Donetsk People's Republic.
- ECHR, or European Convention on Human Rights – European Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950.
- ECtHR - European Court of Human Rights.
- FBK – Anti-Corruption Foundation.
- FSB – Federal Security Service.
- Geneva Conventions (when referred to jointly) - a series of conventions dated August 12 1949, including Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Convention (III) relative to the Treatment of Prisoners of War, Convention (III) relative to the Protection of Civilian Persons in Time of War.
- GKChP – State Committee on the State of Emergency.

- ICC – International Criminal Court.
- ICCPR – International Covenant on Civil and Political Rights of 16 December 1966.
- ICRC - International Committee of the Red Cross.
- ICRF – Investigative Committee of the Russian Federation.
- ICTY – International Criminal Tribunal for the Former Yugoslavia.
- KGB – Committee of State Security.
- LPR – Luhansk People's Republic.
- MDIUC – Main Department of the Investigative Committee of Russia for Investigating Unpunished Crimes.
- NATO – North Atlantic Treaty Organization.
- NKVD – People's Commissariat for Internal Affairs.
- OGV – United Group of Forces for Counter-Terrorist Operations in the North Caucasus Region of the Russian Federation.
- OSCE – Organization for Security and Cooperation in Europe.
- PACE – Parliamentary Assembly of the Council of Europe.
- Rehabilitation Law – Law of the Russian Federation "On Rehabilitation of Victims of Political Persecution", of October 18, 1991, No. 1761-I.
- Resolution 60/147 - UN General Assembly Resolution 60/147 of 16 December 2005 on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.
- Rome Statute – Rome Statute of the International Criminal Court, 17 July 1998.
- UFS – Universal Financial System.
- UN Set of Principles to Combat Impunity – Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN document E/CN.4/2005/102/Add.1 of 8 February 2005
- United Nations – Organization of the United Nations.

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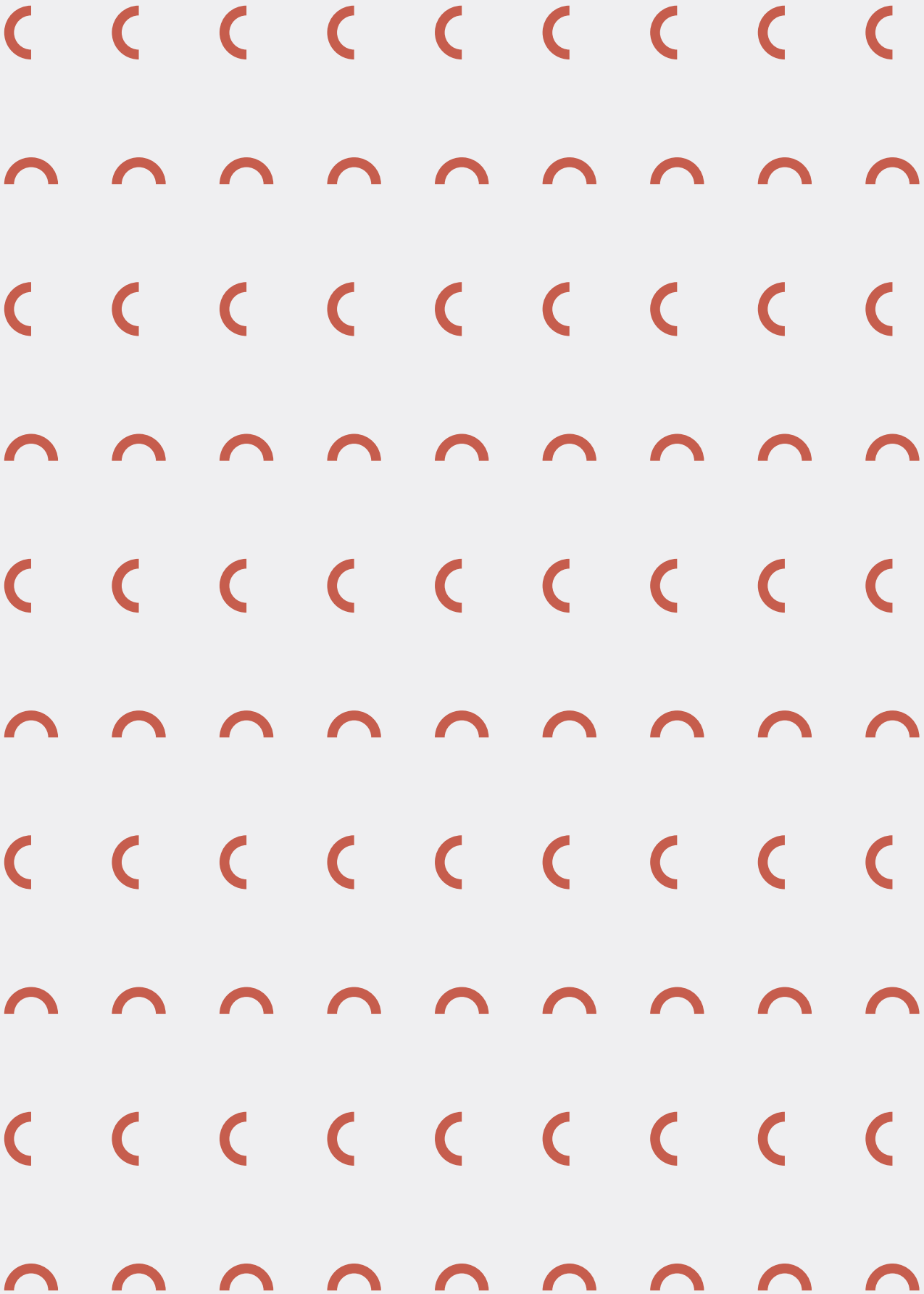

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