

How the KGB Violates Citizens' Rights: The Case of Alexander Nikitin

THOMAS NILSEN AND JON GAUSLAA

Alexander Nikitin has been held in custody in the Federal Security Service (FSB) prison in St. Petersburg since his arrest on 6 February 1996 on charges of espionage. The FSB (the former KGB) claims that Nikitin sold information to the Norwegian environmental foundation Bellona. The preliminary investigation was concluded 30 September 1996, and the FSB charged Nikitin with violations of the espionage paragraph and the law on releasing state secrets. Nikitin, a former navy first-rank captain, is also charged with unlawful use of his military identification card. Since then, the FSB has committed a series of judicial and human rights violations against the environmentalist. The case has achieved noticeable attention internationally, and several important persons and institutions have voiced criticisms to Russian authorities.

Nikitin was jailed for his work as co-author of *The Russian Northern Fleet: Sources of Radioactive Contamination*, a report on the environmental dangers emanating from the nuclear activities of the Russian Northern Fleet. The report was launched by Bellona on 19 August 1996. The FSB accuses Nikitin of having disclosed state secrets for payment.

As an employee of the Bellona Foundation, Nikitin obviously received payment for his work. However, Bellona's report on the Northern Fleet is based in its entirety on open sources that were collected and assembled by Igor Kudrik, Thomas Nilsen, and Nikitin, all of whom are Bellona employees. Furthermore, Russian authorities were advised of the findings throughout the project.

The indictment is based on alleged breaches of two decrees issued by the Russian Ministry of Defense. The nature of the decrees in question is so secret that, even as of mid-1997, Nikitin's defense attorney has not been permitted to see

Thomas Nilsen is a researcher with the Bellona Foundation in Norway and co-author with Alexander Nikitin of the report *The Russian Northern Fleet: Sources of Radioactive Contamination*. Jon Gauslaa is a lawyer with the Bellona Foundation and has a special degree in International Law from the University of Oslo, Norway. *Editor's note:* Alexander Nikitin was released from pre-trial detention on 14 December 1996. The charges have not been dropped and no trial date has been set.

them. Yet keeping secret the grounds on which charges are being brought constitutes a clear infraction of Nikitin's legal rights.

The Russian Constitution adopted in 1993 states that no one is to be charged on the basis of secret laws not known to the defendant. It also states that no such secret laws are above the Constitution. The charges against Nikitin also break with internationally recognized principles of law. No constitutional democratic government has a system that allows the rights of the citizens and the obligations of the authorities, given in law, to be set aside by older laws of less importance, that are secret as well.

A Chronology of the Nikitin Case

The Arrest and Preliminary Investigation

The Nikitin case started on 5 October 1995, when the FSB made its first raid on the Bellona office in Murmansk, while simultaneously apprehending and interrogating Nikitin and fellow Bellona employee S. Filippov in St. Petersburg. Both were released the same evening. On the following day, the FSB confiscated several items from the homes of Bellona employees and their families and took computers and documents from the Bellona office. During the following months, at least sixty people who had some connection to the Bellona Foundation were interrogated. On 18 October 1995, the FSB issued its first press release on the case, stating that the confiscated Bellona material contained state secrets.

On 5 December, an expert committee, which included representatives from the General Staff of the Russian Ministry of Defense, was formed to assess the contents of the confiscated report draft. In its conclusion of 30 January 1996, the committee stated that six out of the eight chapters contained state secrets. However, in arriving at its conclusions, the committee did not consider the question of availability of sources (i.e., whether the alleged secrets had already been published elsewhere and were, therefore, already publicly accessible). Nor did it specify which points in the report constituted state secrets. The assessment is based solely on two decrees from the Ministry of Defense, which themselves have been classified as secret. On 15 February, the FSB reiterated the question of source material to the expert committee. The committee declined to respond, stating that the matter was beyond its competence.

In the early morning of 6 February 1996, the FSB apprehended Nikitin in his apartment in St. Petersburg. Nikitin and his wife were told only that the FSB wanted to ask some further questions and Nikitin left his home without spare clothes or a toiletry bag. At the FSB headquarters, Nikitin was placed under arrest and charged with espionage for having gathered and sold state secrets to the Bellona Foundation (concurrent with the conclusions of the military expert committee).

Furthermore, Nikitin was denied the right to consult with the defense attorney of his choice on the illegal grounds that the attorney would first have to obtain a security clearance issued by the FSB. Following an appeal by Nikitin's defense attorney, Yuri Schmidt, the Russian Constitutional Court ruled on 27 March that the FSB's requirement of a security clearance for Nikitin's lawyer was unconsti-

tutional. As a result of this ruling, Nikitin was allowed to meet with his lawyer on 29 March—after seven and a half weeks in custody.

Implicit in the court's ruling was the principle that the case against the civilian Nikitin was a civilian matter and should, therefore, fall under the jurisdiction of a civilian court. Nevertheless, on 4 April, it was a military court that denied Nikitin's appeal against the FSB decision to retain him in custody for a further two months. The prolonging of custody is not considered to be a court matter unless an official appeal is filed first. The military court also refused an application for bail. During the negotiations, Nikitin was placed in a steel cell and guarded by six soldiers carrying machine guns.

On 11 April, Nikitin and his lawyer received a reformulated indictment from the FSB, the text of which is classified. It is Bellona's understanding that the indictment is now limited to chapter 8 of the report on the Northern Fleet, which discusses accidents on board Soviet and Russian nuclear submarines. Chapter 8.1 on sunken submarines is not mentioned in the indictment.

On 17 April, at a press conference during the G7+1 "Moscow Summit on Nuclear Safety and Security," the Bellona Foundation released a preliminary, text-only version of the report in Russian, English, and Norwegian. Several hundred copies were distributed, and the entire report was also made available on the Internet.¹ One copy, which was brought to Nikitin in jail, was immediately confiscated by the FSB. On 30 April, three copies were confiscated from a Bellona contact in Severodvinsk. On this occasion, the FSB agents showed an official FSB document declaring that, because the report contained state secrets, distribution of the document in Russia was forbidden. Yet, in early June, a representative of Bellona's Oslo office had no trouble clearing thirty to forty copies of the report through customs on his way into St. Petersburg.

On 7 May, Nikitin's attorney, Yuri Schmidt, requested that a new expert committee be formed and he handed over copies of the source material that Nikitin had used for his work on the report. The main reasons for the request were the need to evaluate and clarify the nature of the source material Nikitin had used to assemble the report and to show that the expert committee's conclusions of 30 January and 15 February were general and unspecified. Some of those earlier conclusions related to subchapter 8.1 with regard to sunken submarines only, but the revised indictment did not mention this.

Nikitin's defense counsel proposed that the new committee should include representatives from the Navy's Departments of Shipbuilding, Operation and Maintenance, and from the Interdepartmental Commission for Ecology. The FSB's chief of investigations on the Nikitin case, Maksimenkov, agreed to this and conceded that the earlier conclusions of the expert committee had been rather vague. Nonetheless, it was not until 24 June that the FSB announced its intent to form a new committee.

On 14 May, the defense again requested the release of Nikitin from custody, arguing that he would not be able to impede further investigations. In his new application for bail, Yuri Schmidt argued that, given that the collection of evidence was completed after seven months of investigation, all that remained was

to clarify the extent to which the Bellona report contained state secrets, and if it did, to determine whether or not this information was already publicly available. Both bail money and guarantees from organizations (according to A7 95 of the Russian Penal Code) and individual persons (A7 94), would guarantee Nikitin's conduct upon release. Among the guarantors were authors, scientists, cultural personalities, fifteen members of the State Duma, and five members of the St. Petersburg city soviet, as well as several Russian, Norwegian, and international organizations.

On 21 May, Chief Investigator Maksimenkov denied the bail application giving no legal grounds for his refusal. Instead, he stated: "Circumstances and evidence, which at the present stage of the investigation cannot be made known to the defendant, give reason to suspect that the accused is in a position either to prevent the truth from becoming known or to go into hiding."

Nikitin Files a Complaint against the Prosecution

During the month of May, Nikitin lodged an objection to the way in which Chief Prosecutor Maksimenkov and Attorney General Gutsan had handled his case, arguing that his rights as a defendant were being systematically violated. In his position as attorney general of St. Petersburg, Gutsan was supposed to monitor and ensure the lawful operation of the judicial system within the region. Yet, as evidenced in the correspondence between the office of the attorney general of St. Petersburg and Nikitin's attorney and family, he had openly sided with the prosecution on three occasions: during the presentation of the accusations, during interrogations, and in denying Nikitin access to legal counsel in the period between 6 February and 29 March (the prosecutor assented to the denial of counsel during the first two months in custody).

The indictment of 11 April is in direct contention with Article 144 of the Soviet Penal Code and is as obscure as the conclusions of the expert panel upon which it is based. Thus, in effect, the defendant is deprived of all legal means by which to defend himself. In response to the prosecutor's first question following the stating of the charges—whether the defendant understood the charges leveled against him—Nikitin replied that he did not.

Nikitin's applications for access to the technical and normative reference material essential to building a defense have been consistently denied. Despite repeated requests, the defense has not been permitted to see the two Ministry of Defense decrees on which the entire case is based. Applications and requests delivered months ago remain unanswered, thereby depriving the defense of the possibility to appeal the investigation to the Attorney General according to due process of the law and in due time.

It was State Prosecutor Gutsan himself who initiated the transfer of Nikitin's complaint (for deprivation of counsel, prolonged custody, and absence of legal grounds for arrest) to a military court. Nikitin was shown a formal written denial of his appeal, but Schmidt, as his lawyer, was not allowed to see the document, which is now in the possession of the FSB.

Nikitin's appeal against the prolonging of his time in custody was scheduled

to be tried in the civilian courts of the Dzerzhinsky region on 10 June. Nikitin was at first duly informed of this, but later State Prosecutor Gutsan and Judge Stulikov withdrew the authorization for transport of the defendant to court. A motion was then made to transfer the case to a military court, which the judge approved.

As a result, the hearing of the case was delayed for a further five weeks. In that the defendant's right to a fair trial of the legal grounds on which he had been detained were now completely abrogated, Yuri Schmidt withdrew the appeal in order to appeal to the Supreme Court. On 25 June, chief investigator Maksimenkov announced the prolonging of Nikitin's retention in custody until 6 August and defense attorney Schmidt immediately filed a complaint.

The vice chairman of the Supreme Court, A. E. Merku-shov, ruled that there were no legal grounds for transferring Nikitin's case to a military court. He referred the case to the city court of St. Petersburg, where it was then assigned to the Oktyabrsky regional court.

Merkushov also demanded that the pertinent material be sent to him for preparation of a protest against the decision by Judge Stulikov.

“No constitutional democracy has a judicial system whereby the basic rights and freedoms of citizens and the responsibilities of government, as given by the law, may be superseded by older regulations of lower rank that are also secret.”

A New Expert Committee

On 24 June, the FSB announced the forming of a “new” expert committee. Neither of the two candidates proposed by the defendant were included, nor was any justification given for the omission. Instead, the chief investigator included the eight directorates of the General Staff, who had already stated that they were not competent to determine the matter of the report's source materials. A few days later, there was an answer from the directorates, in which the committee's incompetence to rule in the matter of the sources was restated. The directorates also refused to work on a committee that included any institutions outside their own and categorically refused to apply any measures with respect to state secrets but decrees no. 052 1992 and no. 071 1993 from the Ministry of Defense (as mentioned earlier, these decrees are classified and remain inaccessible to the defense for examination).

The latter is a central point, as Schmidt cannot find anything in the Bellona report draft that would warrant the classification of “state secret” under the terms of the federal law “On State Secrets” that came into effect in 1993. This is also true of President Boris Yeltsin's presidential decree of 30 November 1995 entitled “List of Information Regarded as State Secrets.” In fact, contrary to the FSB's action, the law on state secrets quite explicitly states that keeping secret any information on conditions that may harm the environment or the health of the citizens

is prohibited. In other words: the FSB's indictment of Nikitin is based solely on the two secret decrees of the Ministry of Defense.

Only one of the ten points that the defense wanted the committee to assess was included in the new commission. In its failure to announce that these requests had been denied, the investigation breached Article 133 of the Soviet Penal Process Code. Furthermore, the new expert committee was formed without permitting the defense any possibility of influencing either its makeup or the outcome of its deliberations. This, coupled with the fact that the defendant was not informed of the committee's existence until after it had been formed, violated the defendant's rights under Articles 184 and 185 in the Legal Process Code. In actuality, there is no new expert committee since the new body has the same composition as its predecessor and still considers the question of source materials to be beyond its realm of competence. The expert committee began its work on 10 July.

On 1 July, the defense petitioned that the criminal case against Nikitin be terminated under the provisions of the new penal code, which went into effect on 1 January 1997. At that time, Article 64 of the existing penal code (on which the indictment is based) would have been replaced by Paragraph 275, which defines the crime of treason as a "co-operation with a foreign country, a foreign organization or its representatives, in damaging Russian national security." No one has accused Bellona of such activities. According to Article 3 of the law on "How the Russian penal code will enter into effect" (passed on 24 May 1996), all criminal cases that are not in violation of the new Russian Penal Code, will be terminated. So far, there has been no response to this petition.

Vague Hints at Oktyabrsky Regional Court

After Nikitin had spent five months in custody, his case against further imprisonment was finally tried in the appropriate court. Yet, according to defense attorney Schmidt, the hearing on 12 July in the Oktyabrsky regional court turned into a farce in which state prosecutor Gutsan violated all standards of legal conduct. Unable to present evidence to justify the necessity of further imprisonment, the prosecutor based his argument on the alleged existence of various significant materials that cast Nikitin's role in a completely new light.

Through vague hints presented neither in the case documents nor in the indictment, Gutsan intimated that Nikitin in actuality was a trained agent for a foreign secret service. It appears that these intimations may have influenced the verdict of the court. It also gives reason to speculate on the nature of the information being circulated within the legal and investigative apparatus when the prosecutor resorts to such tactics in full view of the court, the defendant, and his counsel. Moreover, it is not the first occasion that such methods of accusation have been used.

In its grounds for prolonging imprisonment, the prosecution presented a list detailing the plans for further investigation. According to this document, all further investigation would either bear on the findings of the expert committee or on an evaluation of the legality of Bellona's methods of collecting information. Neither the investigator, the state prosecutor, nor the court could explain how the

release of Nikitin on bail would impede these proceedings. The investigation's assertion that, if released, Nikitin would go into hiding was based on his two-year-old intention of emigrating to Canada and on his February announcement of his desire to be registered in his mother's hometown of Vinnitsa in Ukraine, so as to enable the transfer of his military pension to his aging parent. With his wife and children living in St. Petersburg and his international passport confiscated by the FSB in October 1995, Nikitin had no intention of emigrating to Ukraine.

On 19 July, deputies Viktor Pochmelkin, Yuri Rybakov, and Viktor Tetelmin of the State Duma worked out a motion directed to Security Council Secretary Alexander Lebed and Prosecutor General Yuri Skuratov. The motion demanded an explanation of the reasons for violation of citizen Alexander Nikitin's civil rights and insisted that measures be taken to end the illegal actions perpetrated against Nikitin by the FSB and the prosecutor in St. Petersburg. The motion was passed by a majority vote in the State Duma and presented to Lebed on 22 July.

In a letter to Attorney General of Russia Skuratov dated 26 July, with a copy to the Duma, Lebed requested that Skuratov handle the matter. In a letter to the Duma dated 31 July, Skuratov acknowledged receipt of the request and stated that the matter would be investigated and the Duma kept informed of the results.

On 6 August, the FSB announced that Nikitin's imprisonment would be extended until 6 October. Upon inquiry by Nikitin's lawyer as to the grounds for retaining him further in custody, the FSB refused to give the grounds for its decision. Schmidt immediately filed an objection, both to the extension of the term and the classifying of the grounds by which Nikitin was being detained. On 21 August, the question about the prolonged custody was brought up in a court in St. Petersburg. The court decided that the decision had to be postponed until 23 August, because Nikitin's attorney had not had access to the grounds for the prosecution's decision made on 6 August. On 23 August the court decided to support the prosecution's 6 August decision.

The Charge

On 30 September, the FSB concluded the preliminary investigation and presented the charge against Nikitin. The charge is based upon a secret decree (071 from 1993) from eight branches in the Russian Ministry of Defense. The decree includes a list of more than 700 items of information to be regarded as military state secrets. Neither Nikitin nor his lawyers have been allowed to see this decree.

On the basis of the decree, it has been concluded that Nikitin violated paragraph 64a (spying and high treason), paragraph 75 (release of state secrets), and paragraph 196 (misuse of military identity card). It is the contents of chapters 8 (nuclear submarine accidents) and 2.3 (security issues with naval reactors) that form the grounds for the charges.

On 10 October, Bellona was informed that the Russian Foreign Ministry had instructed the Russian consulate in Norway to deny visas to St. Petersburg for representatives from the Bellona Foundation. This was done to prevent Bellona's representatives from actively participating in the defense of Bellona employee Nikitin. Representatives from Bellona intended to go to St. Petersburg with source

material from the Russian Northern Fleet report, information that the FSB claims is secret. Bellona was granted visas to Murmansk and Moscow. The Norwegian Foreign Ministry has been in contact with the Russian embassy in Norway, where it was confirmed that Bellona representatives would no longer be allowed to travel to St. Petersburg. The case has been taken up with authorities in Russia at a high level.

The United Nations High Commissioner on Human Rights, Amnesty International, and the International Helsinki Committee have adopted Nikitin as a “prisoner of conscience.” Amnesty regards Nikitin as Russia’s first major “prisoner of conscience” since dissident physicist Andrei Sakharov. Zdzislaw Kedzis, adviser to the United Nations High Commissioner on Human Rights, has said that the commission is reviewing Nikitin’s case and is very interested in the findings of Amnesty International’s investigation. The International Helsinki Committee has decided to set up an international group of human rights experts to investigate the case.

Russian Law and the Nikitin Case: An Analysis

A number of Russian laws grant the people the right to information about conditions that bear on the safety of the environment and public health. These rules specifically forbid classifying such information as secret and hold officials and others accountable for hindering the availability of such information. Such officials can be charged with penal action and administrative responsibility. Along with Article 42 of the Constitution (cf. Articles 24 and 41), this is also held in A7 7 in the Law of State Secrets (1993), A7 10 in the Law of Information (1995), and A7 84 in the Law on Safety of the Natural Environment (1991).

The Bellona report on the Russian Northern Fleet contains information that is covered by the laws mentioned above. The assertion that an overview of the technological development of nuclear reactors used in the Russian Navy (chapter 2.3.3 of the Bellona report) and accidents on board nuclear submarines and the reasons for these accidents (chapter 8 in the report) have no ecological relevance or significance for the public health is as absurd as contending that the Chernobyl accident has no such relevance. On the contrary, information on the conditions mentioned above is inevitably necessary to solve the environmental problems associated with the Northern Fleet. As long as the prosecution of Nikitin is based on two secret decrees from the Ministry of Defense (052 1992 and 071 1993), the FSB and prosecuting authorities will be in violation of Russian law, because the terms of these decrees conflict with the laws and constitutional requirements mentioned above. It is not Nikitin, in his capacity as a contributor to the Bellona report, who has violated any law, but rather the government agencies that, in their efforts to prosecute him, contribute to the continued classification of information on conditions affecting ecological safety and public health.

Furthermore, these organs of government also violate fundamental principles of law by permitting old rules issued by decree to take precedence over more recent regulations established by lawful statutes and the Russian Constitution. The decrees lost their legal impetus with respect to information bearing on ecological security when the new rules of law and the Constitution came into effect.

In addition, they were not announced to the servicemen in the navy until the year after Nikitin left the service. Hence, as a civilian, the decrees would not have applied to Nikitin anyway.

The treatment Nikitin has been subjected to is in sharp conflict with Article 15, paragraph 3 of the Russian Constitution adopted in February 1996. It states that "no normative rule that affects the rights, freedoms and responsibilities of the individual and the citizen can be applied unless it is officially published for public view." To prosecute Nikitin for having violated a set of rules that he never had the opportunity to see and that contain regulations conflicting directly with provisions of the law and the Constitution, is a very grave violation of the basic norms of legal procedure that the Constitution is supposed to protect. Hence it would be both illegal and unconstitutional to convict Nikitin on the basis of these decrees. Nor do the decrees give any legal grounds for detaining him further.

With adoption of the Constitution in 1993 (Article 1) and entry into the Council of Europe in 1996, Russia declared that the nation was "a constitutional democracy." The Nikitin case, however, shows that the country does not deserve to be described this way. No constitutional democracy has a judicial system whereby the basic rights and freedoms of citizens and the responsibilities of government, as given by the law, may be superseded by older regulations of lower rank that are also secret.

Besides having violated fundamental principles of law and acted against Russian laws that prohibit the classification of and restriction of citizens' access to information bearing on ecological safety, the agencies responsible for bringing charges against Nikitin have also breached a number of other internal provisions of the law. Nikitin is charged with having violated A7 64 (a), 75, and 196 of the Russian (Soviet) Penal Code of 1960, which apply, respectively, to high treason in the form of espionage, the handing over of state secrets without intent of treason, and the improper use of military identity papers. However, all of these regulations were replaced on 1 January 1997 by the new penal code (adopted on 24 May 1996). According to A7 10 of the new statute, the law will go into effect retroactively in instances where a given offense has been decriminalized or the penalty has been lightened. Furthermore, according to A7 3 of the law that puts the new penal code into effect, all convictions reached prior to 1 January 1997 will be made consistent with the new penal code.

This law alters the description of a criminal offense and softens the penalty for the actions for which Nikitin has been charged. An example of this is the reduction of the maximum penalty for high treason from the death penalty to a maximum penalty of twenty years in prison. In the case of handing over state secrets, there is a reduction from a maximum of fifteen years under the old law to a maximum of seven years under the new, cf. A7 64 (a) and 75 in the 1960 law and A7 275 and 283 in the 1996 law. The most logical step would, therefore, have been to base the investigation on these new rules, since any final criminal case against Nikitin would have to be based on them. However, the FSB and the public prosecutor have insisted on using the rules of the old law and have failed to respond to a request from the defense to apply the rules of the new law.

Regardless of the rules that are applied, a condition for convicting Nikitin would be that he indeed had handed over or revealed state secrets. However, as stated above, there are no grounds for the assertion that the Bellona report contains such information as long as it is clearly stated in Russian law that any information of significance to ecological safety and the public health cannot be considered state secrets. In addition to being ecologically relevant, the information was also gathered from open sources, a point that is also documented throughout the report's highly detailed citations of sources.

Hence, the criminal grounds for the indictment against Nikitin are rather thin. It is also clear that the prosecuting authorities in the case have violated a number

“The Nikitin case is not only a case against the individual Alexander Nikitin, but a case in which the entire Russian court system is on trial.”

of rules in the Russian (Soviet) criminal procedure law (1960). Grave violations have occurred both of A7 46 of the criminal procedure law, covering the rights of the accused, and of A7 51 (cf. A7 47 and 48), the rules covering the rights of the defense counsel, which to a large extent coincide with the rights of the accused according to A7 46. It

should be mentioned that the violations consist both of denying Nikitin the attorney of his choice for seven weeks and presenting such vague and unclear charges that it has been impossible to build a defense against them. Nikitin and his legal counsel have neither been allowed access to the decrees that form the grounds for the indictment, nor have they been apprised of what information in the Bellona report is considered to be state secrets.

In conflict with A7 46, there has been no real trial, before a competent court, of the lawfulness and reasonableness of the grounds for the arrest. On 4 April 1996, a military court ruled that the arrest and further detention was lawful, but in June 1996, the vice president of the Supreme Court ruled that the case should be tried before a civilian court. Despite this, the civil court to which the case was assigned stated that it was incompetent to try the questions of lawfulness and justification of continued detention, settling instead on referring to the decision of the incompetent military court. Finally, the rights of the accused and the defense counsel to bring requests and complaints against decisions that have been made as part of the legal proceedings on the question of detention in custody are illusory. This is, in part, because requests and complaints are never answered and, in part, because on the occasions that they are answered, they are denied without further explanation.

A number of violations have occurred in connection with the work of and appointments to the expert commissions that have been appointed in the case. In violation of A7 184 of the Penal Code, these commissions have been appointed without the participation of Nikitin. He has also been deprived of his lawful

rights, under A7 185, to explain his case before the commissions, participate in the forming of them, and to exercise influence on the questions that the commissions are to address. Nor has his defense counsel been given any opportunity to influence the makeup of the commissions or their work.

The work of the commissions has been so one-sided and superficial that there is reason to doubt their objectivity and seriousness. Some of them seem even to have acted in violation of the work requirements for such commissions as laid down in A7 191. Other important rules in the Criminal Procedure Law have also been transgressed, including A7 11 on the inviolability of the individual, A7 20 setting requirements for an objective investigation, A7 36 containing rules determining which courts have competence to decide certain cases, A7 68 covering the gathering of evidence during the investigation, A7 94 and 95 granting the right to release against bail if given guarantees for the appearance of the accused in court, A7 97 governing the length of time spent in custody, A7 131 requiring an explanation when requests and complaints from the accused are denied, and A7 144 on the contents of the indictment.

Taken together, these violations of criminal procedure constitute grounds for the assertion that the entire case against Nikitin has been conducted without any legal grounds from the very outset. The bodies of government in charge of the investigation and the indictment have intentionally denied Nikitin the rights he is entitled to under criminal procedure law. These rights have been partially denied to him and partially made empty as a consequence of the FSB's and the prosecution's handling of the case. The only goal of the prosecution appears to be the conviction of Nikitin at any price and it clearly has been—and remains—of secondary importance to clarify what actually happened and hence, give Nikitin the possibility to defend himself by lawful means.

The Nikitin Case and International Law

Over the course of the Nikitin case, the FSB and the prosecution have violated not only internal rules of law, but also the fundamental human rights that grant the individual protection from arbitrary arrest and the right to a fair trial. These basic rights and freedoms are established in a number of international conventions and declarations, including Articles 5 and 6 of the European Convention of Human Rights (ECHR) (1950); Article 14 of the Covenant on Civil and Political Rights (1966); Articles 9 to 11 of the Universal Declaration of Human Rights (1948); and Section 1, Point VII of the Conference on Security and Co-operation in Europe (1975). The three latter documents were all signed by the Soviet Union and are valid for Russia today.

In addition, in February 1996 the country declared that it would sign the European Convention for Human Rights within a year and ratify it within three years. It is also stated in the Russian Constitution that recognized principles and rules of international law and responsibilities in international agreements form a part of the internal law and these rules take precedence over ordinary national law (Article 15). The Constitution guarantees human rights in accordance with recognized principles and norms of international law (Article 17) and establishes that

human rights are effective immediately within national law (Article 18). The principles expressed by the conventions and declarations mentioned above are thereby directly binding for Russian authorities and courts, whether they appear in conventions signed by Russia or not, and take precedence over national law. Therefore, it is highly relevant to point to these principles in the Nikitin case, especially the European Convention on Human Rights, since it is through the application of this document that the principles of protection from arbitrary arrest and the right of a fair hearing are most substantiated.

In the Nikitin case, there have also been a series of violations of Article 5 of the ECHR, which protects the individual from arbitrary arrest. The seizure and imprisonment of Nikitin also conflicts with Russian national law, in that both the material and procedural rules have been violated. Nikitin has been subjected to an arbitrary deprivation of personal liberty, which also makes the arrest illegal in the context of the convention (cf. Article 5 (1), second paragraph). In Nikitin's case, given that the national law neither grants authority to arrest nor provides for long periods of detention in custody and that the conditions of reasonable suspicion, risk of the commission of another crime, or risk of the suspect fleeing cannot be said to have been fulfilled, Article 5 (1) letter (c) has also been breached. The same is true of Article 5 (2), in that the reasons for the arrest and the charges against him were never made clear to Nikitin. When the prosecuting authorities can claim only that parts of the Bellona report contain state secrets without specifying more clearly what these secrets are or where in the report they appear, and since neither Nikitin nor the defense counsel have been permitted access to the decrees that constitute the grounds for the charges, Article 5 (2) cannot be said to have been fulfilled. Article 5 (3) grants the arrested person the right to an "immediate" hearing before an independent judge to try the grounds for the imprisonment. In addition, the accused has the right to a fair trial "in reasonable time or to be released during preparation of the case."

This requirement implies that the accused appears before a qualified judge in the course of a few days. In Nikitin's case, this did not occur until 12 July 1996—over five months after he was apprehended—and the competent judge failed to try the grounds of imprisonment, instead justifying continued detention of Nikitin by referring to the 4 April 1996 decision of the incompetent military court. The court extended the period of Nikitin's detention in custody even though no evidence was presented in court to substantiate any of the charges against him. Since the guarantees were posted as required by A7 94 and 95 of the Criminal Procedure Law for release of the prisoner prior to the case coming up in court, there is also reason to ask why, under the provision of Article 5 (3), he was not released on bail during preparation of the case.

Article 5 (4) grants the arrested person the right to periodically retry the lawfulness of the arrest and possible imprisonment before an independent court. Nikitin has been deprived of this right, for it was not until 12 July 1996 that the case first came up before a civil court. When it finally did, the court did not properly try the grounds for the imprisonment. Furthermore, several circumstances both before and after the hearing suggest that the court was not, in fact, fully inde-

pendent. For example, on 10 June 1996, ostensibly according to an earlier agreement between the prosecution and the judge, an illegal attempt was made to transfer the case back to a military court.

The denial of Nikitin's and his defense counsel's access to the most essential documents of the case (decrees 052 1992 and 071 1993) constitutes a serious breach of the fundamental principles of "equality of arms" and mutual access to the case documents. The loss of these rights effectively deprived them of any possibility to conduct an adequate defense, constituting a clear violation of Article 5(4). Article 6 of the European Convention on Human Rights (which coincides with Article 14 in the Covenant on Civil and Political Rights) grants persons accused of criminal actions the right to a fair trial and applies from the point in time that formal charges are brought against him. The main principle of a fair trial is established in Article 6 (1) and presumes that the requirements of "equality of arms" and mutual access are fulfilled. It also holds that the proceedings in court must occur in a fair and just manner, which presumes that the judge and the court as such are independent and impartial. Since neither Nikitin nor the defense counsel has been permitted to see the key documents in the case or to conduct an adequate defense, they have had far less opportunity than the prosecution to prepare the case. This is a clear violation of the principles of "equality of arms" and mutual access, and as noted above, given the turn of events in the case so far, there seems little reason for optimism with respect to the court's independence of the prosecution.

Article 6 (2) establishes that anyone who is charged with a criminal offense is presumed innocent until proven guilty under the requirements of the law. Inherent in this is the principle that any reasonable doubt shall benefit the accused, and that the judge must rule impartially. Furthermore, it may be considered a violation of this rule if, for example, the prosecution or representatives of the state authorities make statements laying a basis on which to draw conclusions regarding the guilt of the accused.

In the Nikitin case, President Yeltsin's advisor, I. Satarov, and acting attorney general of Russia, Y. Chayka, have come forth with very clear statements of Nikitin's guilt, and this was several weeks before the conclusion of the investigation. In a letter to the leader of the country's Parliament dated 15 August 1996, Chayka wrote that Nikitin had "deliberately damaged state security," that he had "committed high treason in the form of espionage," that he "is considered guilty of having passed on top secret information," and that he had "actively hindered the search for truth in the case."

Along with the fact that these allegations have no grounds in reality, based on the content and circumstances under which they were advanced, they also constitute a violation of the presumption of innocence until proven guilty as established in Article 6 (2). Article 6 (3) includes rules governing the minimum rights that the accused has in penal cases, including the right to "be immediately informed of the content and the nature of the charges," cf. Article 6 (3) letter (a). As shown above, the factual basis for the indictment against Nikitin is quite unclear and, as long as neither Nikitin nor the defense counsel can see the decrees upon which the charges are based, the provisions of Article 6 (3) must be considered violat-

ed. The fact that the prosecution has insinuated in court that Nikitin is a trained agent has raised the suspicion that the grounds for the charges could be altered just before or during the court case. This would be a violation of letter (a).

Among the minimum rights conferred upon the accused is the right to be "given sufficient time and opportunity to prepare his defense," cf. Article 6 (3) letter (b). Nikitin has had legal assistance since 29 March 1996, but as long as neither he nor his defense counsel is permitted access to the key documents in the case, it cannot be maintained that he has had sufficient opportunity to prepare the defense. The right to "defend oneself either in person or with legal assistance of one's own choice" is also a minimum right of the accused, cf. Article 6 (3) letter (c). As stated before, seven weeks elapsed from the time of the arrest until Nikitin was able to use the lawyer of his choice. Furthermore, as long as neither he nor the defense counsel were advised of the factual (when the offense occurred and what it consisted of) and legal (the two secret and partially illegal decrees) bases on which the prosecution's case was built, the breach of Article 6 (3) letter (c) cannot be said to have been "repaired" on 29 March 1996, but to have lasted through to the present.

Even though the rules mentioned here apply from the day of the indictment, that which (when seen in isolation) represents a violation of those rules could actually be "repaired" to a considerable degree by means of a fair trial before an independent court. But given the FSB's characterizing of Amnesty International's adoption of Nikitin as a prisoner of conscience as a "direct interference in the investigation," coupled with the Russian Ministry of Foreign Affairs' refusal to issue any Bellona representative a visa to St. Petersburg, where Nikitin is being held, it seems uncertain that he will get this treatment. Continued international attention to the case and international monitoring of the legal proceedings will probably be necessary factors to ensure that Nikitin does receive a fair trial.

Conclusion

The Nikitin case is not only a case against the individual Alexander Nikitin, but a case in which the entire Russian court system is on trial. If he is convicted on the grounds on which the charges are currently based, it will constitute a long step backwards and possibly a final break with democratic development in Russia. A precondition for every constitutional democracy is that the country's security police are made subject to the laws of the land and to its international obligations, and that individual persons are not convicted on the basis of secret decrees that are in conflict with the country's laws, constitution, and international obligations.

In the time that Nikitin has been held in custody, the prosecution has been unable to present a single piece of evidence showing that he is guilty of criminal actions that might justify his imprisonment. Rachel Denber, leader of the Moscow office for Human Rights Watch, made the following reflection on what the outcome of the case might reveal about the Russian penal system: "If the FSB can stonewall Nikitin, they can stonewall anybody." It is not difficult to subscribe to this comment, and the outcome of the Nikitin case will doubtless say much about

the direction in which Russia will develop. A verdict of guilty will indicate a turning backwards to Soviet practice, whereas a verdict of acquittal will more aptly reflect Russia's aspirations of becoming a full member of the civilized world.

NOTE

1. See the Bellona website (<http://www.grida.no/ngo/bellona/nikitin.htm>) for up-to-date information on the Nikitin process and the following documents: The Bellona report *The Russian Northern Fleet-Sources of Radioactive Contamination*; Amnesty International: "Russian Federation, Federal Security Service (FSB) versus Prisoner of Conscience Alexandr Nikitin: Return to Soviet Practices"; three resolutions from the European Parliament; and Bellona's juridical assessment of the case.