

**ARMED INJUSTICE:  
ABUSE OF THE LAW AND COMPLEX CRIME  
IN POST-SOVIET RUSSIA**

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*“For man, when perfected, is the best of animals, but, when separated from law and justice, he is the worst of all; since armed injustice is the more dangerous, and he is equipped at birth with arms, meant to be used by intelligence and virtue, which he may use for the worst ends.”<sup>1</sup>*

*“[A] club is a primitive weapon, a rifle is a more efficient one, the most efficient is the court.”*

*Nikolai Krylenko, Commissar of Justice of the Soviet Union, 1936-1938<sup>2</sup>*

I. INTRODUCTION

Abuse of the legal system has become a central technique in various fraudulent and extortionate schemes in Russia. Examples include:

- “commissioned” criminal prosecutions brought for the purpose of extorting money from the victim or driving him out of business;
- “intellectual property squatting” in which “squatters” exploit legal loopholes to register rights to a trademark or patent then initiate extortionate legal proceedings against alleged “infringers”;
- “corporate raiding”<sup>3</sup> in which criminals use corruptly obtained legal documents, such as shareholders’ resolutions, court judgments and state registration documents, as justification to seize a victim company’s assets; and

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\* Resident Legal Advisor, U.S. Department of Justice, U.S. Embassy-Moscow. The views and opinions expressed in this article are those of the author and not necessarily those of the Department of Justice or the U.S. government. For reasons set forth below, very few of the cases discussed herein have resulted in criminal convictions. Therefore, in discussing particular cases, this article relies heavily on publicly available allegations by victims and law enforcement. Unless otherwise noted, nothing in this article should be taken as a statement by the author or the U.S. government that the individuals or companies mentioned as defendants or subjects of investigation are in fact guilty or that they should not be presumed innocent. The author would like to thank the following for their helpful comments: Pavel Boulatov, Richard Daddario, Eric Hamrin, Rosie Hawes, Kathryn Hendley, Daniel Klein, Lauren McCarthy, Catherine Newcombe, Peter Prahar and Daniel Rosenthal.

1. ARISTOTLE, POLITICS 29 (Benjamin Jowett & H.W.C Davis eds., Cosimo Inc. 2008)(1905).

2. HAROLD J. BERMAN, JUSTICE IN THE U.S.S.R. 36 (1963) (quoting N.V. Krylenko in 1923).

3. See generally, Thomas Firestone, *Criminal Corporate Raiding in Russia*, 42 INT’L LAW. 1207 (2008) (discussing corporate raiding in Russia as “a new and sophisticated form of organized crime”).

- collusive litigation in which private parties create a pretextual lawsuit to obtain a predetermined judicial ruling which is then used as part of a scheme to misappropriate the victim's assets.<sup>4</sup>

American businesses, such as Hermitage Capital and Starbucks have reportedly been victimized by the practices described in this article and, according to a U.S. federal judge, "esteemed" U.S. law firms have been used as an instrument in at least one such scheme in the United States.<sup>5</sup> From a purely criminal standpoint, such schemes are brilliant. Using the law as both sword and shield, the perpetrator turns the victim into a legal defendant, misappropriates the state's legal enforcement power for private ends, and obtains a cover from liability through the claim that he is merely enforcing a legal right.

Despite a wealth of quality literature on the various manifestations of organized crime in contemporary Russia, analysts have failed to isolate and study this dangerous trend.<sup>6</sup> This article attempts to fill that gap by: (1) identifying and explaining some of the most common schemes relying on manipulation of the legal system; (2) tracing the historical origins of this phenomenon; (3) analyzing the steps the government is taking to combat the problem; and (4) identifying possible implications of this study for those concerned with the rule of law in Russia.

## II. SCHEMES RELYING ON ABUSE OF THE LEGAL SYSTEM

### A. *Commissioned Prosecutions*

Commissioned criminal prosecutions ("zakaznye dyela"), a term referring to (a) criminal cases "commissioned" by third parties as a way of sabotaging business competitors and (b) criminal cases initiated by law enforcement for extortionate or other improper purposes, are probably the most clear-cut examples of criminal legal abuse in Russia.<sup>7</sup> As Genri Reznick, the head of the Moscow City Bar

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4. These schemes are not mutually exclusive and sometimes supplement one another as part of the same scheme. For example, commissioned prosecutions and collusive litigation are often used in support of corporate raids. They are separated here only for purposes of analytical clarity.

5. See *Telenor Mobile Commc'ns AS v. Storm LLC*, 587 F. Supp. 2d 594, 608 (S.D.N.Y. 2008) (expressing "outrage[ ]" and "surpris[e]" that "two esteemed New York law firms" had become instruments of Storm and the Altimo's scheme to use a "sham" Ukrainian judicial ruling in a U.S. court).

6. For English language literature, see, e.g., JOSEPH SERIO, *INVESTIGATING THE RUSSIAN MAFIA* (2008); MISHA GLENNY, *MCMAFIA: SERIOUSLY ORGANIZED CRIME* 30-31, 312-13 (2008) (discussing Russian cybercrime and money laundering); STEPHEN HANDELMAN, *COMRADE CRIMINAL: RUSSIA'S NEW MAFIYA* (1995); VADIM VOLKOV, *VIOLENT ENTREPRENEURS: THE USE OF FORCE IN THE MAKING OF RUSSIAN CAPITALISM* (2002); PAUL KLEBNIKOV, *GODFATHER OF THE KREMLIN: BORIS BEREZOVSKY AND THE LOOTING OF RUSSIA* (2000); ROBERT I. FRIEDMAN, *RED MAFIYA: HOW THE RUSSIAN MOB HAS INVADED AMERICA* (2000); *RUSSIAN ORGANIZED CRIME: THE NEW THREAT?* (Phil Williams ed., 2d ed. 2000); JAMES O. FINCKENAUER & ELIN J. WARING, *RUSSIAN MAFIA IN AMERICA: IMMIGRATION, CULTURE, AND CRIME* (1998); Louise Shelley, *Crime, Organized Crime and Corruption, in AFTER PUTIN'S RUSSIA: PAST IMPERFECT, FUTURE UNCERTAIN* 183-98 (Stephen K. Wegren & Dale R. Herspring eds., 4th ed. 2009).

7. According to some, only cases initiated by third parties should be referred to as "commissioned cases," given the role of a third party in "commissioning" the case. However, given the

Association, recently said, “commissioned prosecutions” are the “most repulsive phenomenon in our justice system.”<sup>8</sup>

The problem of commissioned cases is widespread and openly recognized at the highest levels of government. In 2008, President Medvedev called on law enforcement to stop “terrorizing” business through “attacks” motivated by commercial aims.<sup>9</sup> Prime Minister Putin recently stated that the majority of regulatory inspections of businesses (often the first stage of a criminal case) were likely “commissioned.”<sup>10</sup> And in 2006, Prosecutor General Yuriy Chaika identified commissioned prosecutions as a major problem for Russia, acknowledged at least 20 such cases in Russia’s Central Federal District alone, and promised a review of all criminal cases to determine if they had been commissioned.<sup>11</sup> Of course, the United States has seen its share of abuse of the criminal justice system for extortionate ends. But in the United States, such cases typically involve extortion of criminals who are, by definition, vulnerable to the threat of criminal prosecution.<sup>12</sup> In Russia, however, extortionate prosecutions have expanded to target legitimate businesses, a feat accomplished by the creative use of legal loopholes and ambiguities to create a threat of criminal prosecution which would not otherwise exist.

One example of the creative abuse of legal ambiguity is provided by the so-called “Chemists Case,” in which corrupt agents of the State Drug Control Agency (FSKN) tried to extort money from the owners of a chemical business. As part of the scheme, the agents brought criminal charges against them for the distribution of diethyl ether, a chemical solvent commonly used as an anesthetic.<sup>13</sup> The agents

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perception of a tight connection between corruptly motivated private parties and corrupt law enforcement and the widespread belief that some cases are “commissioned” by higher-ups within the government or law enforcement for improper motives, the term is used to refer generally to criminal cases brought for improper commercial or political motives. See P.A. SKOBLIKOV, *KORRUPTSIYA V SOVREMENNOI ROSSII* 33-34 (2009). Given the frequent overlap of corrupt commercial motives between these two types of cases, the similarity in techniques that such prosecutions employ and common legal issues that such cases raise, this article uses the term “commissioned cases” to refer to both and treats them as one phenomenon.

8. Interview with Genri Reznick, Sept. 18, 2009, available at <http://www.rusnovosti.ru/programms/prog/39964/51027/>.

9. *Medvedev Poprosil Perestat’ “Koshmarit” Biznes*, [Medvedev Asked to Stop “a Nightmare” Business] LENTA.RU, July 31, 2008, <http://www.lenta.ru/news/2008/07/31/koshmarit/>.

10. Nigina Beroeva, *Vladimir Putin: “Bol’shinstvo proverok biznesa – “zakazniye” ili nedobrosovestniye”* [“The Majority of Russian Business inspections -- are “commissioned” or unscrupulous”], KOMSOMOL’SKAYA PRAVDA [THE TRUTH OF THE KOMSOMOL], Nov. 25, 2009, available at <http://pskov.kp.ru/print/article/24400/576309/>.

11. *Yuri Chaika prekratit “zakaznye dela,”* [Yuri Chaika Stop “Custom Action”], LENTA.RU, Aug. 15, 2006, <http://lenta.ru/news/2006/08/15/chaika/>. It is not clear what became of this promised review and Russian sources are devoid of any indication that it was ever conducted or its results announced.

12. See, e.g., *United States v. Moore*, 363 F.3d 631, 634 (7th Cir. 2004) (extortion of drug dealers by corrupt police officers); *United States v. DePeri*, 778 F.2d 963, 968 (3d Cir. 1985) (extortion of illegal gambling operations by corrupt police officers).

13. See Gregory L. White, *Once Jailed Russian Executive Pushes Law Changes*, WALL ST. J.,

relied on Article 234 of the Russian Criminal Code, which criminalizes the commercial distribution of so-called “virulent” substances, a term nowhere defined in the criminal law.<sup>14</sup> The absence of a statutory definition allowed the officers to rely on a list of allegedly “virulent” substances that had been prepared by an outside expert who had no official status or legislative or administrative authority.<sup>15</sup> After a disavowal of the list by the Ministry of Health and a public campaign highlighting the absurdity of the prosecution, the case was eventually dropped.<sup>16</sup> However, the subjects each spent at least seven months in jail.<sup>17</sup>

Similar cases, relying on contradictions and ambiguities in Russian law related to the anesthetic ketamine (which was prohibited by one official act, but authorized for veterinary anesthetic purposes by another) were brought in 2003 against veterinarians for administering ketamine to pets during routine operations.<sup>18</sup> In these cases, drug control agents set up sting operations in which they brought animals in for treatment. As soon as the veterinarian administered ketamine, they arrested him.<sup>19</sup> Approximately 20 such cases were initiated during 2003.<sup>20</sup> Eventually, the Ministry of Agriculture officially approved the use of ketamine for veterinary uses and almost all of the criminal cases were closed.<sup>21</sup>

Another common technique of subjecting businesses to enhanced penalties for the purpose of facilitating extortion involves the use of Article 171 of the Criminal Code, “Illegal Enterprise” (“operating an illegal enterprise without registration or a special permit (license), in cases where such permit (license) is obligatory”), in conjunction with Article 174.1(1), which criminalizes the use of illegally generated proceeds for “pursuance of entrepreneurial or another economic activity.”<sup>22</sup> Because Article 174, in contrast to U.S. money laundering laws, is not based on a

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Dec. 30, 2009, at A7, available at <http://online.wsj.com/article/SB126212533991109359.html>; see Thomas J. Evans, *The Unusual History of Ether* (2008), <http://www.anesthesia-nursing.com/ether.html>. See also *Materiali Dyela Khimikov NPK Sofeks*, [The Case Materials Chemists], <http://www.himdelo.ru/material/podrobnee/008/> [hereinafter *Khimikov*] (describing the events of the arrest and subsequent proceedings).

14. Ugolovnyi Kodeks RF [UK] [Criminal Code] art.234 (Russ.).

15. See *Khimikov*, *supra* note 13.

16. *Id.*; Interview with Yanna Yakovleva, one of the defendants in the case, in Moscow, Russia (Feb. 2010) [hereinafter Yakovleva Interview] (on file with author).

17. Yakovleva Interview, *supra* note 16.

18. Sid Yanyshev, *Dyelo Veterinarov-Vreditel'ei* [Case Veterinary Pests], GAZETA.RU, Dec. 26, 2003, <http://www.gazeta.ru/2003/12/25/vovsemvinove.shtml>.

19. Elya Vermisheva, *Prokuratura Moskvi priznala zakonnim izpol'zovaniye ketamina v veterinarnoi praktike* [Prosecutors in Moscow have Recognized the Legitimate Use of Ketamine in Veterinary Practice], GAZETA.RU, June 19, 2004, <http://www.medlinks.ru/article.php?sid=16360>.

20. *Id.*

21. *Id.*; *Prikaz Ministerstvo sel'skogo khozyaistva Rossiiskoi Federatsii ot 29 Dekabrya 2003 g. N 1580/619 g Moskva ob utverzhdenii perechnya narkoticheskikh sredstv i psikhotropnikh veshstv ispol'zuyemykh v veterenarii* [Order of the Ministry of Agriculture of the Russian Federation, Ministry of Health of the Russian Federation of December 29, 2003 Moscow N 1580/619 Approving the List of Narcotic Drugs and Psychotropic Substances Used in Veterinary Medicine], Feb. 3, 2004, available at <http://www.rg.ru/2004/02/03/veterinary-doc.html>.

22. Ugolovnyi Kodeks RF [UK] [Criminal Code] arts.171, 174 (Russ.).

list of specified unlawful activities, any crime (with the exception of certain tax offenses) can be used as a money laundering predicate. Thus, taken together, these two statutes allow corrupt law enforcement officers to use a paperwork violation in a company's registration documents to charge the business owners with illegal entrepreneurship, declare all of the business's proceeds illegal, and then threaten the owners and employees with aggravated money laundering (an offense which carries up to 15 years incarceration and a fine equal to the defendant's total earnings).<sup>23</sup>

For example, such a scheme was allegedly used in the so-called "Pharmacists' Case." In that case, the lead defendant, Fyodor Dushin, co-owned a pharmacy in the city of Podolsk with a business partner, Vagif Kuliyeu. Kuliyeu sought to buy him out, but Dushin refused. According to Dushin, Kuliyeu then initiated a criminal case against him and helped law enforcement officers plant false evidence, ostensibly showing that the pharmacy was distributing prescription medicines without an appropriate license. This formed the basis for an Article 171 illegal entrepreneurship charge which, in turn, provided a basis for charges of money laundering by an organized group under Article 174.1. Eventually, Dushin was sentenced to seven years incarceration and 10 of his employees were each sentenced to two years incarceration.<sup>24</sup>

According to Viktor Denisenko, a businessman in Taganrog recently subjected to similar charges, there are currently five prosecutions relying on the same combination of Articles 171 and 174 just in the city of Taganrog (population of approximately 260,000).<sup>25</sup> The abuse of these statutes has become so widespread that lawmakers recently announced a plan to redraft parts of the Criminal Code in order to make such schemes impossible by, for example, excluding proceeds from "illegal entrepreneurship" from the scope of Article 174.<sup>26</sup>

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23. See, e.g., *Dyelo farmatsevtov: obshchestvennaya otsenka prigovora* [Lawsuit of the pharmacists: the public evaluation of the sentence], DYELO FARMATSEVTOV, Apr. 6, 2009, <http://www.himdelo.ru/hrono/podrobnee/139/>; Aleksander Tveretin, *Obrasheniye k deputatam Gosudarstvennoi Dumi RF* [Turning to Deputies of the State Duma RF] (July 29, 2008), transcript available at <http://www.himdelo.ru/prima/podrobnee/168/>; Ugolovnyi Kodeks RF [UK] [Criminal Code] arts. 174.1 (Russ.).

24. See Tveretin, *supra* note 23. Kuliyeu, who allegedly had responsibility for establishing and implementing the pharmacy's policies on distribution of medicines and also for all financial disbursements in the pharmacy, escaped prosecution altogether, a fact which seems to corroborate Dushin's claims that the case was orchestrated by him.

25. Denisenko was charged under Articles 171 and 174 on the grounds that his industrial machine parts laboratory allegedly lacked a necessary "supplemental license." Viktor Denisenko, *Kak menya naznachali prestupnikom* [As they Appointed me the Criminal] transcript available at <http://www.kapitalisty.ru/prime/podrobnee/016/> (last visited Apr. 6, 2010); The Official Website of the City of Taganrog, <http://www.taganrogcity.com/guide.html> (last visited Apr. 6, 2010).

26. See, e.g., *Chast' Gosdumi Priznayet Neobkhozimost' popravok v Stat'y u ob Otmynanii Deneg* [A Part of Gosduma Recognizes the Necessity of Amending the Statute Which Concerns Money Laundering], FINAM FM, Nov. 10, 2010, <http://finam.fm/news/39388/print/> [hereinafter – *Money Laundering*]. Partly in response to this initiative, in April 2010, the Duma amended Article 174.1 of the

### B. Intellectual Property Squatting

“Intellectual property squatting”—the practice of registering trademarks and patents on brands and products already in use and then threatening civil or criminal litigation against the existing rights holders if they do not pay—is another prime example of legal abuse in Russia. According to one analysis, the business of misappropriating others’ brands has reached “colossal proportions.”<sup>27</sup> Russia has even spawned a class of professional IP “marauders”—lawyers who specialize in identifying trademarks and patents vulnerable to attack, registering them, and then initiating litigation against the true rights holders in order to force a buyback.<sup>28</sup> Allegedly, they earn hundreds of millions of dollars annually.<sup>29</sup> One famous trademark squatter, Sergey Zuykov, stated publicly that each successful case of squatting brings him approximately \$10-15,000.<sup>30</sup>

Russia’s IP squatters rely on a variety of legal techniques. For example, under Article 1486(1) of Part IV of the Civil Code, which regulates intellectual property rights, a trademark can be invalidated if not used for more than three years and anyone has the right to file an application to cancel a trademark on the grounds of non-use.<sup>31</sup> Zuykov relied on this provision to cancel and then re-register the Russian trademark of the American coffeehouse Starbucks (which had registered in Russia in 1997, but then delayed its entry into the market because of the financial crisis of 1998) in the name of a company he controlled.<sup>32</sup> Zuykov demanded a \$600,000 payout from Starbucks to sell the trademark.<sup>33</sup> Although the company refused to pay and eventually won the case in court, Zuykov was able to delay Starbucks’ entry into the Russian market by three years,<sup>34</sup> a fact which makes the threat of trademark extortion potent for other potential victims.

Similarly, in patent squatting schemes, a “patent racketeer” takes one distinctive aspect of an established product, describes that aspect in an original way, obtains a patent on that part, and then initiates litigation against the maker of the complete product.<sup>35</sup> One example might be obtaining a patent on a machine

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Criminal Code to exclude from its scope the use of criminal proceeds for the realization of entrepreneurial activity. See Ugolovnyi Kodeks RF [UK] 174.1.

27. *Mastera na Vsye Znaki* [Masters of all Trademarks], RUWEB, <http://www.ru-web.com/index.php?vprn=yes&id=39> (last visited Apr. 14, 2010) [hereinafter *Masters of all Trademarks*].

28. See, e.g., Dmitrii Denisov, *Intellektual'noye maroderstvo bez vzloma* [Intellectual Looting without the Breaking], BIZNES-ZHURNAL, Jan. 25, 2006, <http://www.linnik-patent.com/article0030.html>.

29. *Masters of all Trademarks*, *supra* note 27.

30. *Patentnyi reket v Rossii: Vorovstvo tovarnykh znakov i brendov* [Trademarks: Racketeering of Patents in Russia], <http://www.advertme.ru/znaki/9> (last visited April 8, 2010).

31. Grazhdanskiy Kodeks RF [GK] [Civil Code] Part IV, art.1486(1) (Russ.).

32. See Denisov, *supra* note 28; Andrew Kramer, *After Long Dispute, A Russian Starbucks*, N.Y. TIMES, Sept. 7, 2007, at C3, available at <http://www.nytimes.com/2007/09/07/business/worldbusiness/07sbux.html>.

33. See Denisov, *supra* note 28; Kramer, *supra* note 32.

34. Kramer, *supra* note 32.

35. Dmitrii Denisov, *Ostorozhno Zliye Patentii!* [Careful, Evil Patents!], BIZNES-ZHURNAL, Sept.

that produces cavitation bubbles of a certain size at a certain depth in water at a certain temperature and then suing manufacturers of Jacuzzis for infringement.<sup>36</sup> In one famous case, a company called Technopolis took one aspect of the design of bottles used by several beer makers – a rounded cone-like shape at the top – described it in a novel, complicated and almost incomprehensible way (referring, in part, to vessels with fragments of a slanted conical diameter with an inside and outside) obtained a patent on this “design” and then demanded 5% of the beer companies’ proceeds.<sup>37</sup> Eventually, the beer companies were able to get the Technopolis patents annulled.<sup>38</sup>

Patent racketeers typically rely on a “utility model patent,” a simplified form of patent, not available in the United States, which does not require an extensive world-wide search for analogous products or a thorough examination of the product’s originality.<sup>39</sup> According to the World Intellectual Property Organization (WIPO), utility model patents are primarily designed for small and medium sized businesses that make minor improvements to and/or adaptations of existing products.<sup>40</sup> Therefore, the applicant often does not need to prove an “inventive step” or “non-obviousness” of the invention, as is the case with ordinary patent applications, and patent offices do not make a substantive examination of the application of the patent before approving it.<sup>41</sup> For example, under Russian law, an invention can be patented if it is: (1) new; (2) has “inventive level” (i.e. inventive step); and (3) has industrial application.<sup>42</sup> For utility models, however, the requirements are relaxed and the applicant need not demonstrate “inventive level.”<sup>43</sup>

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30, 2008, <http://www.business-magazine.ru/trends/competition/pub307157>.

36. *Id.*

37. *Id.*

38. Tatyana Samoiloova, *Kak ya izobrel butylku, gvozd' i skvorechnik*, [How I invented the bottle, the nail, and the birdhouse], I2R INTERNET LIBRARY, [http://i2r.ru/static/494/out\\_9815.shtml](http://i2r.ru/static/494/out_9815.shtml) (last visited Apr. 6, 2010).

39. See Vladislav Sorokin, *Taina Patentnykh Trollei* [The Secret of Patent Trolls] (NTV Television broadcast July 6, 2009 at 19:19) available at <http://ip.ntv.ru/news/2745/>.

40. See World Intellectual Property Organization (WIPO), *Protecting Innovations by Utility Models*, [http://www.wipo.int/sme/en/ip\\_business/utility\\_models/utility\\_models.htm](http://www.wipo.int/sme/en/ip_business/utility_models/utility_models.htm) (last visited Apr. 6, 2010).

41. *Id.* According to WIPO, only a small but significant number of countries make utility model patents available. These include: Albania, Angola, Argentina, ARIPO, Armenia, Aruba, Australia, Austria, Azerbaijan, Belarus, Belize, Brazil, Bolivia, Bulgaria, Chile, China (including Hong Kong and Macau), Colombia, Costa Rica, Czech Republic, Denmark, Ecuador, Estonia, Ethiopia, Finland, France, Georgia, Germany, Greece, Guatemala, Honduras, Hungary, Indonesia, Ireland, Italy, Japan, Kazakhstan, Kuwait, Kyrgyzstan, Laos, Malaysia, Mexico, OAPI, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Russian Federation, Slovakia, Spain, Taiwan, Tajikistan, Trinidad & Tobago, Turkey, Ukraine, Uruguay and Uzbekistan. See WIPO, *Where can Utility Models be Acquired?*, [http://www.wipo.int/sme/en/ip\\_business/utility\\_models/where.htm](http://www.wipo.int/sme/en/ip_business/utility_models/where.htm) (last visited Apr. 6, 2010).

42. Grazhdanskii Kodeks RF [GK] [Civil Code] Part IV, art.1350(1) (Russ.).

43. Grazhdanskii Kodeks RF [GK] [Civil Code] Part IV, art.1351(1) (Russ.).

Whatever their merits may be, the relative ease of obtaining utility model patents makes them ideally suited to abuse. As one Russian lawyer said, a utility model patent can be obtained on almost any product, so long as it is described in an original way. For example, one could theoretically obtain a utility model patent for a standard eyeglass case by describing the plastic trim at the intersection of the two sides as a distinguishing characteristic guaranteeing the hermetic seal of the case.<sup>44</sup> Other lawyers claim that not even this much is required, and that a utility patent model can be obtained on almost any product which is not already patented within six months, as no substantive review is required.<sup>45</sup> Although utility model patents generally enjoy lesser protection than ordinary patents (in Russia, they are protected for 10 years, while ordinary patents are protected for 20 years<sup>46</sup>), this is still more than enough time for the patent racketeer to shake down his prey (especially given that annulling a utility model patent can often take up to three years<sup>47</sup>). And under Russian law, when a patent holder, no matter how nominal or dubious his claim to the patent may be, brings an infringement suit, the burden is on the defendant to prove non-infringement, rather than on the plaintiff to prove the validity of the underlying patent, a rule which facilitates extortionate litigation.<sup>48</sup>

Patent extortion is also facilitated by the fact that Russian law, in contrast to U.S. law, provides for criminal liability for patent infringement.<sup>49</sup> This allows patent racketeers to enhance their threats by initiating criminal prosecutions against “infringers.” According to Daniel Klein, a U.S. patent attorney practicing in Moscow and a partner in the law firm of Hellevig, Klein & Usov, the cost to a patent racketeer of initiating a criminal proceeding against his victim is relatively low. However, once the criminal case begins, the victim may face serious business disruptions because law enforcement authorities can seize property, temporarily close importation and manufacturing operations, and arrest the business’s managers. Such attacks disrupt the company’s physical operations and drive away customers, who may fear criminal prosecution for purchasing potentially infringing products and/or be prohibited from doing business with suppliers under criminal investigation. In short, the combination of operational disruption and reputational damage resulting from a racketeer’s attack can destroy a legitimate business.<sup>50</sup>

Moreover, annulling a utility model patent that was obtained in bad faith can often take three years, thus creating the likelihood that the victim “infringer” will be prosecuted and serve his sentence before he succeeds in demonstrating the

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44. Denisov, *supra* note 35.

45. Interview with Daniel Klein, Partner-In-Charge, Hellevig, Klein & Usov, in Moscow, Russ. (Dec. 17, 2009) (on file with author); Interview with Denis Uzoykin, in Moscow, Russ. (Dec. 17, 2009) (on file with author).

46. Grazhdanskiy Kodeks RF [GK] [Civil Code] art.1363(1) (Russ.).

47. See Klein, *supra* note 45; Uzoykin, *supra* note 44.

48. See Sorokin, *supra*, note 39.

49. Ugolovnyi Kodeks [UK] [Criminal Code] art.147 (Russ.).

50. E-mails from Daniel Klein, Partner-In-Charge, Hellevig, Klein & Usov, to author, (Feb. 2010) (on file with author).



invalidity of the faux patent, which gave rise to his criminal prosecution.<sup>51</sup> Finally, Russian law does not clearly criminalize squatting,<sup>52</sup> thus allowing squatters to claim, as Zuykov once stated, “it’s not fair, but it’s legal.”<sup>53</sup>

### C. Corporate Raiding (“Reiderstvo”)

Corporate raiding (“reiderstvo”), a phenomenon which President Medvedev has called “shameful” and which the Ministry of Internal Affairs (MVD) estimates generates approximately 120 billion rubles (approximately \$40 million) a year in illegal profits, is “legal racketeering” at its worst.<sup>54</sup> Raiding lacks an official legal definition in Russia and the word is used carelessly to describe a number of unethical business practices. For purposes of this article, corporate raiding will be defined as the seizure, or attempted seizure, of a business or a substantial part of its assets, through the corrupt reliance on a legal document, including, but not limited to, a court order, judicial decision, corporate resolution, corporate charter document, or state registration document. The execution of a corporate raid typically involves the following three stages: (1) the raider creates or corruptly obtains a legal document establishing faux legal title to some assets, usually shares or real property of a business; (2) the raider carries out a forcible takeover of the target property; and (3) the raider launders the seized property through a series of shell companies to an ostensible “good faith purchaser” from whom it is essentially impossible to recover the property. Typically, the shell companies disappear as soon as they have fulfilled their purpose and the victim is left with no one to pursue. Each stage relies on abuse of the legal system.

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51. There is some indication that intellectual property racketeering has now moved into cyberspace. According to one report, Burger King recently filed suit against squatters who registered the internet domain name burgerking.ru. See Christina Busko, *Forgery of a Hamburger*, KOMMERSANT, Dec. 23, 2009, <http://www.kommersant.ru/doc.aspx?DocsID=1297726>.

52. For example, there is no article in the Criminal Code on intellectual property squatting. Article 147 of the Criminal Code criminalizes, *inter alia*, the “illegal use of a ... utility model” but it is not clear if this applies only to the misappropriation of a third party’s utility model or to the (mis)use of one’s own utility model for extortionate purposes. Ugolovnyi Kodeks [UK] [Criminal Code] art.147 (Russ.). Article 180 of the Criminal Code criminalizes the illegal use of “another’s” trademark, thus seemingly excluding the use of one’s own trademark for extortionate purposes. Ugolovnyi Kodeks [UK] [Criminal Code] art.180 (Russ.). Finally, Article 163, Extortion, applies by its terms to threats to damage “another’s property.” Ugolovnyi Kodeks [UK] [Criminal Code] art.163 (Russ.). It is not clear how this statute applies in a situation where the victim no longer holds legal title to the intellectual property in question because such title has been acquired by the squatter. The author is unaware of any criminal prosecutions of squatters under Article 163 and is unaware of any legal authority the applicability of Articles 147, 163 or 180 to intellectual property squatting.

53. Andrew Kramer, *Ex-salesman Stalls Starbucks’ Russian Entry*, INDIAN EXPRESS, Oct. 13, 2005, <http://www.indianexpress.com/oldStory/79886/>.

54. See, e.g., Rosbalt Informationnoe Aгенstvo [Rosbalt Information Agency], *Medvedev: Za Reiderstvo Nuzhno Bit’ po Rukam* [Medvedev: Corporate Raiding Should be Punished], <http://www.rosbalt.ru/2008/02/27/460264.html> (last visited Apr. 14, 2010); Philip Aldrick, *Exposing Russia’s Corporate ‘Corruption’*, Apr. 4, 2008, <http://www.telegraph.co.uk/finance/markets/2787471/Exposing-Russias-corporate-corruption.html>; PAVEL ASTAKHOV, PROTIVODEISTVIYE REIDERSKIM ZAKHVATAM 5-6 (2007).

### Stage 1 - Obtaining the Documents

In the most blatant schemes, the raider simply creates false legal documents purporting to establish title to the property he intends to take. For example, in one 2005 case in Moscow, a real estate developer was convicted of creating false documents purporting to establish ownership of 400 hectares of land, worth 6.5 million rubles.<sup>55</sup> Sometimes, the raider blackmails or bribes an employee of the target company for access to the documents, which are then falsified to install a false board of directors. According to court documents from one recent case, a St. Petersburg organized crime boss, Vladimir Barsukov, a/k/a "Kumarin," and several of his associates were convicted of a raiding scheme in which they deposited false documents with the State Registry of Corporate Entities, purporting to transfer ownership of the target businesses to Kumarin's co-conspirators. This official registration then generated other official documents which were used as the pretext for the forcible takeover of the businesses. In some cases, officials at the State Registry were simply deceived into believing that the deposited documents were authentic. In other cases, they were bribed to accept documents that they knew to be false.<sup>56</sup>

In more sophisticated schemes, the raider files a lawsuit against the target, often in a remote location where the raider has influence over the local judiciary, and then obtains a judicial order authorizing seizure of some or all of the target's assets.<sup>57</sup> This tactic was allegedly used in the much publicized Ilim Pulp case, which involved an attempted (but unsuccessful) raid of Ilim Pulp, Russia's largest forest products company by an entity controlled by oligarch Oleg Deripaska. In 2002, a minority shareholder in one of Ilim's mills filed suit in a remote location in Siberia, alleging that Ilim had failed to comply with all the terms of its 1994 privatization.<sup>58</sup> A judge awarded the plaintiff \$113 million in damages, confiscated two-thirds of the mill's stock, and transferred the stock to the St. Petersburg State Property Committee, which then sold the stock to Deripaska and his partner.<sup>59</sup> Ilim

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55. Denis Tykulov, *Prokuratura Proveryaet Skupshchikov Podmoskovnykh Zemel'* [Prosecution Checking Buyers of Land in the Moscow Suburbs], GZT.RU NOVOSTI [GZT.RU NEWS], <http://gzt.ru/print.php?home/2005/12/19/211137.html> (last visited Apr. 14, 2010).

56. See Prigovor Imenem Rossiiskaia Federatsii [Conviction by the Russian Federation], ROSSIISKAIA GAZETA [Ros. Gaz.] Nov. 12, 2009 (Russ.) Case No. 1-41/09 [hereinafter Kumarin Judgment] (on file with author), 8, 14. The Kumarin case is the largest raiding case which has been successfully prosecuted in Russia and the court's very detailed judgment provides a rich source of information on the mechanics of raiding schemes. Therefore, this article relies extensively on the judgment. See also Vladimir Fedosenko, *Srok i Avtoritet* [Time and "Authority"], ROSSIISKAIA GAZETA [Ros. Gaz.] Nov. 13, 2009, available at <http://www.rg.ru/2009/11/13/barsukov.html>.

57. Ivan Novitskii, *Tezisy doklada deputata Moskovskoi gorodskoi dumy* [Theses of the report of a Deputy of the Moscow City Duma] 7 (Nov. 16, 2007) (unpublished manuscript, on file with author) (presented at roundtable on raiding, Moscow Oblast Advocates Chamber).

58. Sabrina Tavernise, *Handful of Corporate Raiders Transform Russia's Economy*, N.Y. TIMES, Aug. 13, 2002, at A1; Daniel J. McCarthy & Sheila M. Puffer, *Ilim Pulp Battles a Hostile Takeover*, in CORPORATE GOVERNANCE IN RUSSIA 300, 304 (Daniel J. McCarthy, Sheila M. Puffer & Stanislav V. Shekshnia eds., 2004).

59. Tavernise, *supra* note 58, at A1; McCarthy & Puffer, *supra* note 58, at 304.

Pulp's owners claimed that they were never notified of the suit, (though Deripaska claimed that notice had been sent by mail.)<sup>60</sup> The Deripaska companies then sent in a private security force to seize the mill and court bailiffs arrived with an order installing a new director.<sup>61</sup> However, the mill's owners refused to yield and filed several countersuits against the Deripaska companies.<sup>62</sup> Eventually, according to Ilim, the case was settled amicably out of court.<sup>63</sup>

The same tactic was also allegedly used in a shareholder dispute within the telecommunications company, VimpelCom, between shareholders Telenor, a Norwegian telecommunications company, and Alfa Group, a Russian investment group. In that case, Farimex, a tiny Virgin Islands company that owned less than 1% of VimpelCom filed suit against Telenor in a remote court in Siberia, a location that had no discernible connection to the case. Nevertheless, the Siberian court (at 2:00 a.m. on a Saturday) handed down a \$1.7 billion damage award on behalf of Farimex.<sup>64</sup> This award was then used to freeze Telenor's assets in an effort to compel it to pay \$1.7 billion to Farimex.<sup>65</sup>

Other tactics are also possible. For example, one lawyer told the author about a situation in which a land raider offered the legitimate occupants the opportunity to rent the land on extremely favorable terms. When they agreed, the rent agreements were offered in court as evidence of their affirmation of his legal title to the land.<sup>66</sup>

#### Stage Two – Takeover

During stage two, the documents obtained during Stage One are used as legal cover for the forcible takeover of the target business. For example, in the Telenor case discussed above, a lawyer for Farimex justified Alfa's attempts to force Telenor to pay \$1.7 billion by stating that "Everything is happening in strict compliance with the law."<sup>67</sup> Similarly, the court's judgment in the Kumarin case identifies several instances in which the raiders used corrupt registration documents during the forcible seizure of target businesses.<sup>68</sup> A dramatic illustration of this tactic is provided in the novel *Raider* by Pavel Astakhov, a well-

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60. Tavernise, *supra* note 58, at A1.

61. *Id.*

62. *Id.*; McCarthy & Puffer, *supra* note 58, at 305.

63. Hugo Miller & Yury Humber, *Determined Deripaska Casts a Long Shadow*, THE ST. PETERSBURG TIMES, Apr. 29, 2008, available at [http://www.sptimes.ru/index.php?story\\_id=25836&action\\_id=2](http://www.sptimes.ru/index.php?story_id=25836&action_id=2).

64. Dan Sabbagh, *Telenor to Fight Siberian Court Order*, THE TIMES (London), Aug. 18, 2008, available at [http://business.timesonline.co.uk/tol/business/industry\\_sectors/telecoms/article4553417.ece](http://business.timesonline.co.uk/tol/business/industry_sectors/telecoms/article4553417.ece).

65. Nadia Popova, *Court Marshals Order Sale of Telenor Stake in VimpelCom*, THE ST. PETERSBURG TIMES, June 23, 2009, available at [http://www.sptimes.ru/index.php?action\\_id=2&story\\_id=29306](http://www.sptimes.ru/index.php?action_id=2&story_id=29306).

66. Interview with Vladimir Lisnyak, Attorney, in Moscow, Russ. (Mar. 2009) (on file with author).

67. Popova, *supra* note 65.

68. Kumarin Judgment, *supra* note 56, at 11.

known Russian lawyer. In the novel, the head of the victim business is confronted in his office by the raider's armed thugs, who tell him that he has lost his position and must leave. The victim protests and calls the police. When the police arrive, a judicial marshal working with the raiders presents a package of documents, including minutes of a shareholders' meeting at which a new board of directors was selected and a judicial order restraining 90% of the corporate shares. Satisfied that the takeover is legally authorized, the police officers let the raiders continue their business.<sup>69</sup>

### Stage 3 – Laundering

During the “laundering” stage, the raider typically transfers the seized assets through a series of shell companies to an ostensible “good faith purchaser,” exploiting provisions of Russian law which make recovery of misappropriated assets from a “good faith purchaser” almost impossible.<sup>70</sup> What this means, as a practical matter, is that even if a raiding victim succeeds in obtaining a court ruling voiding the transfer of his company's assets, he cannot recover the misappropriated assets. As the Chief of the Investigative Committee of the General Procuracy, Aleksander Bastrykhin, has written, “after a raiding takeover, the property is laundered through a series of fictitious or offshore firms and eventually becomes the property of a good faith purchaser. Demanding it from such an entity is practically impossible.”<sup>71</sup> Similarly, an August 2008 report by the National Anti-Corruption Committee cites a typical case in which raiders falsified corporate documents and transferred the seized assets through a series of offshore shell companies to another offshore shell company which, relying on its alleged good faith purchaser status, sent in its security forces to forcibly remove the real owners from the property.<sup>72</sup>

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69. PAVEL ASTAKHOV, REIDER [RAIDER] 25-26 (2008).

70. Article 167 of the Russian Civil Code provides that when a transaction is declared invalid, each of the parties to the transaction must return to the other everything it has received in the deal or make appropriate monetary compensation. *Grazhdanskii Kodeks RF [GK] [Civil Code] art.167 (Russ.)*. However, Russia's Constitutional Court held that these provisions “cannot be extended to a good faith purchaser unless this is specifically provided by statute.” WILLIAM BURNHAM, PETER B. MAGGS & GENNADY M. DANILENKO, *LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION* 356 (Juris Publishing 3d ed. 2004). By contrast, U.S. law allows for recovery of assets from a third party in a civil proceeding upon a showing that the purchaser “possesses knowledge of facts that suggest a transfer may be fraudulent.” *See Banner v. Kassow*, 104 F.3d 352, 352 (2d Cir. 1996). In addition, some states recognize a “larceny exception” which defeats even a good faith purchaser's claim when it can be shown that the seller acquired title to the transferred property by larceny. *Dimension Funding LLC v. DKA Assocs., Inc.*, 191 P.3d 923, 926 (Wash. Ct. App. 2008). For a complete discussion of the aspects of Russian law that make recovery from a good faith purchaser difficult, see Firestone, *supra* note 3.

71. Letter and recommendations from A.I. Bastrykhin, Chairman of the Investigative Comm. of the Procuracy of the Russian Fed'n, to E.P. Velikhov, Chairman of the Counsel of the Public Chamber of the Russian Fed'n para 2 (Oct, 30, 2009) (on file with author) [hereinafter Bastrykhin Letter].

72. DOKLAD NATIONAL'NOGO ANTIKORRUPCIONNOGO KOMMITETA [NATIONAL ANTICORRUPTION COMMITTEE REPORT], PREDLOZHENIYA PO POVYSHENIYU EFFEKTIVNOSTI BORBY S REIDERSTVOM (NEZAKONNYM ZAKHVATOM SOBSTVENNOSTI) [SUGGESTIONS TO INCREASE

This technique was also at the heart of the Kumarin case. According to the court's judgment, Kumarin's organization recruited co-conspirators to pose as "good-faith purchasers" and then arranged the sale of the seized businesses from one to the other.<sup>73</sup> Kumarin even retained lawyers to create litigation among the good faith purchasers,<sup>74</sup> a process which obscures the legal status of the misappropriated assets, making their recovery, and any possible criminal prosecution, more difficult. Bastrykhin considers abuse of the law on good faith purchasers to be so severe that he recommends changing the traditional rule to make it easier for raiding victims to get property back from even legitimate good faith purchasers.<sup>75</sup>

#### *D. Collusive Litigation*

Perhaps the most sophisticated form of legal abuse involves collusive litigation, in which a party concocts uncontested litigation with the goal of obtaining a judicial decision that can be used for criminal purposes. Collusive litigation is sometimes used as a means to effectuate a raid (as, for example, in Kumarin's orchestration of suits among the various "good faith purchasers" through whom he laundered the raided business assets). But it can also be used in support of other fraudulent schemes. For example, collusive litigation was allegedly at the heart of a massive tax fraud in the infamous Hermitage Capital case. According to Hermitage, raiders, operating in conjunction with law enforcement officials, obtained a search warrant for the offices of certain Hermitage law firms located in Moscow. During the search, the officials seized corporate seals, charters and articles of association of Hermitage investment companies, transferred ownership of the seized companies to co-conspirators, and sued the misappropriated companies, using shell companies as the nominal plaintiffs.<sup>76</sup> According to court documents, lawyers representing the seized companies conceded the claims entirely and the courts entered judgments against the seized companies for hundreds of millions of dollars.<sup>77</sup> Using these judgments, the raiders claimed that the lawsuits had wiped out the historic profits of the seized companies and obtained a refund of \$230 million in "overpaid taxes" from the government.<sup>78</sup>

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EFFECTIVENESS IN THE FIGHT AGAINST ILLEGAL SEIZURE OF PROPERTY] 13-14 (MA Krasnov, KV Kabanov, CB Vasya, EM Golenkovoy & GA Shantina, eds., 2008) (unpublished manuscript, on file with author), [hereinafter NACC Report].

73. Kumarin Judgment, *supra* note 56, at 9, 13.

74. *See, e.g., id.* at 7.

75. Bastrykhin Letter, *supra* note 71, at para. 2.

76. *See Persecution of Hermitage Capital in Russia in Order to Steal US \$230 Million from the Russian People*, LAW AND ORDER IN RUSSIA, Oct. 7, 2009, <http://lawandorderinrussia.org/news-releases/presentations/> [hereinafter *Persecution of Hermitage*].

77. *Id.* at 26, 56. *See also* Protokol Sudebnogo Zasedaniya [Protocol of Legal Proceeding], No A5622479/2007 (Arbitrazhniy Sud Sankt-Peterburga i Leningradskoj Oblasti [Arbitration Court of St. Petersburg and Leningrad Region] Aug. 28, 2007) (on file with author).

78. *Persecution of Hermitage*, *supra* note 76, at 50.

According to Russian experts, collusive litigation is also used in complex frauds that typically work as follows. The corporation perpetrating the fraud (the "fraud corporation") enters into a contract, often with a foreign party (the "counter-party"). In order to protect itself against the vagaries of the Russian court system, the counter-party inserts a clause requiring that disputes be adjudicated in an international arbitral forum. The counter-party performs its obligations under the contract. The fraud corporation does not. The counter-party avails itself of the arbitration clause, files a claim, and wins an award. The fraud corporation then arranges for a shareholder to bring a suit in a Russian court alleging that the contract should be declared null and void because the representative who entered into the contract on behalf of the fraud corporation lacked the requisite authority under Russian law or had an interest in the transaction. The corporation does not contest the charge in any meaningful way and the court finds that the contract was entered into in violation of the corporation's internal rules and declares the entire contract, including the arbitration clause, null and void. As a result, the arbitration award cannot be enforced and the fraud corporation walks away with the benefits of the contract, but no liability.<sup>79</sup>

Perpetrators of such schemes often create the fraud corporation solely to enter into the contract and deliberately create violations during negotiations with the goal of using the violations to later invalidate the contract.<sup>80</sup> Schemes such as these are made possible by several aspects of Russian corporate law, including: (1) provisions that certain major transactions and transactions involving a possible conflict of interest can be declared null and void if entered into without shareholder approval or the approval of the Board of Directors, or in some cases, shareholder approval;<sup>81</sup> (2) provisions allowing almost any shareholder, whether or not the individual held stock at the time of the transaction, to challenge a corporate transaction;<sup>82</sup> (3) the absence of serious penalties for bad faith litigation;<sup>83</sup> and (4)

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79. B.R. KARABEL'NIKOV, KOSVENNIYE ISKI KAK SPOSOB UZAKONIT NARUSHENIE ROSSIISKIMI KOMPANIAMI IKH SOBSTVENNYKH OBIAAZATELSTV [Indirect Lawsuits by Russian Companies as a Way to Legalize the Breach of Their Responsibilities] 1 (2007) (on file with author).

80. Conversation with P.A. Skoblikov, Professor, Acad. of Mgmt. of the Ministry of Interior Affairs of Russ. (Dec. 29, 2009) (on file with author).

81. See, e.g., Federal'nyi Zakon ob Aktsionnykh Obshestvakh [FZAO] [Federal Law on Joint Stock Companies] (2007), No. 120, art. 79(1) (requiring that a large scale transaction must be approved by Board of Directors or General Shareholders Meeting as provided for herein); *id.* art. 79(3) (requiring that a transaction involving more than 50% of the balance price of the corporation's shares must be approved by 75% of voting shareholders at a general shareholders' meeting); *id.* art. 79(6) (indicating that a major transaction concluded in violation of the Federal Law on Joint Stock Companies can be declared null and void based on a suit by the corporation or a shareholder); Federalnyi Zakon ob Obshestvakh s Ogranichenoi Otvetstvenostyu [Federal Law on Limited Liability Companies] [FZOOO] (2007), No. 14-FZ, art. 45(3) (requiring that a transaction involving a conflict of interest must be approved by a general shareholders' resolution); *id.* art. 45(5) (requiring that a transaction involving conflict of interest concluded in violation of art. 45 of the Law on Limited Liability Corporations can be declared null and void based on a suit brought by the corporation or a shareholder); KARABEL'NIKOV, *supra* note 79, at 1, 2.

82. FZAO, *supra* note 81, art. 79(6); FZOOO, *supra* note 81, art. 45(5); KARABEL'NIKOV, *supra* note 79, at 2.

Russian courts' reluctance to award quantum meruit damages in breach of contract cases.<sup>84</sup>

A collusive litigation scheme was apparently used in part of the litigation discussed above between Telenor and Alpha. Telenor and Alpha jointly owned Kyivstar, a Ukrainian telecommunications venture, pursuant to a contract that provided for arbitration of any disputes before an arbitral tribunal in New York.<sup>85</sup> Eventually, Telenor fell into a dispute with the subsidiary through which Alpha exercised its ownership of Kyivstar, an entity named Storm, and initiated arbitration against Storm in New York.<sup>86</sup> Storm then initiated a lawsuit in Ukraine in which Alpren, a company which owned a minority share of Storm, sought a declaration that the Storm-Telenor contract was invalid because Storm's General Director had concluded it without the requisite shareholder approval.<sup>87</sup>

According to a court in the Southern District of New York which was called upon to consider the arbitrability of the Storm-Telenor dispute, the Ukrainian litigation had a "number of curious features."<sup>88</sup> For example, Storm did not retain counsel or file any written opposition.<sup>89</sup> Storm's legal representative in the case was not a lawyer, but was the Vice President of the holding company that owned both Storm and Alpren.<sup>90</sup> The proceeding lasted just ten minutes and, not surprisingly, given the lack of any opposition, ended in a ruling that the shareholders' agreement was invalid.<sup>91</sup> Moreover, when Storm appealed the decision, it failed to submit any real defense of its position.<sup>92</sup> The appellate court not only affirmed the lower court's decision against Storm, but broadened it by finding specifically that the Arbitration Agreement was invalid, a ruling which Storm used to contest the arbitrability of the dispute in New York.<sup>93</sup> After extensive litigation, the Southern District of New York rejected Storm's arguments, finding that "Storm colluded in the bringing of this litigation against itself," held the dispute arbitrable, and eventually upheld the arbitration panel's

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83. *E.g.*, *Grazhdanskii Protsessual'nyi Kodeks RF [GPK] [Civil Procedural Code] art. 99 (Russ.)* (allowing courts to award damages to victims of bad faith litigation; however, such a provision is useless in deterring collusive litigation given that the "victimized" party is by definition connected to the offending party). *See also* *Grazhdanskii Kodeks RF [GK] [Civil Code] art. 10 (Russ.)* (stating broadly that "abuse of rights" shall not be permitted, but the only remedy it provides is for the court to refuse to protect the rights of the offending party, a remedy that would not have any effect in cases of collusive litigation). The Criminal Code does not criminalize collusive litigation or abuse of process.

84. *KARABEL'NIKOV*, *supra* note 79, at 2.

85. *Storm LLC v. Telenor Mobile Commc'ns*, No. 06 Civ. 13157 (GEL), 2006 WL 3735657, at 1 (S.D.N.Y. Dec. 15, 2006).

86. *Id.* at 1-2.

87. *Id.* at 2, 4.

88. *Id.* at 3.

89. *Id.* at 2.

90. *Id.* at 3.

91. *Id.*

92. *Id.*

93. *Id.*

award of relief to Telenor.<sup>94</sup> Storm then returned to Ukraine and through more collusive litigation obtained a ruling that compliance with the New York court's decision would place it in violation of Ukrainian law.<sup>95</sup> In rejecting this argument, the court stated:

The [Ukrainian] opinions appear to be nothing more than a sham, a pseudo-legal excuse for Storm and the Altimo Entities to continue to refuse to do what they have all along refused to do. It is outrageous, though not surprising given their prior conduct in this matter, that Storm and the Altimo Entities would construct such a sham. It is both outrageous and surprising that their counsel—two esteemed New York law firms—would represent that sham to the Court, unexamined, as a bona fide basis for their clients' refusal to comply with the [arbitration panel's] Final Award.<sup>96</sup>

A recent legislative amendment based on a 2008 ruling by the Russian Constitutional Court in the “case of Surinov” may provide new opportunities for collusive litigation scams. The defendant, Tatevos Surinov, was convicted of embezzlement.<sup>97</sup> While the criminal case was proceeding, Surinov initiated litigation in the commercial (arbitrazh) courts<sup>98</sup> and obtained rulings that he had acquired the subject property legally. He then attempted to use these rulings to get the criminal case dismissed.<sup>99</sup> The court hearing the criminal case refused to give preclusive effect to the commercial court rulings.<sup>100</sup> Surinov then challenged his conviction in the Constitutional Court on the grounds that the criminal court's refusal to give deference to the rulings of the arbitrazh courts was unconstitutional. The Constitutional Court agreed, holding that the presumption of innocence requires courts of general jurisdiction to give deference to arbitrazh court rulings favorable to a criminal defendant.<sup>101</sup> In fulfillment of the Surinov decision, in 2009 President Medvedev signed into law amendments to the Code of Criminal

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94. *Id.* at 12.

95. *Telenor*, 587 F. Supp. 2d at 608 n.14.

96. *Id.* One of the New York law firms was Cravath, Swaine & Moore LLP.

97. P.A. Skoblikov, *Preiuditsiya Aktov Arbitrazhnykh Sudov v. Ugolovnom Protssesse: Novoe Prochteniyeye* [Prejudicial Acts of Arbitral Courts in Criminal Procedure: The New Reading], 2 J. RUSS. L. 69, 75 (2008).

98. Russia has a tripartite court system consisting of: (1) arbitrazh or commercial courts which have jurisdiction over disputes between legal entities and between the state and legal entities; (2) courts of general jurisdiction, which are empowered to hear criminal cases as well as civil disputes between individuals and legal entities; and (3) the Constitutional Court, which is authorized to hear challenges to the constitutionality of certain statutes. BURNHAM ET. AL., *supra* note 70, at 50.

99. Skoblikov, *supra* note 97, at 75.

100. *Id.* at 77. Specifically, Surinov challenged the constitutionality of Article 90 of the Code of Criminal Procedure, which provides, in pertinent part, that a sentence imposed by a court of general jurisdiction has preclusive effect in a subsequent criminal investigation. Article 90 is silent with regard to the potentially preclusive effect of a ruling in a civil case, an omission generally understood to mean that a ruling by a commercial court has no preclusive effect in a criminal case. Ugolovno-Protssessual'nyi Kodeks RF [UPK] [Criminal Procedural Code] art. 90 (Russ.).

101. Bastykhin Letter, *supra* note 71, at 12 (on file with author).



Procedure essentially making the factual findings of arbitrazh court decisions binding on investigators and prosecutors.<sup>102</sup>

‘Like many of the other rules discussed in this article, the Surinov ruling and the amendments to Article 90 on issue preclusion appear well-motivated. However, in the hands of criminals, they could easily be abused. Some Russian experts contend that organized crime groups will now use collusive litigation in the arbitrazh courts to obtain desired rulings on property issues that will then be used to defeat criminal prosecutions or, even worse, initiate criminal prosecutions for malicious purposes.<sup>103</sup> For example, a fraudster accused of misappropriation of property could concoct litigation in the arbitrazh courts to establish faux title to the property in question and then use that ruling to obtain the dismissal of the criminal prosecution. Alternatively, raiders could orchestrate litigation in the arbitrazh courts to establish their title to someone else’s property and then use the arbitrazh court ruling to initiate a criminal prosecution of the real property owner as part of a scheme to misappropriate the property.

### III. CAUSES

Upon first glance, it may appear that widespread legal abuse in contemporary Russia is simply the result of state and judicial corruption. While there is undoubtedly truth to this, corruption does not appear to provide a complete explanation for at least two reasons. First, many of the schemes described herein do not require corruption. For example, in collusive litigation schemes, a judge presented with an uncontested claim has little choice but to enter judgment for the plaintiff.<sup>104</sup> Similarly, trademark squatters do not need to corrupt state officials if they identify trademarks that have lapsed. Patent squatters do not need to corrupt state officials if they are adept enough at drafting applications for utility model patents. And even raiding does not always require corruption. For example, while some of the state officials who registered fraudulent documents in the Kumarin case were bribed, others were simply deceived.<sup>105</sup> Second, to the extent that legal

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102. See DOMINIQUE TISSOT & ANASTASIA PROZOR, CMS RUSSIA, RUSSIA TAX OUTLOOK #9 DECEMBER 2009 – JANUARY 2010: MAJOR AMENDMENTS TO RUSSIAN TAX LEGISLATION COMING INTO FORCE IN 2010, at 5 (2010) (discussing Federal Law “On Amendments to Part 1 of the Tax Code of the Russian Federation and Certain Regulations of the Russian Federation” No. 383-FZ dated 29 December 2009); KPMG, RUSSIAN LEGISLATIVE NEWS: TAX 2 (Feb. 10, 2010), [http://www.kpmg.ru/russian/supl/publications/periodicals/RussiaLegislativeNews/2010/1\\_RLN\\_10.pdf](http://www.kpmg.ru/russian/supl/publications/periodicals/RussiaLegislativeNews/2010/1_RLN_10.pdf) (discussing Federal Law “On Amendments to Part 1 of the Tax Code of the Russian Federation and Certain Regulations of the Russian Federation” No. 383-FZ dated 29 December 2009).

103. See Skoblikov, *supra* note 97, at 80-81 (on file with author); Bastrykhin Letter, *supra* note 71, at 12-15 (on file with author).

104. It should be noted that Article 70(4) of the Arbitrazh Procedure Code provides that a judge should not accept a party’s concession if there is a basis to believe that the concession was made with the goal of concealing certain facts. Arbitrazhno-Protsessual’nyi Kodeks RF [APK] [Code of Arbitration Procedure] art. 70(4) (Russ.). However, if the litigation is collusive and neither party has an interest in presenting the relevant facts, it is hard to know how the judge could identify a basis for rejecting the concession.

105. Kumarin Judgment, *supra* note 56, at 8 (on file with author).

abuse does rely on corruption, explaining it as the result of corruption is simply circular. It does not explain the underlying cause of the corruption or why it takes the particular form that it does. Therefore, an additional explanation must be sought elsewhere.

This explanation can be found in the continuing legacy of certain aspects of the Soviet legal system. While the Russian legal system has, of course changed since Soviet times, the current legal system is still heavily influenced by its Soviet predecessor (which was, in turn, heavily influenced by its imperial predecessor). As President Medvedev has noted, fifteen years is not sufficient to overcome the legacy of traditional Russian legal attitudes.<sup>106</sup> According to the leading textbook on the Russian legal system:

[T]he Soviet and imperial past have left their marks on Russia's legal system. This legacy affects not only the content of legal institutions and rules, but also underlying attitudes about the nature and significance of law and the way it should be reformed and enforced . . . . The effects of the traditional Soviet and imperial authoritarian administrative style are felt at every level and branch of government.<sup>107</sup>

For purposes of this article, three aspects of the Soviet legal system appear particularly relevant to explaining the prevalence of legal abuse.

First, the Soviet legal system was based on the notion that law is an instrument of political rule rather than a neutral system for the arbitration of disputes. According to historian Peter Solomon, "most Bolshevik leaders adopted an instrumental view of the law. Without enshrining the law as a value and always stressing the subordinate status of the law, Lenin and his colleagues used the law as a tool for implementing their policies."<sup>108</sup> The leading early Soviet legal theorist E. B. Pashukanis provided a theoretical rationale for this approach, writing: "In bourgeois-capitalist society, the legal superstructure should have maximum immobility—maximum stability—because it represents a firm framework of the movement of the economic forces whose bearers are capitalist entrepreneurs . . . . [L]aw occupies among us, on the contrary, a subordinate position with reference to politics."<sup>109</sup>

This approach reached practitioners, such as Procurator General Andrei Vyshinsky, who in 1935 wrote: "[t]here might be collisions and discrepancies between the formal commands of laws and those of the proletarian revolution . . . .

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106. *Dmitri Medvedev: Pravovoi nihilizm poiavilsia ne vchera* [Dmitri Medvedev: *Legal Nihilism Did Not Occur Yesterday*], VSLUH.RU NEWS, Nov. 5, 2008, <http://www.vsluh.ru/news/politics/155483.html> [hereinafter VSLUH.RU NEWS – *Legal Nihilism*].

107. BURNHAM ET. AL., *supra* note 70, at 6.

108. PETER H. SOLOMON, JR., *SOVIET CRIMINAL JUSTICE UNDER STALIN* 17 (1996).

109. BERMAN, *supra* note 2, at 42 (quoting E. B. Pashukanis, Director, Institute of Soviet Construction and Law, *Sovetskoe Gosudarstvo i Revolutsiia Prava* [The Soviet State and the Revolution of Law] (1930) translated in HUGH W. BABB, *SOVIET LEGAL PHIL.* 237-80 (1951)).

This collision must be solved only by the subordination of the formal commands of the law to those of party policy.”<sup>110</sup>

Use of the law for political repression found its fullest and most dramatic expression in the “show trials” in which Stalin’s political enemies were convicted of crimes against the state.<sup>111</sup> This public abuse of the legal system set an example for ordinary citizens, some of whom apparently began to use criminal denunciation to advance their personal interests. Historian Sheila Fitzpatrick maintains that one offshoot of the Stalinist terror was the denunciation by ordinary citizens of their neighbors and co-workers as a way of settling personal scores and advancing their personal interests.<sup>112</sup> Fitzpatrick cites one typical case that bears eerie similarity to contemporary raiding and commissioned prosecutions. Two con men joined a collective farm (kolkhoz), persuaded the kolkhoz members to criticize the chairman for abuse of power, then used these criticisms to write denunciations accusing him of corruption, all in order to get him replaced by their own man and obtain control of the kolkhoz assets for themselves.<sup>113</sup> Although the post-Stalin era saw significant reforms, according to Solomon, “[t]he Stalinist mold of criminal justice proved to have lasting significance, for it persisted for decades after the death of the tyrant . . . each of [the] core features of Stalinist criminal justice remained alive in the 1980s . . .”<sup>114</sup> For example, the use of criminal prosecution to repress political dissent continued into the Brezhnev era.<sup>115</sup>

Given this history, it is not surprising that the post-Soviet period still maintains some features of what President Medvedev has termed “legal nihilism” (defined as disrespect for the law), a problem which he identified as a legacy of Russia’s past.<sup>116</sup> It is also not surprising that many continue to view the law as an

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110. *Id.* at 42-43.

111. THE GREAT PURGE TRIAL, at ix-x (Robert C. Tucker & Stephen F. Cohen eds., 1965).

112. See SHEILA FITZPATRICK, EVERYDAY STALINISM: ORDINARY LIFE IN EXTRAORDINARY TIMES: SOVIET RUSSIA IN THE 1930S 205-08 (1999); Nellie H. Ohr, *The Care and Feeding of Homo Sovieticus*, H-RUSSIA, Mar. 2000, at 2 (reviewing SHEILA FITZPATRICK, EVERYDAY STALINISM: ORDINARY LIFE IN EXTRAORDINARY TIMES: SOVIET RUSSIA IN THE 1930S (1999)). See also Vladimir A. Kozlov, *Denunciation and Its Functions in Soviet Governance: A Study of Denunciations and Their Bureaucratic Handling From Soviet Police Archives, 1944-1953*, in ACCUSATORY PRACTICES: DENUNCIATION IN MODERN EUROPEAN HISTORY, 1789-1989, at 121, 133 (Sheila Fitzpatrick & Robert Gellately eds., 1997) (identifying “interested denunciations” directed against supervisors, co-workers and neighbors as one of the main forms of Stalin-era denunciation).

113. Sheila Fitzpatrick, *Signals from Below: Soviet Letters of Denunciation of the 1930s*, in ACCUSATORY PRACTICES: DENUNCIATION IN MODERN EUROPEAN HISTORY, 1789-1989, at 85, 107-08 (Sheila Fitzpatrick & Robert Gellately eds., 1997).

114. SOLOMON, *supra* note 108, at 453.

115. See, e.g., ON TRIAL: THE SOVIET STATE VERSUS “ABRAM TERTZ” AND “NIKOLAI ARZHAK” (Leopold Labedz & Max Hayward eds., 1967) (discussing a case that occurred in 1966, during the Brezhnev Era 1964-1982).

116. VSLUH.RU NEWS – *Legal Nihilism*, *supra* note 106; Burnham, Maggs and Danilenko also note that “legal nihilism in the mass consciousness . . . continues to undermine efforts to install legality as a principle on which both society and the state should be based” and the Council of Europe has also identified the development of a “legal culture” of respect for the law as one of Russia’s main tasks. BURNHAM ET AL., *supra* note 70, at 6-7.

instrument for achieving extra-legal ends. During the Soviet period, abuse of the law usually took the form of government use of the legal system for political ends. Today, with the disappearance of Soviet ideology, it appears to have devolved all too often into an instrument of extortion and fraud by criminals. But the underlying principle of utilitarian manipulation of the law for improper ends remains the same.

The second cause appears rooted in the Soviet legal system's relationship to private property. The Soviet legal system criminalized entrepreneurial activity, provided almost no protection for private property, and even provided a legal mechanism for the expropriation of property. As Burnham, Maggs and Danilenko write:

According to Marx, the abolition of private ownership of [the] means of production was an absolute prerequisite for a just society. Guided by this theory, the Soviet communists nationalized all means of production and almost all private property . . . . As private property disappeared and a command economy replaced private industry and commerce, most of the private civil and commercial law disappeared.<sup>117</sup>

The legacy of this system lives on in laws like the criminal prohibition on "illegal entrepreneurship" that underlies many commissioned prosecutions, the uncertain protection of intellectual property rights underlying patent racketeering and trademark squatting, and the attitude among some law enforcement officials that the "terrorization" of business is acceptable. It also lives on in the split between general jurisdiction courts and arbitrazh courts (successors to the Soviet state arbitrazh system which settled disputes between state enterprises),<sup>118</sup> which make possible the issue preclusion schemes discussed above. Moreover, because of the absence of a well-defined body of law regulating property rights, the post-Soviet privatization of state assets was carried out without a firm legal framework. As a result, property rights in contemporary Russia are uncertain, making it possible to present a legal challenge to almost any property ownership, thus creating fertile ground for all the schemes discussed above.<sup>119</sup> This point is well illustrated by a recent survey in which 45 percent of Russian business owners said that Russian property law provides no protection against illegal takings by the state and 24 percent said that it actually facilitates the misappropriation of private property by the state.<sup>120</sup>

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117. BURNHAM ET AL., *supra* note 70, at 4-5.

118. *Id.* at 77.

119. SKOBLIKOV, *supra* note 7, at 35 (noting that pursuit of certain business activities in post-Soviet Russia almost inevitably involves violations of the law).

120. BUSINESS SOLIDARNOST': ORGANIZACIYA ZASCHITI PREDPRIYATIY [ORGANIZATION FOR PROTECTION OF ENTERPRISES], ISSLEDOVANIYA BIZNESS ZHURNAL-ONLAIN [INVESTIGATIONS OF THE BUSINESS JOURNAL-ONLINE], SCHITAETE LI VY CHTO ZAKONODATEL'NAYA BAZA I PRAVOPRIMENITEL'NAYA PRAKTIKA POLNOST'YU ZASHISHYAYET VASH BIZNES OT POSYAGATEL'STV SO STORONY GOSUDARSTVA? [DO YOU THINK THAT THE LAW AND ITS PRACTICE PROTECTS YOUR BUSINESS FROM ILLEGAL TAKING BY GOVERNMENT?] (2009), <http://www.kapitalisty.ru/research/podrobnee/003/>.

Third, the Soviet legal system was rigid, formalized and abstract, like European civil law in the 19th Century, before the advent of legal realism. As Burnham, Maggs and Danilenko write:

[T]he Soviet legal system missed out on developments that took place in Western European civil law systems during the 20th [C]entury. One of these was the relaxation in Western continental systems of many of the more absolutist and dogmatic aspects of legal theory. In essence, many aspects of Soviet legal theory remained stuck in a “time warp.” To the extent that it had a kinship with Western European civil law systems, Soviet legal theory reflected 19th Century ideas that had long ago been discarded by Western European legal scholars.<sup>121</sup>

Such a pre-legal realism approach provides fertile opportunity for those who seek to manipulate the letter of the law while violating the spirit of the law. For example, formalism encourages judicial actions based on facially valid documents without a meaningful inquiry into the process that generated the documents, thus making the system vulnerable to raiding and collusive litigation. It promotes the mechanistic enforcement of intellectual property rights that makes patent and trademark squatting possible, as well as the literal application of rules on “good faith purchasers” so often exploited by raiders. But perhaps most importantly, it limits judges’ ability to hold parties to a flexible notion of “good faith” and to fashion practical, equitable remedies on a case by case basis, something that is essential to preventing the kinds of schemes discussed herein.<sup>122</sup> In short, as Jeffrey Kahn has written:

Russia is not tabula rasa when it comes to law and legislation. Russia is not starting from scratch, which certainly has advantages, but it has the disadvantage of a lot of bad legal habits. Worst of these is a historical attachment to bare legal positivism as a tool for state control.<sup>123</sup>

#### IV. POSSIBLE CURES

Yet, not all is bleak. Consistent with President Medvedev’s calls for an end to the “terrorization” of business, the government appears to be taking important initial steps to combat raiding and official extortion. Some of these measures are designed to prevent raiding, others to facilitate its prosecution.

##### A. *Prevention*

In terms of prevention, on July 19, 2009, the Duma passed a series of amendments to existing legislation, which was designed to limit the opportunities

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121. BURNHAM ET AL., *supra* note 70, at 4.

122. See, e.g., Gevorg Beknazar-Yuzbashchev, *Zloupotreblenie Pravom i Printsip Dobroi Sovesti v Grazhdanskom Prave Rossii I Germanii* [Abuse of the Law and the Principle of Good Conscience in Russian and German Civil Law] 3, 24-5, (2010) (unpublished Ph.D. dissertation, Avtoreferat, Institut Gosudarstva i Prava Rossiiskoi Akademii Nauk [The Russian Science Academy Institute of Government and Law]) (on file with author).

123. Jeffrey Kahn, *Vladimir Putin and the Rule of Law in Russia*, 36 GA. J. INT’L & COMP. L. 511, 520 (2008).

for raiding.<sup>124</sup> For example, in order to prevent schemes in which a raider obtains a judicial decision in a remote location freezing the target corporation's assets (as allegedly happened in the Ilim Pulp and Telenor/Farimex cases discussed above), the law requires that corporate disputes and motions for restraint of corporate assets be brought in the district where the corporation is located.<sup>125</sup> In order to prevent "sneak attacks," the law also requires commercial courts to post on their web sites information about the filing of the case and its progress.<sup>126</sup> To deter raids accomplished through falsification of the corporate register, the law amends the Law on Joint Stock Companies to provide that the company and its registrar will be subject to joint and several liability for shareholder losses resulting from improper maintenance of the shareholder register.<sup>127</sup> Other provisions of the July 19 amendments will make collusive litigation schemes more difficult. For example, one provision amends the law on limited liability companies to provide judges the discretion to refuse to invalidate corporate transactions concluded in violation of internal corporate rules if such violations were not "material" and did not cause damages to the company or the party bringing the claim.<sup>128</sup>

In another significant act, in December 2009, President Medvedev signed amendments to the Criminal Code which provide tax offenders the opportunity for exoneration from criminal liability if they pay their tax in arrears within a designated period of time and which eliminate pretrial detention in criminal tax investigations, two steps which are expected to reduce extortionate tax prosecutions.<sup>129</sup> In April 2010, the Duma passed legislation restricting the possibility of pre-trial detention in cases involving white collar crimes, including fraud and money laundering.<sup>130</sup> This legislation will also make it much more difficult to use criminal prosecution to extort businesses.

### B. Prosecution

In terms of prosecution, the Kumarin case, which resulted in a fourteen-year sentence for Kumarin and convictions for seven other members of his gang, was a notable success in the battle against raiding.<sup>131</sup> To facilitate future raiding

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124. See, e.g., Federal'nyi zakon ot 19 iyulya 2009 O vnesenii izmenyeni v otdel'nye akti Rossisskoi Federatsii [Federal Law of July 19, 2009 on Amending Some Legislative Acts of the Russian Federation] 2009, N. 205-FZ [No. 205-FZ ] [hereinafter July 19, 2009 Law]. Arbitrazhnyi Protessual'nyi Kodeks RF [APK] [Code of Arbitration Procedure] arts. 38(4.1), 99(3.1) (Russ.).

125. See July 19, 2009 Law, art. 10.

126. Arbitrazhnyi Protessual'nyi Kodeks RF [APK] [Code of Arbitration Procedure] art. art. 225.4(1) (Russ.).

127. July 19, 2009 Law, art. 3; FZAO, art. 44(4), in BERNARD S. BLACK, REINIER KRAAKMAN & ANNA S. TARASSOVA, GUIDE TO THE RUSSIAN LAW ON JOINT STOCK COMPANIES app. III p. 36 (1998).

128. July 19, 2009 Law, art. 6; see FZOOO, art. 43.

129. TISSOT & PROZOR, *supra* note 102; see Yana Yakovleva, *Medvedev's Battle Against Legal Nihilism*, ST. PETERSBURG TIMES, Jan. 26, 2010, [http://www.sptimes.ru/index.php?story\\_id=30693&action\\_id=2](http://www.sptimes.ru/index.php?story_id=30693&action_id=2) (discussing Federal Law "On Amendments to Part 1 of the Tax Code of the Russian Federation and Certain Regulations of the Russian Federation" No. 383-FZ dated 29 December 2009).

130. Ugolovno-Protessualnyi Kodeks RF [UPK] art. 108 1.1

131. Kumarin Judgment, *supra* note 56, at 168-71 (on file with author); Barsukov (Kumarin) Priznan Vynovnym po Delu o Reiderstve v Sankt Peterburge [Barsukov (Kumarin) Found Guilty of

prosecutions, Investigative Committee Chief Bastrykhin recently put forward a series of legislative proposals which include the following: (a) “introducing criminal liability for corruptly obtaining and using unlawful rulings from civil litigation” (this would facilitate the prosecution of collusive litigation schemes and raids based on corruptly obtained arbitrazh court decisions); (b) changing the law to give civil court decisions only a rebuttable presumption of preclusive effect in criminal cases and creating a mechanism for prosecutors to appeal decisions of arbitrazh courts (this would help address the Surinov problem); and (c) amending the law on good faith purchasers to address the laundering aspects of raiding.<sup>132</sup>

Moreover, in 2009 a new law on cooperating witnesses took effect. The law provides, in pertinent part, that defendants who cooperate completely and honestly, as certified by the prosecutor and judge, cannot be sentenced to more than one-half of the otherwise applicable maximum sentence.<sup>133</sup> While applicable to all multi-defendant cases, this law could be especially valuable in raiding prosecutions. As Bastrykhin notes, prosecuting crimes that use corrupt judicial rulings is difficult because it requires proof that rulings which are facially valid were corruptly obtained with criminal intent.<sup>134</sup> Testimony from insiders who were part of the scheme is often the only way to obtain such evidence and the new cooperating witness law will, for the first time, provide Russian prosecutors with a legal mechanism to reward witnesses for such testimony.<sup>135</sup>

### C. Expansion of Jury Trials

One solution that the government has not yet pursued may lie in the expansion of jury trials, currently available only for a limited class of criminal cases, to all criminal cases.<sup>136</sup> There are at least two reasons for this. First, trial by jury is a deterrent to commissioned prosecutions, a fact recognized even by America’s founders. As Alexander Hamilton explained in Federalist 83, trial by jury provides security against corruption because it is much harder to corrupt a jury than a single judge. “By increasing the obstacles to success,” Hamilton wrote, this “complicated agency” discourages “[a]rbitrary impeachments, arbitrary methods of

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Corporate Raiding in St. Petersburg], POLIT.RU NOVOSTI [POLIT.RU NEWS], Nov. 12, 2009, <http://www.polit.ru/news/2009/11/12/Kumarin.html>.

132. Bastrykhin Letter, *supra* note 71, at 14 (on file with author).

133. Federal Law 383-FZ, December 29, 2009 “On the Introduction of Amendments in the First Part of the Tax Code of the Russian Federation and Other Legislative Acts of the Russian Federation.”

134. Bastrykhin Letter, *supra* note 71, at 1 (on file with author).

135. Russian prosecutors appear to appreciate the value of the law. In a recent survey conducted by the author, 109 out of 131 respondents indicated they think that the new cooperating witness law is an “essential” element in combating organized crime and stated that they intend to use the new law in their work. Survey by Thomas Firestone, Survey of Russian Prosecutors (2009) (on file with author). Moreover, the law is already being used. For example, according to statistics of the Sverdlovsk District Court, within the first three months, thirteen applications for cooperation were approved just in the city of Belgorod. Statistics of the Sverdlovsk District Court (Oct. 8, 2009) (on file with author).

136. Trial by jury is not available for illegal entrepreneurship, money laundering, fraud and criminal patent infringement – some of the statutes that are most commonly abused for extortionate purposes. Nor is it available for any civil cases.

prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions.”<sup>137</sup> This theory seems to apply even more so in contemporary Russia. While the acquittal rate in bench trials is less than 1%, the acquittal rate in Russian jury trials is approximately 20%,<sup>138</sup> making commissioned prosecutions much less likely to succeed. Moreover, according to judges and former jurors, Russian juries regularly reject cases that they perceive as fabricated, commissioned, or brought for improper purposes.<sup>139</sup> For example, in 2007, feeling that they were all that had protected a businessman from wrongful conviction in a commissioned prosecution, a group of former jurors even formed an association to protect and expand trial by jury in Russia and to lobby for legal reform.<sup>140</sup> As one former investigator bluntly wrote on a Russian blog, “commissioned cases fall apart in jury trials.”<sup>141</sup> Thus, the expansion of jury trials to more criminal cases, especially white collar crimes, would reduce the opportunity to use criminal prosecution for extortionate purposes.

Second, trial by jury can be an effective means of instilling popular respect for the law and curing so-called “legal nihilism.” In *Democracy in America*, Alexis de Tocqueville described jury service as an education in civic virtue and said that trial by jury in the United States had helped to “promote the legalistic attitude even down to the lowest of the social classes.”<sup>142</sup> According to Tocqueville, jury service:

[M]olds the human mind to its procedures and becomes bound up, as it were, with the very conception of justice . . . . Juries . . . help to instill in the minds of all the citizens something of the mental habits of judges, which are exactly those which best prepare a people to be free. They spread respect for the courts' decisions and the concepts of right throughout all classes . . . .<sup>143</sup>

A recent study of almost one hundred former jurors conducted by the Russian Academy of Sciences suggests that jury service has begun to have such an effect on Russians. In oral interviews, former jurors repeatedly described developing a

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137. THE FEDERALIST PAPERS, 498-500 (CLINTON ROSSITER ED., SIGNET CLASSIC 2003) (1788).

138. Kahn, *supra* note 123, at 547.

139. Interview with Russian Jurors, Meeting of the Russian “Jurors’ Club,” in Moscow (Mar. 2008) (on file with author); Interview with Russian Jurors, Meeting of the Russian “Jurors’ Club,” in St. Petersburg, (June 2008) (on file with author); Interview with Russian Jurors, Meeting of the Russian “Jurors’ Club,” in St. Petersburg (Oct. 2008) (on file with author); Interview with Russian Jurors, Meeting of the Russian “Jurors’ Club,” in Moscow (Dec. 2008) (on file with author); Interview with Russian Jurors, Meeting of the Russian “Jurors’ Club,” in Sochi (Sept. 2009) (on file with author).

140. Club of Jurors, *About Us*, GUILD OF COURT REPORTERS, 2008, <http://www.juryclub.ru>.

141. Andrei Skrobot, “Ne Vinoven: Pervyi v Moskve Sud Prisyazhnykh Opravdal Podsudimogo Obvinyavshevosa v Ubistve” [“Not Guilty: The First Moscow Jury Acquitted a Defendant Accused of Murder”], NEZAVISIMAYA GAZ. [THE INDEPENDENT NEWSPAPER], Aug. 15, 2003, Posting of Arthur Poghosyan to <http://www.advokatus.ru/doc/292> (Jan. 31, 2007).

142. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 316, 321 (GERALD E BEVIN TRANS., PENGUIN BOOKS 2002) (1835).

143. *Id.* at 320-21.



sense of responsibility for the fate of another person. Many indicated that, even months after their jury service ended, they continued to feel stress over the verdict and to wonder whether they had done the right thing.<sup>144</sup> In numerous interviews that the author has conducted with former jurors, they repeatedly described the experience as empowering and explained that it had instilled in them a new interest and respect for the law. Thus, jury service, if available to a large enough portion of the population, can help to create a culture in which abuse of the law is less tolerated.

#### IV. IMPLICATIONS

What are the implications of this study?

First, at the most general level, this study reminds us of the continuing legacy of the Soviet past, the obstacles it creates for reformers, and the opportunities it creates for criminals.

Second, it has implications for the broader theoretical debate over whether participation in legitimate spheres of social and economic activity is likely to force criminals to “legitimize” their behavior. Daniel Bell in his famous essay “Crime as an American Way of Life: A Queer Ladder of Social Mobility” predicted the “embourgeoisement” of organized crime in America and its decline “[w]ith the rationalization and absorption of some illicit activities into the structure of the economy . . . .”<sup>145</sup> This theory has been applied to Russia by those who see contemporary Russian financial crime as a stage in the development of Russian capitalism, analogous to the robber baron era in U.S. history.<sup>146</sup> However, this study highlights the opposite possibility—when criminals enter the legal system, they are just as likely to corrupt the legal system as the legal system is likely to force them to behave honestly. Thus, this study suggests that we should not be sanguine about contemporary Russian financial crime or assume that it is simply a passing fad. Rather, affirmative measures on the part of governments and businesses are necessary.

Third, governments and enforcement authorities, both in Russia and in countries affected by the schemes discussed above, should recognize manipulation of the legal system as a new and potentially dangerous form of crime. Investigators should be prepared to investigate the legal aspects of such schemes and to trace the origins of judicial decisions and other legal documents used therein in the same way that they investigate financial machinations and the origins of

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144. Interview by L.M. Karnozova and V.S. Merkulova with Russian Jurors (on file with author).

145. DANIEL BELL, *THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES* 148-50 (Harvard Univ. Press 1988) (1960).

146. See e.g., Annelise Anderson, *The Red Mafia: A Legacy of Communism*, in *ECONOMIC TRANSITION IN EASTERN EUROPE AND RUSSIA: REALITIES OF REFORM* (Edward P. Lazear ed., 1995) (summarizing arguments that contemporary Russian organized crime is an early stage of capitalism like the robber baron era); see also DAVID E. HOFFMAN, *THE OLIGARCHS: WEALTH AND POWER IN THE NEW RUSSIA* 6 (2003) (comparing techniques of the first Russian financiers to exploitation of banks, the state, and investors, manipulation of the stock market and acquisition of companies by early 20<sup>th</sup> Century American businessmen).

suspected criminal schemes. Governments should review their relevant legislation and, where appropriate, consider heightening civil and/or criminal penalties for bad faith litigation, falsification of documents and abuse of process.

Fourth, this study has implications for the provision of rule of law technical assistance to developing countries. Specifically, it highlights the danger that law enforcement tools that have proven effective in combating organized crime in the West, such as criminal penalties for money laundering, can become perverted when transported to foreign soil and can sometimes enhance, rather than reduce, organized crime if they are not carefully adapted to local conditions and accompanied by appropriate guarantees of transparency. Thus, technical assistance providers should carefully study local conditions and, rather than automatically basing legislative recommendations on what has worked in the United States,<sup>147</sup> should support efforts to adopt legislation addressing receiving countries' specific crime problems. In the case of Russia, legislation establishing criminal liability for such practices as commissioned prosecutions, trademark squatting, and collusive litigation, as well as legislation removing criminal liability for patent infringement, could prove as important in combating organized crime as the adoption of legislation based on U.S. experience.

Finally, while good legal counsel is essential in any business in any country, the prevalence of legal abuse in Russia means that it is especially important for businesses operating there. Quality legal counsel can ensure that contracts are drafted tightly, with minimal opportunity for abuse; that corporate books and records are subject to minimum risk of falsification; and that patents and trademarks are maintained and are not vulnerable to squatting. Although such measures are not a guarantee of protection, they can help to reduce the risks. Complete protection will be possible only after more significant changes in the law and the societal mindset.

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147. A previous article by the author provides a good example of this mistake. See Thomas Firestone, *What Russia Must Do to Fight Organized Crime*, 14 DEMOKRATIZATSIYA: J. POST-SOVIET DEMOCRATIZATION 59 (2006).