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RUSSIA'S COUNTERTERRORISM LEGISLATION, WARTS AND ALL: OVERVIEW AND ASSESSMENT OF THE LEGAL FRAMEWORK FOR COMBATING TERRORISM IN THE RUSSIAN FEDERATION

Mariya Omelicheva

The last years of the Soviet Union were marked by a series of destructive processes conducive to the rise of violence and organized crime. Terrorist and extremist acts, which were infrequent under the totalitarian rule, also intensified posing a threat to the security of the newly independent nations. In Russia, the threat of terrorism has been concomitant with the protracted insurgency in Chechnya and the broader North Caucasus region. The country has experienced a multitude of terrorist and militant attacks, and the turn of the century was marked by a series of high-profile terrorist incidents involving a large number of civilian casualties. Responding to the threat, the Russian authorities adopted extensive counterterrorism legislation, established and modified institutions responsible for combating terrorism, and streamlined the leadership and conduct of counterterrorist operations.¹

The sheer volume of laws, decrees, and executive orders related to the combat with terrorism – by some accounts over 500 normative acts in the area of counterterrorism were adopted during the last decade in Russia² – invites an analysis of Russia's counterterrorism legislation. Until recently, the country has seen no decline in the number of terrorist acts, and the terrorist crime detection has been at 10-20% level of all committed attacks, whereas 80-90% of the attacks have reached their goals.³ The inability of the Russian security

¹ Traditionally, counterterrorism has been associated with a range of offensive measures. The term “anti-terrorism” has been used for describing defensive responses. Although this distinction has been maintained in some scholarly analyses and policy documents of individual governments and international organizations, it has become common to broaden the traditional discussion of counterterrorism to incorporate the defensive dimension, as well. In the same vein, I do not differentiate between counterterrorism and anti-terrorism strategies and operations and use the notion of counterterrorism in reference to both offensive and defensive measures aimed at combating terrorism.

² Dikaev (2004) p. 128.

³ Dolgova (2002).

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agencies and the law enforcement forces to prevent or adequately respond to the major terrorist attacks raises an important question about the impact of normative frameworks on the effectiveness of Russia's measures aimed at combating terrorism.

The goal of this work is to explore and assess the legislative basis for combating terrorism in the Russian Federation with a focus on the two legal pillars – the 1998 Act “On Combating Terrorism” and the 2006 Act “On Counteraction to Terrorism”. These two normative acts codified and legalized Russia's experiences with suppressing terrorism and streamlined numerous normative and institutional changes introduced to the Russian legislation in the years preceding their adoption.

I will begin with an overview of the evolution of Russia's legislative framework for combating terrorism and an analysis of the novelties of the existing legislation. I will compare and contrast the 2006 act to the 1998 version, and emphasize those features of the new law that demonstrate the government's attempt to hone Russia's definition of terrorism and strengthen its regulation of counterterrorism responses. Next, I will consider gaps, limitations and controversies in the acting legislation, and will critically examine those particular counterterrorism norms, which broad interpretation allows for infringements on individuals' freedoms. I will conclude with an overall assessment of the current legislation, i.e., its ability to accomplish the goals it is set to achieve, and suggestions for the development of a comprehensive strategy and program for successful counteraction to terrorism.

Russia's Counterterrorism Legislation: Comparing the Old and New Legislative Frameworks for Combating Terrorism

In the context of Russia, terrorism has been tightly associated with the activities of Islamic militants in Chechnya and the broader North Caucasus. The latter has been an area with the highest concentration of terrorist acts in Russia, and the Chechen guerilla fighters have been implicated in the vast majority of hostage-taking incidents and terrorist crimes in the country. The development of Russia's counterterrorism legislation and institutional framework has trailed the government's experiences with fighting the Chechen resistance and coping with the threat of terrorism in the North Caucasus region. It is no coincidence, for example, that the crime of terrorism was added to Russia's first criminal code inherited from the Soviet past in 1994, which marked the start of the first war in Chechnya.⁴ But it was not until the adoption of the Federal Law No.

⁴ Jonson (2004) p. 123.

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130-FZ of 25 July 1998 “On Combating Terrorism” that the Russian legislators attempted to define terrorist activity and establish an institutional framework and principles for responding to the threat of terrorism.⁵

For the next eight years, the 1998 Act “On Combating Terrorism” had become the principal legal pillar of the Russian counterterrorism efforts. It sketched out the legal regime of the counterterrorist operation, and defined the organizational basis of counterterrorism placing Russia’s Federal Security Service (FSB), and the Ministry of Interior (MVD) on top of the list of agencies responsible for combating terrorism.⁶ The law put forth a more fine-tuned definition of terrorism – compared to the one provided in the criminal legislation – by noting an element of intimidation as one of the characteristics of the crime, but it failed to incorporate political motivation. Thus, the law made no distinction between terrorist and criminal violence.

After the breakup of the Soviet Union, a special office for combating terrorism established in the structure of the Soviet-era Committee for State Security (KGB), traveled to the Federal Security Service of the Russian Federation created in 1995. The same year, the FSB’s director ordered the replacement of the anti-terrorism office with the Anti-Terrorism Center. The latter was transformed into the Inter-departmental Counterterrorism Commission in 1997, renamed as the Federal Counterterrorism Commission in 1998. Headed by the Russian Prime minister, this commission was supposed to coordinate the counterterrorism activities of various power ministries.⁸

The FSB played a primary role in combating terrorism in Russia until 2003, when the MVD expanded its authority over the management of the counterterrorist operation in the North Caucasus and created its own Anti-Terrorism Center “T”. A special inter-departmental center was established in the North Caucasus to address the problem of coordination and intelligence sharing between the FSB and MVD, whose counterterrorism agencies duplicated each other’s functions. Yet, this coordinating center had neither the authority nor the means to perform its information sharing and coordination functions and

⁵ In some English translations, this law is also known as the Act “On the Fight Against Terrorism” and the Act “On Fighting Terrorism”. It should be noted that the earliest version of the law on combating terrorism in Russia appeared in 1993. It was largely envisioned as an instrument for suppressing hijacking incidents. After the start of the first war in Chechnya, the Russian legislators extended their work on the counterterrorism law.

⁶ Among other agencies that take part in the fight against terrorism in Russia are the Foreign Intelligence Service, Federal Protection Service, Defense Ministry, Federal Border Service, and others.

⁸ Perovic (2006).

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was unable to resolve the issue of inter-agency cooperation. The overlapping authority and the deficit of coordination between the FSB and MVD had become major obstacles to the success of counterterrorist operations in Russia.⁹

In 1999, Russia entered the second Chechen military campaign, and a new wave of terrorist violence and insurgency engulfed the country in the early 2000s. These and other developments on the domestic scene coupled with intensified terrorist activity in the international arena compelled the Russian government to reassess the terrorist threat and reconsider the tactics and methods of its counteraction. The Russian counterterrorism legislation had been subjected to frequent changes reflecting experiences attained in the field and acquired through Russia's cooperation with other states and international organizations. Russia's entry into international counterterrorism conventions necessitated further modifications to the normative framework governing Russia's efforts in the area of combating terrorism. After the hostage crisis at a local school in Beslan in September 2004, President Putin pledged to overhaul the system of Russia's security services and develop procedures for coordinating the activities of the counterterrorism agencies. To streamline these changes, the Russian government adopted a new Federal Law No. 35-EZ of 6 March 2006 "On Counteraction to Terrorism", which replaced the 1998 version. The 2006 Act demonstrates an attempt by the Russian government to refine the legal definition of terrorism, legalize the practice of using military forces for the purpose of combating terrorism, and provide a detailed regulation for the conduct of a counterterrorism operation. What follows is a detailed account of the novelties and the most important changes introduced to the new legislation.

Definition of Terrorism

Until the passage of the 2006 law, the Russian legal practice drew an equation sign between terrorism and its individual manifestations. The 1998 Law "On Combating Terrorism" failed to differentiate between terrorism as a complex socio-political phenomenon and terrorism as a crime. The definitions of terrorism and terrorist action provided in the law enumerated different methods of inflicting violence on individuals or organizations and causing damage to property with a view of intimidating the population, violating public safety, influencing governmental decisions, or satisfying the mercenary interests of the perpetrators. Not only did these definitions fail to accommodate all the possible motives of terrorist action, they also confounded methods with goals, and established a two-faceted nature of terrorism, namely, political terrorism and terrorism in pursuit of illegitimate material interests. The law thrust the

⁹ See, for example, Forster (2006); Plater-Zyberk (2004).

responsibility for combating terrorism on two different governmental agencies: the FSB was responsible for preventing, uncovering, and defeating political terrorism, while the MVD were placed in charge of the fight against terrorist crimes with mercenary objectives. The relations between the FSB and MVD had long been marred by the inter-agency feud. The division of competency between the two agencies stifled the effectiveness of the counterterrorism measures, and led to an indeterminacy of investigative jurisdiction in practice.¹⁰

The new law is set to resolve these definitional and jurisdictional issues. The act is a product of considerable conceptual work by the Russian law-makers and expert community and a reflection of international experiences and knowledge accumulated in other national cultures. For the first time in the Russian practice, the 2006 law defines terrorism not as separate acts but as an ideology of violence and the practice of influencing decision-making by state and local agencies or international organizations by means of frightening the population or other forms of unlawful violent action. Separately, it defines terrorist activity (i.e., various forms of assistance, preparation, and instigation of terrorism), and terrorist acts (explosion, arson, and other actions). The law recognizes terrorism as a multi-layered social phenomenon, where intimidation is not a goal but a method for accomplishing terrorist political objectives. Furthermore, it streamlines the definition of terrorism and a terrorist act with those provided in the criminal legislation by reproducing the *corpus delicti* of the crime of terrorism contained in Russia's Criminal Code, another feature that was lacking in the past.

Regime of Counterterrorist Operation

The nature of terrorist threat, the danger it poses to the lives and livelihoods of individuals, and the risks associated with the consequences of a terrorist attack may call forth a set of extraordinary measures that the Russian legislation subsumes under a special regime of counterterrorist operations. This is a new regime, which, along with the regimes of emergency situation and martial law, allows the Russian government to impose temporal restrictions on certain constitutionally guaranteed rights and liberties.

The 1998 law also described a special regime of counterterrorist operation aimed at suppressing an act of terrorism. However, the new legislation expands the parameters of a counterterrorist operation by defining it as a set of special measures, which may include active combat and military responses,

¹⁰ Gorbunov (2008) pp. 236-7.

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accompanied by the use of military equipment, armaments, and special facilities for containing and disrupting an act of terrorism and reducing its detrimental impact. The addition of military and operational-combat measures to a set of counterterrorism responses was needed to legalize and regulate participation of Russia's armed forces in counterterrorism. The Russian military had long been involved in combating terrorism in the context of the second Chechen military campaign, framed as a counterterrorism operation by the Russian government. Yet, this practice had been neither properly sanctioned nor regulated in the Russian legislation.

The regime of a counterterrorist operation opens up a legal possibility for derogating certain rights and liberties, and the new law contains a long but exhaustive list of all permissible temporary restrictions. Those may include documents, vehicles, and property inspections; telephone and wire tapping; restrictions on the freedom of movement; establishing a quarantine or restrictions on the circulation of weapons and explosives, and other measures. An important novelty in the 2006 act is that it requires immediate public announcement of a decision about the establishment and termination of the regime of a counterterrorist operation. Such an announcement must specify the area, measures, and restrictions involved. In the absence of a public announcement about a counterterrorism operation, all counterterrorism measures conducted under the special regime will be considered illegal.

Organizational Basis of Counterterrorism

The 1998 law "On Combating Terrorism" did not ascribe primary responsibility for the conduct of counterterrorist operations to either the FSB or the MVD. Either of these agencies could have been placed in charge of the leadership of a counterterrorist operation. An important lesson that the Russian government had learned from mistakes committed in counterterrorist operations was that all units and resources engaged in counterterrorism should be placed under a single command for a coordinated and synchronized response to the terrorist threat.¹¹

The new law's provisions about the operation headquarters are a reflection of the practical lessons. The 2006 act asserts the principle of undivided authority over the conduct of a counterterrorist operation. According to the law, the operation headquarters take full charge of the counterterrorist operation, its leadership, direction, and the management of human and technical resources. All elements drawn together for participation in the counterterrorist operation –

¹¹ Forster (2006); Plater-Zyberk (2004).

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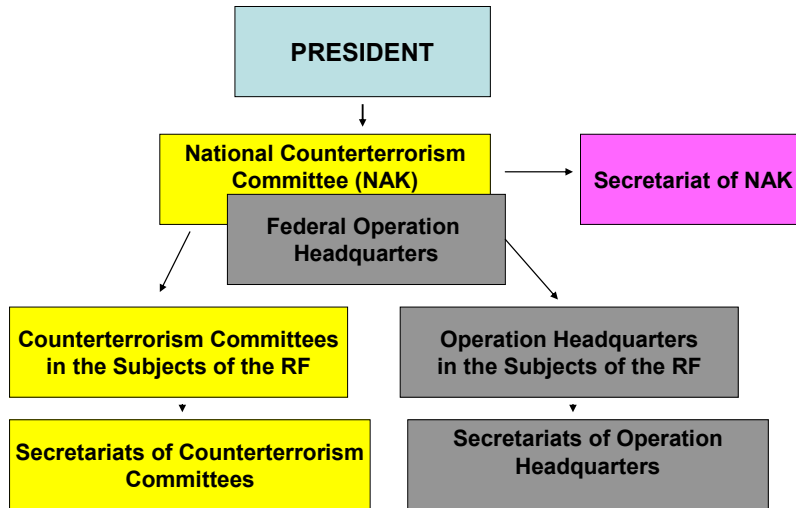
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the military units of the Defense and Interior Ministries, the police, firefighters, soldiers from the Ministry of Emergency Situations, etc. – are transferred from the jurisdiction of their respective ministries under the full authority of the operation headquarters. The latter is also responsible for collecting and analyzing information for the purpose of making informed decisions about the goals, scope, timeframe, and specific measures of the counterterrorist operation.

The 2006 law also contains a general provision allowing the Russian president to set up inter-departmental agencies for counteracting terrorism. One of such agencies, the National Counterterrorism Committee (NAK), was decreed by President Putin in February 2006. It is composed of the representatives of 17 federal agencies, including the FSB, MVD, Ministry of Interior, Ministry of Emergency Situations, and others, and tasked with the coordination of all federal-level counterterrorism policies and operations. The NAK replaced the Federal Antiterrorist Commission created in 1998, which lacked a permanent secretariat, viable mechanisms for monitoring and enforcing its decisions, and effective tools for coordinating the day-to-day counterterrorism activities of the federal bodies constituting the Commission. The regional counterterrorism committees led by the regional administration chiefs perform the NAK's functions in the regions.

The operation headquarters envisioned by the 2006 law is an arm of the counterterrorism committees. The operation headquarters are placed in charge of the direction of counterterrorist operations, as well as the planning of effective and efficient ways to utilize available resources for the purpose of combating terrorism. The multi-level structure of the operation headquarters instituted by the presidential decree in February 2006 exists within the broader structure of the federal and regional counterterrorism committees. The federal operation headquarters function within the structure of the National Antiterrorism Committee. The operation headquarters of the subjects of the Russian Federation exist in the respective regional counterterrorism committees (see Figure 1 below). The operation headquarters in Chechnya are vested with the leadership over the counterterrorism operation in the republic of Chechnya and North Caucasus.

Figure 1. The organizational Basis of Counteraction to Terrorism in Russia*

*

Adopted from the NAK's website: <http://nak.fsb.ru/nac/structure.htm>

Use of Armed Forces

The primary task of the Russian army is to defend the country against aggression. The new counterterrorism legislation expands the goals of the Russian armed forces by legalizing their participation in the combat against terrorism in Russia and abroad.¹² The practice of using the Russian military in counterterrorism operations together with security services or individually had long preceded the adoption of the corresponding norms. The Combined Group of Forces in the North Caucasus was created by the presidential decree in 1999 to carry out the counterterrorism and “mop-up” operations in Chechnya. It consisted of the troops of the Defense Ministry, interior troops, forces of the Ministry of Emergency Situations, and units of the FSB and Border Service. To assist the military battalions in carrying out counterterrorism tasks, the FSB, the MVD, and the Main Intelligence Service of Russia created special task teams for liquidating terrorists and militants. Their goal has been to tighten the control over the internal borders between the republics of the North Caucasus, and Russia's international borders to the south.¹³

¹² Trunov (2005) p. 69.

¹³ Perovic (2006).

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The legislators considered it necessary to provide more specific guidelines on the circumstances in which the Russian army can be employed in combating terrorism, as well as to establish general legal parameters for military engagement in counterterrorism.¹⁴ The 2006 law authorizes the chief of a counterterrorist operation to order the creation of a combined group of forces that can include military forces for participation in the counterterrorist operation.

Besides direct participation in counterterrorist operations, the military can be used for preventing terrorist attacks involving hijacking and suppressing acts of terrorism in the Russian inner waters and territorial sea. Russian legislators included a norm that allows the military to destroy an aircraft (or sea vessel) having confirmed that the vessel has been hijacked and poses a real imminent danger to vital targets or sites with a high concentration of people. In other words, the law allows sacrificing the lives of passengers and crew members on board of an airplane for the safety and security of a greater number of people on the ground. The law does not specify the national registration of the carrier; therefore, these measures can be applied to both Russian and foreign air planes.

Military force can also be used for targeting terrorists and their bases abroad, and for suppressing international terrorist activity outside of the Russian territory. The previous law of 1998 contained no provision that would have allowed deploying Russia's armed forces in counterterrorism operations abroad. Under contemporary legislation, the President of Russia has the authority to make personal decisions concerning the use of the armed forces from the territory of Russia against terrorists and their bases overseas. The President's decision to use Russia's armed forces for conducting counterterrorism operations abroad requires the approval of the Federation Council, an upper chamber of the Russian Parliament. However, an amendment to the 2006 act gives the President full discretion in utilizing the FSB security forces abroad. No permission from the Federation Council is needed in those cases.

Another novelty of the counterterrorism legislation is the principle of making no political concessions to terrorists. The 1998 "On Combating Terrorism" allowed minimal concessions, whereas the current law contains a more categorical formulation.¹⁵ The act, nevertheless, allows for the possibility of negotiations for the sole purpose of saving the lives of people. Those talks can only

¹⁴ The use of armed forces to fight terrorism domestically is also allowed by the amendment to the Federal Law "On Defense" that was adopted in April 2005.

¹⁵ Marluhina and Rozhdestvina (2007).

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be conducted by the appointed negotiators and authorized by the chief of the counterterrorist operation. In other words, the law allows for some tactical concessions, but places a ban on giving in to terrorists' political demands.¹⁶

Gaps and Limitations in Russia's Counterterrorism Legislation

The 2006 Act "On Counteraction to Terrorism" was envisioned as a comprehensive piece of legislation encompassing a wide range of preventive measures and policies aimed at protecting people and infrastructure against terrorist attacks, as well as responses to acts of terrorism already committed. An explanatory note accompanying the 2006 act points out that "counteraction" has a broader meaning than "combat". It encompasses responses of special services and law-enforcement bodies, as well as activities of various state and local agencies, organizations, and individuals in preventing terrorism, among other things.¹⁷ The priority of preventive measures is stated as one of the main principles of counteraction to terrorism in the new law, which also calls for a systematic approach including political, informational, socio-economic, legal, and other responses to the threat of terrorism.

In a broad sense, prevention should include the analysis of risks and trends of terrorism, the identification of factors contributing to the recruitment of terrorists or radicalization of groups and movements, as well as the detection of and counteraction to the methods, propaganda and conditions through which individuals are drawn into terrorism. Regrettably, the law has not delivered on the stated principles prioritizing terrorism prevention and emphasizing the need for a comprehensive approach to terrorism. The legislation is silent about preventive or prophylactic measures of counteraction to terrorism.

An effective system of prevention of terrorist attacks in Russia is in a rudimentary shape. Neither the law-enforcement agencies nor the secret services have a well-established practice of systematic examination of their counterterrorism experiences for preparing recommendations regarding the improvements of the methods and tactics of counteraction to terrorism. For a long time in Russia, terrorism had been defined as a sum of discrete criminal acts, and the law-enforcement and security agencies were tasked with the struggle against individual manifestations of terrorism. The analysis of the causes and

¹⁶ According to the provisions of the 1998 legislation, it was possible to negotiate with terrorists with the aim of saving material valuables or for the purpose of studying the counteraction to terrorism without using forceful means.

¹⁷ Petrushov (2006).

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conditions giving rise to the terrorist problem fell largely outside of their jurisdictional scope.¹⁸

The 2006 law takes an important step toward recognizing terrorism as a complex socio-political phenomenon, thus laying ground for developing preventive and prophylactic counterterrorism measures. The act does not, however, follow up with the outline and details of these preventive responses. Neither does the law define a series of protective measures aimed at reducing the vulnerability of people and infrastructure to terrorist attacks and improving the border, transport, and critical facilities security. Despite the detailed regulation of counterterrorist operation, the lawmakers sidestepped the development of measures aimed at protecting the rights, property, and lives of the people that happened to come under the purview of this regime. The law does not ascribe liability for a failure to act or for a negligence of counterterrorist responsibilities, for an abuse of authority or for human rights violations.¹⁹ It does not provide for effective internal and external oversight mechanisms guarding against such kinds of neglect and abuse. In practice, these legislative omissions have contributed to substantial property damage and casualties in the civilian population, when the military and security services have utilized force as a means of combating terrorism.

Detection and suppression of terrorist acts and mitigation of the destructive consequences of terrorism are the only methods of counteraction that received detailed explanation in the new law. The latter also places considerable emphasis on punitive measures, the use of force, and the role of the armed forces in combating terrorism. The new legislation appears to reflect the practice where the choice had long been made in favor of military-style operations carried out by the army troops or small secretive "liquidation" squads.

Another limitation of the Russian counterterrorism legislation is that it does not provide for inter-departmental exchange of information, which is a necessary part of counteraction and prevention of terrorism. The National Counterterrorism Committee that was established to coordinate the counterterrorism activities of various federal structures does not enable daily informational exchanges. Among its purposes are the strategic assessment of the level of terrorist threat, the development of counterterrorism tactics and methods, and the procurement of financial and other resources to support counterterrorism initiatives. The importance of regular exchanges of information on various aspects of terrorism and counterterrorism is understood at every governmental level.

¹⁸ Gorbunov (2008) p. 168-9.

¹⁹ Truntsevcki (2005).

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Yet, the acting legislation contains no provisions for the creation of a unified platform, embodied in a specialized agency or institution, for facilitating and maintaining these kinds of work.

The adoption of the 2006 Act “On Counteraction to Terrorism” has also created discrepancies between the counterterrorism law and other legislation. A norm of the 2006 law that allows for the downing of a hijacked airplane contradicts to the constitutional provisions enshrining the right to life and disallowing derogation from this principle under any conditions.²⁰ This norm also collides with the provisions of the 1993 Federal Law “On State Border of the Russian Federation”. The latter act prohibits employment of weapons and military equipment against air planes or other means of transportation with passengers aboard.²¹

Furthermore, the 2006 act “On Counteraction to Terrorism” has not resolved the quagmire between the two power ministries over the leadership role in combating terrorism. According to the law, the FSB should be the main body responsible for combating terrorism. At the same time in the North Caucasus, it was the MVD that was decreed by the president to carry out this function. Until summer 2006, the leadership of the counterterrorist operation in the North Caucasus was with the Regional Operational Headquarters (ROSh) led by the MVD. With the end of the counterterrorism operation in August 2006, the ROSh was dissolved. In place of the ROSh, the President decreed the establishment of operational headquarters in each of the regional republics to combat the remnants of rebel units. These operational headquarters have been headed by the MVD officials, with the Minister of Interior holding command over the operational headquarters in Chechnya. In September 2008, the Russian president further strengthened the counterterrorism role of the MVD by liquidating the Interior Ministry’s department for combating organized crime and terrorism and establishing new units tasked with the fight against extremism on their basis. Traditionally, it has been the FSB that has performed the counter-extremist and counter-terrorist functions.

Controversies in Russia’s Counterterrorism Legislation

The passage of the 2006 act “On Counteraction to Terrorism” was wrapped in a shroud of controversy. Much of the polemics revolved around the expansive definition of terrorism and the wide discretion over the management of the regime of a counterterrorist operation, including substantial restrictions on hu-

²⁰ Marluhina and Rozhdestvina (2007).

²¹ Trunov (2005).

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man rights with virtual impunity for their violation. The provisions of the law that impart the chief of a counterterrorist operation with broad authority in implementing the law, including the use of the armed forces for combating terrorism at home or abroad, have also received public disapproval.²²

Controversy Surrounding the Definition of Terrorism

The 2006 law defines terrorism as the “practice of influencing the decisions of the government, local self-government or international organizations by intimidating the population or using other forms of illegal violent action”, and as the “ideology of violence”. According to some legal experts, the definition of terrorism as *practice* and *ideology* lends itself to broad interpretations, thus creating legal uncertainty in the application of the law²³. There are legitimate fears about the possibility of “stretching” the definition to any offensive ideology or political agenda. However, the existing criminal legislation closes this loop-hole. According to Russia’s Criminal Code, which establishes criminal responsibility for terrorism, only acts, such as arson, explosion, hostage-taking, and other *actions* committed with the purpose of violating public safety, state security, and the security of individuals and institutions enjoying international protection, are recognized as terrorism²⁴.

What is more troubling, however, is the even broader definition of terrorist activity in the law “On Counteraction to Terrorism”, which includes, among other things “informational or other types of assistance” at the various stages of terrorism, as well as the “propaganda of terrorist ideas, dissemination of materials or information, which urge terrorist activity, substantiate and justify the need for such activity”. The liability for “informational assistance” may become a major deterrent to the circulation of unofficial information about terrorist attacks by the broadcasting organizations.²⁵ The liability for the “justification of terrorism,” which was established by an amendment to Russia’s Criminal Code in July 2007, may have a chilling effect on the freedom of speech and open debate concerning terrorism. Although the Russian criminal legislation attempts to define the public justification of terrorism as public

²² In January-February 2007, a group of eight independent jurists, members of the Eminent Jurists Panel on Terrorism, Counterterrorism and Human Rights, appointed by the International Commission of Jurists (ICJ) reiterated these major concerns after their visit to Russia to examine the impact of terrorism and counterterrorism measures on the rule of law and human rights (see, Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights 2007).

²³ Levinson (2007).

²⁴ Marluhina and Rozhdestvina (2007).

²⁵ Levinson (2007) p. 2.

statements that recognize terrorist ideology and practice as legitimate and deserving support and emulation, there are considerable risks of a politically-motivated enforcement of these legislative provisions.²⁶

The Federal Law on Mass Media has already been amended with a new restriction that prohibits public justifications of terrorism **by mass media sources**. Given that terrorism has always been a politically-charged term, it is very difficult to separate terrorism from other manifestations of politically motivated violence. The imposition of the ban on the vaguely defined justifications of terrorism can promote editorial self-censorship and restrictions on the freedom of expression. It may stifle investigative journalism and promote censorship of news media articles on contentious topics related to terrorism.²⁷

The criminalization of public calls to terrorist activity or public justification of terrorism also creates a situation for the competition of norms. The existing legislation on counteraction to extremist activity already prohibits public calls to extremism. The criminal legislation already establishes criminal liability for extremist activity. The latter, among other things, includes the preparation, planning, and performance of acts with the purpose of carrying out terrorist activity. In other words, the new law “On Counteraction to Terrorism” and amendments to the criminal legislation establish criminal liability for an activity that is already criminalized in the Russian law. The practitioners will face the difficult task of choosing a proper criminal qualification of the public calls to both terrorist and extremist activity. Under these circumstances, charging an individual for two crimes – public calls to terrorist activity and public calls to extremist activity – will violate an essential principle of criminal justice, namely that no one should be punished for the same criminal act twice.²⁸

Loop-Holes in the Regime of Counterterrorist Operation

Like the 1998 act “On Combating Terrorism”, the 2006 counterterrorism law allows for the suspension of certain individual liberties in the zone of a counterterrorist operation. Concerns have been expressed about the constitutionality of the new regime, the vagueness of its territorial and time limitations, and the lack of safeguards against human rights abuses under the pretext or in the name of combating terrorism.

The Russian Constitution of 1993 allows for certain derogations of rights and liberties in a state of emergency and in accordance with the federal constitu-

²⁶ Levinson (2007).

²⁷ Levinson (2007).

²⁸ Marluhina and Rozhdestvina (2007).

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tional law establishing the necessary procedures for introducing a state of emergency.²⁹ The two constitutional acts that provide for the establishment of a state of emergency in the Russian Federation are the Federal Constitutional Law “On the State of Emergency” (2001), and the Federal Constitutional Law “On Martial Law” (2002). Under the Constitution and these acts, the President is vested with the exclusive right to impose martial law or declare a state of emergency by issuing a presidential decree that must be approved by the Federation Council. Pursuant to Russia’s international obligations, the President is responsible for the notification of the UN and the Secretary Generals of the Council of Europe about any deviations from Russia’s obligations under international human rights treaties resulting from temporary restrictions on the rights and liberties under a martial law or a state of emergency. Both regimes are subject to numerous restraints and controls.

The regime of counterterrorism operation has not been defined in a federal constitutional law. It does not require the declaration of a state of emergency but imposes the same restrictions. Whereas the latter requires a clear delineation of its temporal and territorial boundaries and is subject to a fairly complicated procedure to extend its duration or geographical domain, the regime of a counterterrorist operation is not limited in either time or space, and the chief of the counterterrorist operation has ultimate discretion to determine the area and duration of the operation.³⁰ For instance, following the murder of a member of Dagestan’s parliament in December 2007, the republic’s counterterrorism committee established the regime of a counterterrorist operation in the Untsukul district to carry out large-scale sweeps to find the parliamentarian’s killers. The operation swiftly attracted a large number of security forces combing the area. In July 2008, a decision was made to extend the regime until November, and it might even be extended once again. This means that by the end of the counterterrorism operation it will have lasted for more than a year³¹.

The regime of a counterterrorist operation does not require international accountability or parliamentary oversight but grants enormous surveillance powers to the security forces, thus opening up possibilities for infringing on the basic rights of people. The regime warrants ID checks, screening of all types of communications, restrictions on movement, unhindered access to private homes and premises of organizations, various checks and searches, and other restrictions for the purpose of combating terrorism. The critics of the law state that it effectively strips individuals of any judicial protection and contradicts

²⁹ Federal constitutional laws top the hierarchy of federal laws in the Russian Federation.

³⁰ Levinson (2007).

³¹ Alikhanov and Magomedova (2008).

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to the constitutional provisions that require a court's decision for conducting any investigative or operational activities – screenings or searches – infringing on the individuals' rights to privacy.

The law does not, however, eliminate judicial supervision over the surveillance practices and criminal investigation. The articles of the law should be read and interpreted in conjunction with the provisions of other legal acts that are currently in force in the Russian Federation.³² The 2006 law contains a blanket norm providing for the possibility of imposing restrictions on the exercise of human rights and refers to other pertinent legislation for details about the procedures and requirements for using wiretapping and searchers. Russia's laws "On Operational-Search Activities" and "On the State Security Service" regulate investigative practices. These acts stipulate that a judicial decision is needed to authorize those surveillance measures and investigative tactics that violate individuals' constitutional rights, including the right to privacy of communication. Russia's Supreme Court in its authoritative interpretation of the law re-affirmed that the Russian courts are not allowed to use evidence obtained by using tactics that infringe on people's constitutional rights unless those measures received judicial authorization.³³ Only in very rare instances, when a situation demands urgent action to prevent a grave crime, can an investigative body carry out operational-search activities based on a non-judicial warrant with an obligatory notification within 24 hours of a judge who must authorize these measures within a 48-hour time frame. The interpretation of the law on counteraction to terrorism in conjunction with the legislation on the conduct of surveillance and criminal investigation calls for these same procedures.³⁴ Fears over the possibilities of abuse of the investigative and operational-search prerogatives are not unwarranted. Yet, the reason has less to do with the limitations of law than the rampant corruption of the law-enforcement offices.

Assessing the Effectiveness of the Counterterrorism Legislation and Drawing Conclusions about the Ways to Strengthen the Legal Basis for Counteraction to Terrorism in Russia

The effectiveness of a piece of legislation is typically assessed by looking at the extent to which the law has accomplished the goals envisaged by the lawmakers. The goals of the 2006 act "On Counteraction to Terrorism" are specified in the preamble to the law. The act purports to provide the legal and insti-

³² Trunov (2005).

³³ Petrushov, (2006).

³⁴ Marluhina and Rozhdestvina (2007); Petrushov (2006).

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tutional foundation for the prevention, suppression, and mitigation of the destructive effects of terrorism on the basis of a number of important principles. Among the top principles listed in the law are respect for human rights in the context of counterterrorism and the protection of rights and the legitimate interests of the victims of terrorism. Accordingly, Russia's counterterrorism legislation must be premised on the principle of protecting human rights. The latter principle, however, has not been embodied in the normative provisions of the counterterrorism legislation. It is also indisputable that the law has failed to establish the legal and organizational bases for a variety of preventive and protective measures against terrorism. The legal experts and practitioners concur that the legislative reform has had little impact on the prevention of terrorism. Today, as in the past, Russia lacks a comprehensive counterterrorism policy embracing legal, criminological, punitive, political, and other dimensions of the struggle against terrorism.

The law provides a more detailed description of measures aimed at suppressing terrorism. There are, however, gaps and inconsistencies in the existing legislation. The law attempted to resolve a long-standing quagmire between the FSB and MVD over the leadership in the counterterrorist operation by vesting the former with the sole authority over Russia's counterterrorism. In practice, however, this task in the North Caucasus is still performed by the MVD. Thus, the problem with establishing a single command for directing and coordinating counterterrorism responses has not been resolved by the legislation.

By emphasizing forceful, military-style responses and punitive measures aimed at suppressing terrorism, the 2006 law, inadvertently, fortifies a system of counterterrorism that prioritizes the "stick" over a more balanced approach to the counteraction of terrorism. The "stick" is the Russian armed forces that shell the houses and apartment blocks on the suspicion that terrorists are harbored there, and the special units of the security service that mop-up the villages and brutalize the population.

One of the reasons for the listed deficiencies of Russia's counterterrorism legislation is its reactive nature. The Russian counterterrorism laws have been adopted in a "catch-up" mode in response to the events and processes unfolding in the realm of counterterrorism. The latter, in turn, has been largely confined to the military and counterterrorist operations in Chechnya. The patterns of terrorism in the Chechen republic have been inseparable from the general dynamics of insurgency in the region. Subsequently, the Russian counterterrorism, counter-insurgency, and military combat operations have become tightly intertwined. The protracted brutal war has become a "counterterrorist operation", the governmental war strategy has transmogrified into Russia's

counterterrorism strategy, and the tools of conventional warfare and other coercive means for fighting insurgency have become the tactics of combating terrorism.³⁵ Since both the war and the counterterrorism operation have been led by the same people, funded from the same sources, and aimed at the same enemy, no effort has been made at distinguishing between terrorism and other forms of politically motivated violence, such as guerrilla warfare. Although the two are essentially different modes of operation, they have been approached using similar methods of counteraction.

The threat of terrorism is not the only source of instability in the North Caucasus. Separatism, Islamism, banditry, skirmishes between clannish, tribal and other communal groupings, low-scale insurgency, and organized crime threaten to destabilize the region.³⁶ Each of these factors of instability, and each individual conflict situation demand their own unique solutions. A blanket approach termed “counterterrorism” with excessive reliance on the use of force will be futile in reducing criminal violence and terrorism.

The lack of a comprehensive program of prevention and the use of excessive force as a primary means of combating terrorism have doomed Russia’s efforts to limit the growth of terrorism in Russia’s regions. The government needs a long-term counterterrorism strategy that will include socio-economic approaches and an effective system of prevention and protection from terrorist attacks along with the punitive and consequence management dimensions. The Russian legislators should address the corrosive effects of the counterterrorism legislation on the rule of law, civil society, and the media, and strengthen the safeguards against human rights violations in the counterterrorism legislation. The latter should also define the mechanisms of public accountability and legal responsibility for the abuse of authority, as well as ascribe liability for negligence and inaction in implementing the counterterrorism legislation.

Although there is, definitely, a need for further work at improving the legal framework for counteracting terrorism in the Russian Federation, legislative measures should not be viewed as a cure for the ineffectiveness of Russia’s efforts aimed at combating terrorism. The huge gap that exists between laws and their application in practice cannot be closed by adding amendments to the existing legislation or adopting new legislative mechanisms. The tag-of-war between Russia’s state agencies will continue to seriously impede the successful realization of counterterrorism responses. The enforcement of

³⁵ Baev (2004).

³⁶ Combating these types of threats is the responsibility of MVD, and this explains active involvement of the MVD forces in the territorial unites of the North Caucasus region.

counterterrorism laws will be unfeasible without the disruption of rampant corruption, the elevation of living standards in all regions of Russia, political and economic reforms, free democratic elections at all levels, as well as the establishment of necessary safeguards against human rights abuse.

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