



International Commission of Jurists

Opinion on the Russian Federation Amendments to the NGO Law on Foreign Agents

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Introduction

The law 121-FZ ("Amendments to the NGO Law"),¹ requires certain NGOs that receive foreign funding and engage in "political activity" to register as "foreign agents."² The law came into force on 20 July 2012 and amends previously existing legislation regulating the existence and activities of non-governmental organizations, designated as "non-commercial-organizations" according to Russian Law, by introducing a new concept of "foreign agent" to the Law On Non-Commercial Organizations N 7-FZ of 12 January 1996. NGOs which meet criteria set out in the law are required to enroll in the list of foreign agents, or face sanctions for non-compliance with these requirements. Reporting and administrative requirements, additional to those that apply to all NGOs, are imposed on NGOs listed as foreign agents.

This opinion addresses whether the *Amendments to the NGO Law of 2012* are in compliance with the Russian Federation's obligations to respect and protect the rights to freedom of association and expression as recognized by international human rights law. These rights are specifically guaranteed by the European Convention on Human Rights and the International Covenant on Civil and Political Rights, and are reinforced by the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders). The opinion will assess the extent to which the Amendments to the NGO Law in both their content and their application in practice, comply with these instruments.

A. General Principles

1. The capacity of individuals and legal entities to exercise the rights to freedom of expression and freedom of association, and their protection in law and in practice, is recognized in international human rights law as central to the functioning of a democratic and pluralist society.

2. The right to freedom of association is protected *inter alia* in article 20 (1 and 2) of the Universal Declaration of Human Rights (UDHR) which provides that: "(1) Everyone has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association". The same right is protected in Article 22(1) of the International Covenant on Civil and Political Rights (ICCPR) which states that: "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests." Article 11(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), states that "everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests."

3. The right to freedom of expression is protected *inter alia* in article 19 UDHR which states that "everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers". Article 19 (1 and 2) ICCPR provides that "1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either

¹ Law 121-FZ on the Amendment of the Legislation of the Russian Federation in respect of regulation of activities of Non-governmental Organizations Performing Functions of Foreign Agents.

² Paragraph 6 of Art 2 of Federal Law No 7-FZ 'On Non-Commercial Organizations' from 12 January 1996 (in its version amended by Law 121-FZ)

orally, in writing or in print, in the form of art, or through any other media of his choice.” Article 10 (1) ECHR, provides that: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises”.

4. The obligations of states to respect and protect these rights, and the extent to which they may be restricted³ in the public interest, is the subject of authoritative jurisprudence and commentary by international human rights bodies mandated to supervise their observance and enforcement, including the European Court of Human Rights and the UN Committee on Human Rights. International jurisprudence on the right to freedom of assembly is also relevant, as this right is protected together with freedom of association under article 11 ECHR and these rights share the same objective of allowing individuals to come together for the expression and protection of their common interests.⁴

5. The rights to freedom of association and freedom of expression, as guaranteed in international human rights law, may be subject to restriction or limitation under certain circumstances. However, in accordance with Article 10(2) and 11(2) ECHR, and Articles 19(3) and 22(2) ICCPR, such interference is only permissible where it is adequately prescribed by law; where it pursues a legitimate aim as provided in the applicable treaty, such as, for example, the protection of national security; and where the limitation or restriction can be shown to be strictly necessary in a democratic society in order to achieve its aim. This would be so where it serves a pressing social need and is proportionate to its aim. In section B, the ICJ assesses whether and to what extent the provisions of the Amendments to the NGO Law restrict or interfere with rights to freedom of association and of expression, or, put differently, the extent to which the content of the law and the manner in which it is applied affect the enjoyment of these rights; in section C, the ICJ analyses whether such restriction or interference is justifiable, in the sense of being adequately prescribed by law, and also necessary and proportionate to a legitimate aim.

6. It is well recognized in international human rights law that civil society organizations, including NGOs, play an essential role in fostering debate on matters of public importance in a democratic society, including on matters of public policy. The “essential contribution made by NGOs to the development and realization of democracy”⁵ is stressed in the Recommendation of the Council of Europe Committee of Ministers to Member States on the legal status of non-governmental organizations in Europe and in the Fundamental Principles on the status of Non-governmental organizations in Europe.⁶

7. Furthermore, case law of the European Court of Human Rights (the ECtHR) recognizes that the right to form an association such as an NGO is not only important as an end in itself, but also plays a crucial role in ensuring pluralism and democracy. Thus, in *Gorzelik and Others v. Poland*,⁷ where an NGO that represented the interests of an ethnic minority group was refused registration, the Grand Chamber of the ECtHR affirmed “the direct relationship

³ For the purposes of this opinion the ICJ has chosen to use the terms ‘restriction on rights’ or ‘interference with rights’ as interchangeable terms which both refer to any limitation of rights protected in international treaties.

⁴ That these two rights have common grounds of protection is recognized by the UN Human Rights Council in its Resolutions on the rights to freedom of peaceful assembly and association 15/21 nr A/HRC/RES/15/21, 6 October 2010; 21/16 , nr A/HRC/RES/21/16, 11 October 2012; 24/5, nr A/HRC/RES/24/5, 26 September 2013 establishing and extending the mandate of the Special Rapporteur on the rights to freedom of peaceful assembly and of association

⁵ Recommendation of the Committee of Ministers to member states on the legal status of non-governmental organizations in Europe, CM/Rec(2007)14, 10 October 2007

⁶ Fundamental Principles on the Status of Non-governmental Organizations in Europe and explanatory memorandum, 13 November 2002.

⁷ *Gorzelik and Others v. Poland*, App. No 44158/98, 17 February 2004, para. 88-9

between democracy, pluralism and the freedom of association and ... the principle that only convincing and compelling reasons can justify restrictions on that freedom". Further in *the United Macedonian Organization Ilinden and Others v. Bulgaria*⁸ where the registration of an NGO was refused on the ground that its articles of association included provisions which advocated national and ethnic hatred, the ECtHR, in declaring the restriction disproportionate and therefore contrary to Article 11 of ECHR, remarked that the norm "that citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning. The way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned".

8. The rights to freedom of association and expression are also reinforced by the Declaration on Human Rights Defenders,⁹ which in its articles 6-8 underlines the importance of participation of everyone (alone or in association) in the development and discussion of principles and ideas concerning human rights and their advocacy. Such participation may take different forms, including, among others, seeking and obtaining information; human rights advocacy; engaging in governance and the conduct of public affairs and submitting proposals for policy and legislative reform.

9. In its jurisprudence on freedom of association, the ECtHR has attributed a high value to the role of NGOs in promoting and debating matters of public interest. In *Vides Aizsardzibas Klubs v. Latvia*,¹⁰ the ECtHR found that an NGO engaged in environmental protection had the role of a "watchdog", which was "essential for a democratic society". This reasoning has also been applied to NGOs whose work relates to the advocacy of political reform, which lies at the heart of the democratic processes. In *Zhechev v. Bulgaria*,¹¹ the registration of an NGO had been refused on the ground that it was engaged in political activity and therefore was subject to registration as a political party. The ECtHR clarified that "associations [...] including those protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or asserting a minority consciousness, are also important to the proper functioning of democracy". The Court added that it "is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively."

10. The right of those representing NGOs to exercise freedom of expression when addressing matters of public interest, is also considered by international human rights authorities as requiring particular protection, since in this regard NGOs play a role similar to that of the media.¹² In *Chassagnou and Others v. France*¹³ the Court observed that "freedom of thought and opinion and freedom of expression, guaranteed by art 9 and 10 of the Convention respectively would thus be of very limited scope if they were not accompanied by a guarantee of being able to share one's beliefs of ideas in community with others, particularly through associations of individuals having the same beliefs, ideas or interests." In this regard, freedom of expression and freedom of association are closely linked, since "the implementation of the principle of pluralism is impossible without an association being able to

⁸ The United Macedonian Organization Ilinden and Others v. Bulgaria, App no 59491/00, 19 January 2006, para 57

⁹ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by Resolution of UN General Assembly A/Res/53/144, 8 March 1999, articles 6, 7, 8.

¹⁰ *Vides Aizsardzibas Klubs v. Latvia*, App no 57829/00, 27 May 2004, para 42

¹¹ *Zhechev v. Bulgaria*, App no 57045/00, 21 June 2007, para 35

¹² *Vides Aizsardzibas Klubs v. Latvia*, op cit. footnote 5, para 42

¹³ *Chassagnou and Others v. France*, App no 2833/95 and 28443/95, 29 April 1999, para 100

express freely its ideas and opinions."¹⁴ Therefore, the jurisprudence of the ECtHR maintains that "article 11 must be also considered in the light of the guarantees established under art 10 ECHR."¹⁵ In this respect, the ECtHR emphasized in *Ezelin v. France*¹⁶ that "art 10 is to be regarded as a *lex generalis* in relation to art 11 a *lex specialis*." In *United Macedonian Organization Ilinden and Others v. Bulgaria*¹⁷ the ECtHR observed that "such a link is particularly relevant where [...] the authorities' intervention against an association was, at least in part, in reaction to its views and statements."

11. The UN Human Rights Committee (HRC) in its General Comment No 34 regarding the right to freedom of expression protected in article 19 ICCPR observed¹⁸ that the right encompasses "the expression and receipt of communications of every form of idea and opinion capable of transmission to others...[including] ... discussion of human rights." The Committee held in particular that "it is not compatible with para 3 [of art 19 ICCPR] to invoke ... laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others for having disseminated such information."

B. Nature of the interferences with rights imposed by the Amendments to the NGO law

12. The Amendments to the NGO Law affect a large number of Russian Federation NGOs in multiple ways. They have an impact both on NGOs that choose to apply for registration as a "foreign agent", and those that choose not to do so. The ECtHR has established that Convention rights may be engaged where a restrictive or punitive measure has a deterrent or "chilling effect" on the exercise of rights to freedom of association or expression of those, such as the media, with a social watchdog role analogous to NGOs.¹⁹ The over-broad and vague terms of the Amendments, as well as current practice in their implementation as outlined below, places NGOs under particular pressure, as they find themselves at constant risk of being subjected to restrictive or punitive measures under the law. Such pressure may result in a chilling effect, deterring the exercise of freedom of association and expression for NGOs that want to pursue activities or debate on matters of public policy, including human rights, through organizing public events or disseminating information on such matters.

13. The cumulative impact of the amendments on NGOs, many of which play a vital role in the civil society of the Russian Federation and contribute significantly to the advancement of democratic processes and debate, is to unduly interfere with the rights to freedom of association and of expression of these organizations and their members. The particular ways in which the law, and its application in practice, interferes with these rights, are outlined in this section.

Consequences for NGOs that register as foreign agents

14. The additional requirements which the Amendments to the NGO Law impose on Russian NGOs,²⁰ which receive donations from foreign sources, amount to interference with rights

¹⁴ *Gorzelik and Others v. Poland*, op cit. footnote 3, para 91

¹⁵ *Young, James and Webster v. UK*, App no 7601/76 and 7806/77, 13 August 1981, para 57

¹⁶ *Ezelin v. France*, App. no 11800/85, 26 April 1991, para. 39

¹⁷ *United Macedonian Organization Ilinden and Others v. Bulgaria*, op cit. footnote 4, para 59

¹⁸ General Comment No 34, art 19: Freedom of opinion and expression, CCPR/C/GC/34, 12 September 2011, para 30

¹⁹ *Goodwin v UK*, Application No.17488/90, Judgment of 27 March 1996, para.39

²⁰ According to paragraph 3 of article 32 of 7-FZ in its amended version NGOs which fall under the definition of 'foreign agent' (paragraph 6 of article 2) are, additionally to the obligations provided in respect of all NGOs, required to organize separate accounting of the funds received from foreign sources; submit to Ministry of Justice quarterly reports on the purposes of funding received and on the factual spending, including of funding received from foreign sources; and deliver annual audit report; according to paragraph 1 of article 24 'foreign agents' are obliged to include to all 'materials' published or distributed by a such NGO a notification that these

protected in article 11 of the ECHR and article 22 ICCPR, and in some cases will also interfere with rights protected in article 10 ECHR and article 19 ICCPR. NGOs which register as foreign agents are subject to additional administrative burdens, including reporting and inspections, the effect of which is to interfere with these rights.

15. The imposition of administrative burdens has been found to engage article 11 ECHR on a number of occasions. In *Martin Balluch v. Austria*,²¹ where an organizer of a public event was later fined for non-compliance with a requirement to notify authorities regarding assemblies as provided in a regional Road Act, the ECtHR observed that such measures may in principle constitute "a hidden obstacle to the protected freedom". In that case the ECtHR considered it necessary to examine whether "an obligation [imposed on the applicant] encroached upon the essence of the right to freedom of assembly" or in other words if it "has or could have an effect on the right to assemble." Recently, in *Kasparov and Others v. Russia*²² in respect of the restriction to the right to freedom of assembly, the ECtHR emphasized 'that the interference does not need to amount to an outright ban, legal or de facto, but can consist in various other measures taken by the authorities.' Thus, in *Ezelin v. France*²³ the administrative measure imposed on the applicant in connection with his refusal to give evidence before the judge regarding an assembly in which he took part, amounted to a restriction of the right to freedom of assembly. In that case, the ECtHR made it clear that "the term 'restriction' in paragraph 2 of Article 11 and of Article 10 should not be read only as precluding measures - such as punitive measures - taken not before or during but after a meeting."

16. Other examples where such measures were identified as interfering with article 11 ECHR rights can be found in established case law of the ECtHR: in *Baczowski and others v. Poland*,²⁴ where the participants in an assembly had not received an authorization from the authority for holding an event, even where this decision was later quashed by an appeal court, the Court observed that "the refusals to give an authorization could have had a chilling effect on the applicants and other participants in the assemblies." In *Djavit An v. Turkey*²⁵ the prohibition for a participant of a meeting to move freely to the place where the meeting was held amounted to a restriction on freedom of assembly.

Stigmatization of organizations registered as "foreign agents".

17. Where an organization has chosen to comply with the law and registered as a "foreign agent" it is likely to be subject to misrepresentation and stigma through being labelled a "foreign agent," which in turn may lead to harassment and impede its effective operation, thus interfering with the right to freedom of association, and in some cases, with its right to freedom of expression. This view was expressed in a recent Venice Commission Opinion On the Draft Law Amending the Law on Non-

materials are published or distributed by a foreign agent. According to paragraph 4.6 of article 32 NGOs registered as foreign agents are subject to unplanned inspections carried out by a relevant authorities. However, according to the provisions of para 3 of article 32 of the Non-commercial Organizations Act in force before Amendments to the NGO Law, NGOs were obliged to provide Ministry of Justice with an annual report including information concerning management structure (including personal information) and information regarding financial sources (including information on the factual spending of received funding). The same report had to be published in the internet to be publicly accessible (para 3.1 en 3.2 of previous version of the Non-commercial Organizations Act)

²¹ *Martin Balluch v. Austria* (dec.), App no 4471/06, 25 September 2012, para 24

²² *Kasparov and Others v. Russia*, App no 21613/07, 3 October 2013, para 84

²³ *Ezelin v. France*, App no 11800/85, 26 April 1991, para 39, similar approach to be found in *Mkrtchyan v. Armenia*, App no 6562/03, 11 January 2007, para 37; *Galstyan v. Armenia*, App no 26986/03, 15 November 2007, para 100; *Osmani and ors v. FYROM* (dec.), App no 50841/99

²⁴ *Baczowski and others v. Poland*, App no 1543/06, 3 May 2007, para 67

²⁵ *Djavit An v. Turkey*, App no 20652/92, 20 February 2003, para 57

commercial organizations and other legislative acts of the Kyrgyz Republic:²⁶ “In light of the negative connotation of the term ‘foreign agent’, a non-commercial organization labelled as a ‘foreign agent’ would most probably encounter an atmosphere of mistrust, fear, hostility, which would make it difficult for it to operate. Other people, and, in particular, representatives of state institutions will be likely to be reluctant to co-operate with them, in particular in discussions on possible changes to legislation or public policy. The labelling of a non-commercial organization as foreign agent and the obligation for it to include a reference to the ‘foreign agent origin’ in any materials published or distributed by such an organization therefore, together with the additional obligations which ensue from this labelling, undoubtedly represent an interference with the exercise of the right to freedom of association and of freedom of expression without discrimination.”. Furthermore, such stigmatization based on international fundraising of NGOs which work to achieve the full realization of rights guaranteed in the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) runs contrary the spirit of both Covenants which proclaim²⁷ the necessity for “international assistance and co-operation, especially economic and technical” in achieving the full realization of the protected rights.

Punitive measures for failure to register

18. Recently, NGOs that have failed to comply with the requirement to register as a ‘foreign agent’ have been subject to various punitive measures under the Amendments to the NGO Law. These measures necessarily interfere with the exercise of the right to freedom of association and, in certain cases, freedom of expression, of the organization concerned.²⁸ Thus, for example, the activities of Regional Public Association Golos were suspended on 30 September 2013 by a decision of Ministry of Justice in connection with non-compliance of the organization with the requirement to enrol in the list of foreign agents.²⁹ Another association of the non-commercial organization ‘Golos’ and its head were fined 300 000 Russian roubles (some 8 000 EUR) and 100 000 Russian roubles (some 2300 EUR) respectively for carrying

²⁶ European Commission for Democracy through law (Venice Commission) and OSCE office for democratic institutions and human rights (OSCE/ODIHR), joint interim opinion On the Draft Law Amending the Law on Non-commercial organizations and other legislative acts of the Kyrgyz Republic, 1-12 October 2013, para 47

²⁷ Article 2 of the International Covenant on Economic, Social and Cultural Rights

²⁸ (a) Liability under the Code of Administrative Offences.

(1) Art 19.34 of the Code of Administrative Offences in paragraph 1 administrative fine up to 300 000 roubles (physical persons) and 500 000 roubles (legal entities) as punishment for carrying out activities without being registered as a ‘non-governmental association performing a function of a foreign agent’ or publishing or spreading materials without indication that it is being published or spread by a ‘non-governmental association performing a function of a foreign agent’.

(2) Art 19.7-5.2 provides punishment for failure to provide, or failure to provide in a timely manner, information required from a ‘non-governmental association performing a function of a foreign agent’. Such administrative offence will be punished with a fine up to 30 000 roubles (physical person) or 300 000 roubles (legal entity)

(b) Liability under the Criminal Code. Art 330(1) of the Criminal Code, which provides that malicious evasion from applying to be included in the list of non-governmental associations performing a function of a foreign agent will be subject to a fine amounting to 300 000 roubles (around 8 000 EUR), or up to 480 hours of involuntarily work or 2 years of compulsory labour or 2 year imprisonment.

(c) suspension (ban) of activities of an organization for a period of up to 6 months (ex part 6 of para 5 of art 32 of 7-FZ). The suspension of activities means, under para 6.1 of art 7-FZ, inter alia, suspension of statutory rights which this organization has in any media, prohibition of organization of any public events, and prohibition of use of its bank account(s).

²⁹ <http://minjust.ru/node/5593> - information note at the Ministry of Justice website (the activities of Regional Public Association for protection of rights and freedoms ‘Golos’ were suspended till 30 December 2013 due to the failure to enrol in the list of foreign agents)

out activities of the NGO without being registered as a foreign agent.³⁰ Many NGOs have had to seek liquidation³¹ as a consequence of the punitive measures applied under the law.

19. The imposition of such punitive measures constitutes an interference, and therefore a restriction of article 11 rights, as affirmed by the ECtHR in the cases of *Christian Democratic People's Party v. Moldova*,³² where a temporary one-month ban was imposed on activities of a political party, and in *Skiba v. Poland*.³³ In the latter case, the applicant was subjected to a fine for having knowingly disregarded the domestic law under which, as the organizer of the planned public meeting, he was required to give the authorities prior notice.

Restriction on ability to seek financial support

20. The Amendments to the NGO Law have a significant impact on the ability of NGOs to seek and receive financial support from any foreign source,³⁴ whereas article 13 of the Declaration on Human Rights Defenders stresses the important role such ability plays for effective operation of an NGO. As noted above, article 2 of the ICESCR expressly stresses the necessity of "international assistance and co-operation, especially economic and technical" in achieving the full realization of the rights protected under this Covenant. Such assistance and cooperation also includes the financial support of NGOs engaged in activities to achieve the full realization of those rights. The importance of safeguarding the capacity of NGOs to engage in fundraising activities has also been stressed in the recent Report of the Special Rapporteur on the right to freedom of peaceful assembly and of association, Maina Kiai, who emphasized with reference to the jurisprudence of the Human Rights Committee³⁵ that "fundraising activities are protected under article 22 of the Covenant, and funding restrictions that impede the ability of associations to pursue their statutory activities constitute an interference with article 22."³⁶ The Human Rights Council in its Resolution 22/6³⁷ calls upon states not to criminalize or delegitimize activities in defence of human rights on account of the origin of funding.

21. Under the Amendments to the NGO Law, many NGOs are confronted with an unacceptable choice. They may opt to stop receiving foreign funding, which will have a significant impact on their finances and their on their capacity to carry out their work effectively, and may threaten their very viability and survival. Alternatively, they may register as a foreign agent, which, as described above, is likely to impair their capacity to function effectively, if at all. In cognisance of such likely effects, the ECtHR has recognized that restrictions on funding of NGOs may adversely and impermissibly interfere with the exercise of freedom of association by the NGO and its members. Thus, in *Ramazanova and Others v. Azerbaijan*³⁸ the Court acknowledged that "...even assuming that theoretically the association had a right to exist, the domestic law effectively restricted the association's ability to function properly. It could not, *inter alia*, receive any "grants" or financial donations which constituted one of the main sources of financing of non-governmental organizations

³⁰ <http://www.svoboda.org/content/article/24967911.html>

³¹ <http://www.dw.de/замглавы-голоса-о-ликвидации-нко-первые-но-не-последние/a-16937342>

³² *Christian Democratic People's Party v. Moldova*, App no 28793/02, 14 February 2006, para 47

³³ *Skiba v. Poland* (dec.), App no10659/03, 7 July 2009

³⁴ According to amended paragraph 6 of Article 2 funding from a foreign source is defined as "financial or other means received from foreign states, their bodies, international and foreign organisations, foreign citizens and stateless persons or their representatives, and from Russian legal entities, receiving their property or other assets from these foreign sources."

³⁵ Communication of Human Rights Committee, 16 October-3 November 2006, No. 1274/2004, U.N. Doc. CCPR/C/88/D/1274/2004 (2006), para 7(2): "[...] the Committee observes that the right to freedom of association relates not only to the right to form an association, but also guarantees the right of such an association freely to carry out its statutory activities."

³⁶ Report of the Special Rapporteur on the right to freedom of peaceful assembly and of association, A/HRC/23/39, 24 April 2013, para 16

³⁷ Human Rights Council Resolution 22/6, Protecting human rights defenders, A/HRC/Res/22/6, para 9 (b).

³⁸ *Ramazanova and Others v. Azerbaijan*, App no. 44363/02, 1 February 2007, para 59

in Azerbaijan. Without proper financing, the association was not able to engage in charitable activities which constituted the main purpose of its existence." Similarly, in *Parti Nationaliste Basque-Organization Regionale D'Iparalde v. France*,³⁹ a prohibition on a political party receiving foreign funding was characterized as an interference with freedom of association, "having regard to the impact of the circumstances in issue on the applicant party's financial capacity to carry on its political activities."

Interference with the right to freedom of expression of NGOs and their members

22. Restrictions on the right to freedom of association of NGOs under the Amendments to the NGO law will, in many cases, also interfere with their right to freedom of expression, and in particular, their right to receive and impart information and ideas, and the public's right to receive such information and ideas⁴⁰ as protected in article 10 ECHR, and article 19 ICCPR. In this respect, provisions of the Amendments to the NGO Law directly affect freedom of expression where an NGO engaged in activity on "forming public opinion" is recognized as being engaged in political activity and therefore obliged to comply with additional requirements of the Law. Thus NGOs are limited in expressing opinions and disseminating information regarding matters of public importance. For example, in respect of the Kostroma Centre of Support to Public Initiatives, Sverdlovskij District Court of Kostroma found in its judgment of 2 August 2013 that the NGO was engaged in political activity on the grounds that it organized a public round table discussion: 'Reset of Reset: Where do US-Russia relations go?' and published the results of local elections monitoring on its website.⁴¹ On 29 November 2013, the Saratov Centre of Social Policy and Gender Studies in the judgment of Kirov District Court of Saratov was recognized as a foreign agent and obliged to enrol itself in the list of foreign agents on the ground that it has received foreign funding to pursue a political activity, namely, to publish a book (monograph) entitled '*Critical analysis of social policy within Post-Soviet area*' and to organize a conference on "Reviewing social policy within post-soviet space: ideologies, actors and cultures."⁴²

C. Permissible restrictions on or interferences with freedom of association and expression

23. Under both the ECHR and the ICCPR, rights to freedom of association, assembly and expression may be subject to narrow tailored restrictions or interference, provided certain strict conditions are met. A State's domestic law may therefore impose requirements for the registration and regulation of NGOs, but only in "a manner compatible with their obligations under the Convention and subject to review by the Convention institutions."⁴³ In accordance with paragraphs 2 of articles 10 and 11 of ECHR and paragraph 3 of articles 19 and 22 of the ICCPR any such restriction must be clearly prescribed by law, designed to serve one of the legitimate purposes listed in the relevant treaty, and must restrict the rights of those concerned only to the degree necessary and proportionate to that purpose.⁴⁴ In its General Comment No 34 concerning the obligations of States Parties to the ICCPR in respect of freedom of expression (article 19 of ICCPR)⁴⁵ the Human Rights Committee stressed that "extreme care must be taken to ensure that [...] provisions relating to national security [...]

³⁹ *Parti Nationaliste Basque-Organization Regionale D'Iparalde v. France*, 71251/01, 7 July 2007, para 38

⁴⁰ *Lingens v. Austria (No 1)*, App no 9815/82, 8 July 1976, para 41, para 42

⁴¹ <http://k1news.ru/news/politics/kostromskikh-obshchestvennikov-vse-taki-priznali-agentami-zapada/>

⁴² <http://www.hrw.org/ru/news/2013/12/09/rossiya-pervoe-reshenie-po-grazhdanskomu-isku-o-registratsii-inostrannogo-agenta>

⁴³ *United Macedonian Organization Ilinden and Others v. Bulgaria*, op cit. footnote 4, para 57

⁴⁴ *Gorzelik v Poland*; *Koretsky v Ukraine* App no 40269/02, 3 April 2008; *Sidiropoulous and others v Greece* App no 26695/95, 10 July 1998; Human Rights Committee General Comment 31, para.6; GC.34 paras.21-22; United Nations, Economic and Social Council, Siracusa Principles on Limitations and Derogations in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985)

⁴⁵ General Comment No 34, art 19: Freedom of opinion and expression, CCPR/C/GC/34, 12 September 2011, para 30

are crafted and applied in a manner that conforms to the strict requirements of paragraph 3."⁴⁶ The same principle of proportionality is stressed in the jurisprudence of the Constitutional Court of the Russian Federation (the Constitutional Court) in relation to restrictions on constitutional rights and non-discrimination in paragraph 3 of article 55 and article 19 of the Constitution of the Russian Federation respectively.⁴⁷

Restrictions must be adequately prescribed by law

24. As noted above, any restrictions on or interference with rights to freedom of association or expression must be prescribed by law, in accordance with the general principle of legality. For a measure that restricts or interferes with rights to meet this requirement, it must be established in terms that are sufficiently precise to allow their consequences to be reasonably foreseeable. In *Koretsky v. Ukraine*,⁴⁸ the ECtHR observed that: "the law should be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail." The same standard was affirmed by the HRC in its General Comment No 34:⁴⁹ "a norm, to be characterized as a 'law', must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not."

25. Paragraph 6 of article 2 of Law 7-FZ in its amended version defines a foreign agent as an organization which receives funding from a "foreign" source and is engaged in "political activity" in the Russian Federation. Accordingly, funding from a foreign source is defined as "financial or other means received from foreign states, their bodies, international and foreign organizations, foreign citizens and stateless persons or their representatives, and (or) from Russian legal entities, receiving their property or other assets from these foreign sources (with the exception of government-sponsored open stock companies and their subsidiaries)". Further, political activity for the purpose of this article includes "the organization and conduct of political actions aimed at influencing decision-making by state bodies intended to change state policy pursued by them, as well as forming public opinion for the aforementioned purposes". Paragraph 6 of article 2 excludes from the concept of political activity academic, cultural, artistic activity, activity in the areas of public health, citizens health protection and disease prevention, social support and security, protection of motherhood and childhood, social security for people with special needs, advocacy for healthy living, physical exercises and sport, protection of flora and fauna, charity activity, and also activity for promotion of charity and voluntary work.

26. These provisions read together with other relevant legal provisions, appear to be impermissibly vague, in relation to their scope and effect, in a number of respects. First, the

⁴⁶ Para 3 of art 19 of International Covenant on Civil and Political Rights provides as follows: '3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.'

⁴⁷ Judgments of the Constitutional Court of the Russian Federation: 13 February 2013 No 4-P; 17 January 2013, No 1-P; 19 March 2003 No 3-P; 13 March 2008 No 5-P; 27 May 2008 No 8-P; 13 July 2010 No 15-P

⁴⁸ *Koretsky v. Ukraine*, App no 40269/02, 3 April 2008, para 47

⁴⁹ General Comment No 34, art 19: Freedom of opinion and expression, cit. op footnote 17, para 25

notion of "political activity" - a condition for registration as a foreign agent under the Amendments to the NGO Law⁵⁰ - is undefined, and is prone to overly broad and even abusive application. "Political activity" was similarly ill-defined in the case *Zhechev v. Bulgaria*,⁵¹ where the ECtHR observed that "bearing in mind that this term is inherently vague and could be subject to largely diverse interpretations, it is quite conceivable that [...] courts could label any goals which are in some way related to the normal functioning of a democratic society as 'political' and accordingly direct the founders of legal entities wishing to pursue such goals to register them as political parties instead of 'ordinary' associations." The ECtHR further stressed that "a classification based on this criterion is therefore liable to produce incoherent results and engender considerable uncertainty among those wishing to apply for registration of such entities."

27. The concerns with the Amendments to the NGO Law in this respect are exemplified in a ruling on 12 December 2013 by Leninskij District Court of Saint-Petersburg, which approved the civil claim of the prosecution office of Admiraltejskij District of Saint-Petersburg by finding that all activities of the Anti-Discrimination Centre "Memorial"⁵² fall under the definition of a foreign agent. In this judgment, neither the Court nor the applicant (prosecution office) specified which particular activities were or could be considered political within the meaning of Amendments to the NGO Law. Earlier the prosecution initiated administrative liability proceedings against the same NGO, claiming that filing a report entitled *Roma, migrants, activists: victims of police abuse* before the United Nations Committee Against Torture (CAT) formed part of the political activities of the NGO. After the administrative liability proceedings were quashed in judicial proceedings, the prosecution filed a civil claim requesting the courts to oblige the NGO to enrol itself in the list of foreign agents.

28. A further concern is that the list of the activities which are excluded from the definition of "political activity" under paragraph 6 of article 2 of the Amendments to the NGO law is not formulated with sufficient clarity. Neither does the interpretation of this list by the relevant authorities or courts allow for a clear understanding of which activity requires, or does not require, registration as a foreign agent. In practice, there are several examples of over-broad interpretation of "political activity" and disregard of the list of activities which are explicitly excluded from this notion under article 6 para.2. According to the judgment of the Kirov District Court of Saratov of 29 November 2013, the Saratov Centre of Social Policy and Gender Studies, which carries out purely academic research in social policies, was recognized as a foreign agent.⁵³ Furthermore, a number of NGOs which engage in ecological activities and pursue charitable ecological aims received warnings from local prosecution offices according to which their activities were considered to be political, and were required to enrol themselves in the list of foreign agents. The Irkutsk Region Public Organization "Baikal Ecologic Wave", Amur Region Public Ecological Organization "AmurSoEs", Chelyabinsk Region Charity Fund "For Nature", Habarovsk Area Charity Public Organization "Green House" have been considered as falling under the definition of foreign agent.⁵⁴ The Irkutsk NGO "Centre of Independent Social Research and Education" has been warned by the prosecution that pursuing activities in accordance with its articles of association, namely, providing

⁵⁰ Para 6 of art 2 (b): 'Political activity for the purpose of this article includes 'the organization and conduct of political actions aimed at influence over the decision-making by state bodies intended for the change of state policy pursued by them, as well as shaping of public opinion for the aforementioned purposes'. The concept of political activity excludes academic, cultural, artistic activity, activity in the areas of public health, citizens health protection and disease prevention, , social support and security, protection of motherhood and childhood, social security for people with special needs, advocacy for healthy living, physical exercises and sport, protection of flora and fauna, charity activity, and also activity for promotion of charity and voluntary work'

⁵¹ *Zhechev v. Bulgaria*, op cit. footnote 6, para 55

⁵² <http://www.memo.ru/d/180300.html>

⁵³ http://www.kasparov.ru/material.php?id=5297706E0083A§ion_id=434531DDE0DD8

⁵⁴ <http://www.wwf.ru/resources/news/article/11191>

services in the area of social research for, among others, state and municipal bodies, and distributing information concerning its activities would be considered as a public political activity.⁵⁵

29. Under the Amendments to the NGO Law, many NGOs find themselves subject to obligations to be registered as a foreign agent, where they engage in activity which is connected in any way with "forming a public opinion". However, the law does not provide any specific criteria of the circumstances in which public opinion may be said to have been influenced by the activities of an NGO. Thus, a prosecution office considered the activity of sociological research centre the 'Levada Centre' as political activity on the grounds that it carries out and publishes the results of sociological research and expresses its ideas regarding different matters of current political debate. Therefore, the NGO was found to be pursuing a political activity.⁵⁶ In the case of the Saratov Centre of Social Policy and Gender Studies, the mere fact that the NGO had a website where it published the results of its research was enough for the prosecution to consider that the NGO engaged in forming of public opinion.⁵⁷ In a prosecution warning sent to 'Panorama Centre' by the Moscow prosecution office, the activity of the NGO was found to be political on the ground that it had formed public opinion by publishing on its own website ('scilla.ru') information regarding its assessment of political processes in Moscow and in the Russian regions, including assessment of possible shortcomings of the authorities.⁵⁸ The application of the law in these cases constitutes a highly problematic conflation of dissemination of the results of scientific research and the conduct of advocacy. The implications are that any scientific work could be considered political activity, where the research concerns any matters of public debate or policy.

30. Another criteria for the status of foreign agent is "receiving money or other assets from a foreign source". The wording of this provision is not sufficiently precise for NGOs to be able to foresee at what point in time they may be considered as receiving "money or other assets from a foreign source" and how far this definition applies retrospectively, to funds received in previous years. In particular, Russian courts do not demonstrate consistency in interpreting what should be understood to fall within the definition of "foreign funding". In the judgment of the Presnenskij Moscow Regional Court of 14 June 2013 in respect of Association Golos, it was found a financial award from an international NGO, awarded before the Amendments to the NGO Law came into force and furthermore, refused by the NGO, so that the money only went as far as the transit account of its bank, amounted to receipt of "funding from a foreign source."⁵⁹

31. Where terms used in para 6 of Article 2 of the Amendments to the NGO law, such as "political activity", "receiving money or other assets from a foreign source" or "forming of public opinion" are worded in general terms and are not sufficiently clear, the Ministry of Justice and the other relevant authorities, such as, the prosecutorial authorities, are afforded wide discretion to intervene in matters relating to the application of the Law on Non-Commercial Organizations, including interpreting the meaning and scope of the terms provided by law, for the purposes of identifying which organizations should have been registered as foreign agents and applying controls and penalties under the law. Considering the vagueness of the definition of "foreign agent" the conferring of such discretion is likely to lead to arbitrariness in the application of the law. For example, the application of Chuvash human rights protection organisation Schit i Mech (Shield and Sword) to be enrolled in the list of foreign agents was refused by the Ministry of Justice with no detailed explanation of

⁵⁵ <http://article20.org/files/3-26-2.jpg>

⁵⁶ <http://www.levada.ru/22-05-2013/sotsiologiyu-obyavili-inostrannym-agentom>

⁵⁷ <http://democrator.ru/problem/11646/>

⁵⁸ <http://lj.rossia.org/users/anticomproamat/2053674.html>

⁵⁹ <http://sobesednik.ru/news/20130614-cto-zhdet-v-budushchem-assotsiatsiyu-golos-vozmozhnye-resheniya>; http://www.gazeta.ru/politics/2013/04/09_a_5249277.shtml

which activities in particular an NGO has to pursue to satisfy the requirements of the status of foreign agent.⁶⁰ Later the same year prosecutors carried out an inspection of this NGO referring to an assumed violation of the Amendments to the NGO Law.

32. A particular point of concern in regard to the foreseeability of liability for sanctions under the law, is that the grounds for criminal liability under Article 330(1) of the Criminal Code are not separated clearly from the grounds of liability under Article 19.34 of the Code of Administrative Offences, thus giving room for arbitrary application of the law. This standard in this regard was set forth by the ECtHR in *Karademirci and others v. Turkey*.⁶¹ "[I]n the Court's view, if, [...] a failure to comply with a formal procedure constitutes a criminal offence, the law must clearly define the circumstances in which it will apply. [...] This requirement will be satisfied if the individual is able to establish from the wording of the relevant provision, and if need be with the assistance of the courts' interpretation of it, the acts and omissions which will make him criminally liable." In its official opinion⁶² on the proposed draft of the Amendments to the NGO Law, the Supreme Court of the Russian Federation has expressed its concern regarding compliance of amendments to Article 330.1 of the Criminal Code with the formal foreseeability test. In particular the Supreme Court has pointed out that the criteria of "excessive" violation, which distinguish grounds of administrative and criminal liability is of evaluative nature and therefore can cause difficulties in its interpretation and application. Furthermore, criminal liability for failure to comply with the law established without designating specific shortcomings in its application.

33. The ECtHR has previously found a violation of article 11 of the ECHR due to the vagueness of legislative provisions regulating NGOs, in *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*⁶³ where it found that the provisions of the national NGO Act did not meet the "quality of law requirement" considering that the discretion of the authorities to intervene on the basis of insufficiently precise provisions did not satisfy the standard of foreseeability:

"the Court agrees [...] that the above provisions are worded in rather general terms and may give rise to extensive interpretation. The Government have not submitted any examples of domestic judicial cases which would provide a specific interpretation of these provisions. In such circumstances, the NGO Act appears to have afforded the Ministry of Justice a rather wide discretion to intervene in any matter related to an association's existence. This situation could render it difficult for associations to foresee which specific actions on their part could be qualified by the Ministry as "incompatible with the objectives" of the NGO Act."

34. The same approach was taken in *Koretskyy v. Ukraine*⁶⁴ where the Court found that "the provisions [...] regulating the registration of associations were too vague to be sufficiently 'foreseeable' for the persons concerned and grant an excessively wide margin of discretion to the authorities in deciding whether a particular association may be registered. In such a situation, the judicial review procedure available to the applicants could not prevent arbitrary refusals of registration."

35. In light of the above, the ICJ considers that the inherently vague scope of application of the law, and in particular the wide and unclear definition of "political activity" as well as of other terms in the law, mean that NGOs are unable to predict with any certainty whether or not they will be required to register as "foreign

⁶⁰<http://m.forbes.ru/article.php?id=233313>

⁶¹ *Karademirci and others v Turkey*, App no 37096/97, 37101/97, 25 January 2005, para 40

⁶² The Supreme Court of Russian Federation, official opinion on the legislative draft of the Amendment of the Legislation of the Russian Federation in respect of regulation of activities of Non-governmental Organizations Performing Functions of Foreign Agents, 29 June 2012, No 2-SC-3395/12

⁶³ *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, App no 37083/03, 8 October 2009, para 62

⁶⁴ *Koretskyy v. Ukraine*, op cit. footnote 17, para 48

agents”, or when they will be liable to criminal or administrative penalties under the law. Furthermore, the broad terms in which the law is formulated leave room for inconsistent or arbitrary application of the law by courts. The only conclusion to be drawn is that the law as it is presently formulated is contrary to the general principle of legality and to the Russian Federation’s international legal obligations to ensure that any contemplated restrictions with or interferences to the right to freedom of association or freedom of expression meet the requirements of prescription by law.

The measures must seek to achieve a legitimate aim

36. Even if the provisions of the Amendments to the NGO Law are considered to be sufficiently precise and foreseeable in their application to satisfy the requirement of prescription by law, they must nevertheless satisfy the international human rights law requirement that restrictions on rights to freedom of association or expression must serve a legitimate aim. Articles 11(2) and 10(2) of the ECHR set out an exhaustive list of the legitimate aims which can justify restrictions on freedom of association and expression. In respect of freedom of association, under article 11(2), these aims are the interests of national security or public safety, the prevention of disorder or crime, the protection of health or morals and the protection of the rights and freedoms of others. In respect of freedom of expression, under article 10(2), legitimate aims are stated to be the interests of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, preventing the disclosure of information received in confidence, or and maintaining the authority and impartiality of the judiciary. Articles 19(3) and 22(3) of the ICCPR also set out an exhaustive list of aims which can justify legitimate restrictions on rights guaranteed under those articles. Article 19(3) specifies that restrictions on freedom of expression can be imposed only to protect national security, public order (*ordre public*), health, morals or the fundamental rights or reputation of others. Article 22(3) specifies similar legitimate aims, with the addition of public safety.

37. The purpose of the Amendments to the NGO Law was declared in the commentary to the draft law introducing the amendments⁶⁵ as being "to secure openness and publicity in activities of foreign agents and to establish extra public control over activities of organizations engaged in political activity and receiving foreign funding". It is not clear, and the authorities have not put forward arguments to establish, that the restrictions on rights imposed by the law are designed to serve one of the legitimate aims specified under the relevant articles of the ECHR or the ICCPR.

Restriction on rights must be necessary and proportionate to a legitimate purpose

38. Even if the Amendments to the NGO Law may be considered to serve a legitimate aim, it must still be examined whether the restrictions they impose are necessary in a democratic society for the achievement of these aims. As has been established in the jurisprudence of the ECtHR, this requires that the measure must serve a pressing social need and must be proportionate to this need - which means that in their severity, scope and duration, the measures must be the least restrictive means available to the authorities to achieve their aim.

39. In its established case-law the ECtHR has continuously shown particular reluctance to accept as necessary restrictions on participation in debate concerning matters of public

⁶⁵ Commentary to legislative draft, available at official website of State Duma; <www.asozd2.duma.gov.ru/>; See also verbatim records of parliamentary debates on the draft of 6 July 2012, available at the same website.

interest. Thus, in *Arslan v. Turkey*,⁶⁶ the ECtHR recalled that "that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest. Furthermore, the limits of permissible criticism are wider with regard to the government than in relation to private citizens or even politicians. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion." The HRC in its General Comment No 34 regarding article 19 ICCPR⁶⁷ affirmed that: "restrictions must not be overbroad. [...] The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law." The HRC has indicated that certain laws are incompatible with article 19, including those which "suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute [...] human rights defenders for having disseminated such information".⁶⁸

Whether the law serves a pressing social need

40. The purpose of the Amendments to the NGO Law has been declared as being "to secure openness and publicity in the activities of foreign agents and to establish extra public control over activities of organizations engaged in political activity and receiving foreign funding". It is difficult to see how such greater public control over NGOs would be necessary, or even appropriate, for the objectives of protection of national security or public order or the rights and freedoms of others. It is even less evident that the particular restrictions applied to NGOs' rights under the Amendments may be said to meet a pressing social need. It is therefore open to serious doubt whether the law meets the standard set out by the Human Rights Committee in *Lee v. Republic of Korea*⁶⁹ where it underlined, in respect of the necessity of the restriction in a democratic society, that: "the existence of any reasonable and objective justification for limiting the freedom of association is not sufficient. The State Party must further demonstrate that the [restrictions] are in fact necessary to avert a real, and not only hypothetical danger to the national security or democratic order, and that less intrusive measures would be insufficient to achieve this purpose."

41. The ECtHR found in *Koretskyy v. Ukraine*⁷⁰ that the refusal to register an NGO on the grounds of the inconsistency of their articles of association with the law, in particular the prohibition on NGOs distributing propaganda and lobbying for their ideas and aims, involving volunteers as members or carrying out publishing activities, with no "explanation for, or even an indication of the necessity of the existing restrictions", did not pursue "a pressing social need."

42. In none of the cases in which the law has already been applied to designate NGOs as foreign agents, have the authorities invoked any "relevant and sufficient" reasons for the need to restrict rights to freedom of association or expression.⁷¹ In the majority of the cases in which the law has been applied, as described above⁷² NGOs were served with a warning to enrol in the list of foreign agents or administrative measures were imposed on them for

⁶⁶ *Arslan v. Turkey*, App no 23462/94, 8 July 1999, para 46

⁶⁷ General Comment No 34, art 19: Freedom of opinion and expression, op cit. footnote 16, paras 34-5

⁶⁸ General Comment No 34, art 19: Freedom of opinion and expression, op cit. footnote 40, para 30

⁶⁹ *Lee v. Republic of Korea* (1119/2002), ICCPR, A/60/40 vol II (20 July 2005) 174, para 7.2

⁷⁰ *Koretskyy v. Ukraine*, op cit. footnote 17, paras 52-4

⁷¹ Paras 2 of Article 10 and Article 11 ECHR, General Comment No 34, art 19: Freedom of opinion and expression, op cit. footnote 40, para 30 *Stankov and United Macedonian Organization Ilinden v Bulgaria*, App nos 29221/95 29225/95, 2 October 2001, para 87

⁷² See for example, among others, text of prosecution warnings received by Panorama-Centre, available at < <http://lj.rossia.org/users/anticompromat/2053674.html>>; Centre of Independent Social Research and Education, available at < <http://article20.org/files/3-26-2.jpg>>; Saratov Centre of Social Policy and Gender Studies, available at: < <http://democrator.ru/problem/11646/>>

failure to do so solely on the basis of analysis of their articles of association, websites and current activities. In each of those cases relevant authorities, including courts, failed to explain in which particular way the enrolment of a particular NGO in the list of foreign agents would serve the purpose of the Amendments to the NGO Law, namely "to secure openness and publicity in activities of foreign agents and to establish extra public control over activities of organizations engaged in political activity and receiving foreign funding." Still less has it been clear why the measures are necessary to protect one of the legitimate aims specified in the relevant articles of the ECHR and ICCPR.

43. When assessing the pressing social need for measures taken under the Amendments to the NGO law, it should be considered that Russian NGOs, under the legislation which applied before the entry into force of the Amendments, were already obliged to report regularly to the relevant authorities.⁷³ The amendments to the NGO Law applied extra requirements to NGOs registered as foreign agents, including reporting requirements, but neither the wording of the Amendments themselves nor their implementation in practice by the relevant domestic authorities or courts, provide any grounds on which to conclude that these extra requirements are necessary to serve the expressed purpose of the law, namely "openness and publicity in activities of foreign agents" or any legitimate aim under international human rights law.

44. In *Zhechev v. Bulgaria*⁷⁴ the Court observed that where non-governmental organizations could not take part in any level of election there was "therefore no 'pressing social need' to require every association deemed by the courts to pursue 'political' goals to register as a political party. "That would mean [...]subjecting it to a number of additional requirements and restrictions [...]which may in some cases prove an insurmountable obstacle for its founders. Moreover, such an approach runs counter to freedom of association, because, in case it is adopted, the liberty of action which will remain available to the founders of an association may become either nonexistent or so reduced as to be of no practical value."

45. Specifically in respect of restrictions on receipt of foreign funding, in *Parti Nationaliste Basque-Organization Regionale D'Iparalde v. France*⁷⁵ the ECtHR "could not see exactly how" in situations when a political party receives financing from a foreign political party, "that would undermine state sovereignty by this factor alone". Although in this case the prohibition was not found to violate the right to freedom of association, such conclusion of the ECtHR was based on the ground that the State enjoyed a margin of appreciation in regulating financing of political parties and that the measure was therefore not disproportionate given that the applicant could rely on alternative sources of financing. Such wide margin of appreciation has not generally been afforded to States where the measures in issue restrict the rights of NGOs. In *United Macedonian Organization Ilinden and Others v. Bulgaria*⁷⁶ the ECtHR held that "in determining whether a necessity within the meaning of Article 11 § 2 exists, the States have only a limited margin of appreciation".

Whether the law is proportionate to the aim pursued

46. Restrictions on the right to freedom of association and expression must be proportionate to the legitimate aim pursued, as affirmed repeatedly by the HRC, and by the ECtHR in respect of rights including freedom of expression and association. As the ECtHR has pointed out in *Republican Party of Russia v. Russia*:⁷⁷ "while States are entitled to require organizations seeking official registration to comply with reasonable legal formalities, that is always subject to the condition of proportionality". In the jurisprudence of the Russian

⁷³ See outline of existing and amended obligations op cit footnote 19

⁷⁴ *Zhechev v. Bulgaria*, op cit. footnote 6, paras 55-6

⁷⁵ *Parti Nationaliste Basque-Organization Regionale D'Iparalde v. France*, op cit. footnote 21, para 47

⁷⁶ *United Macedonian Organization Ilinden and Others v. Bulgaria*, op cit. footnote 4, para 61

⁷⁷ *Republican Party of Russia v. Russia*, App no 12976/07, 12 April 2011, para 87

Federation Constitutional Court, the proportionality test also plays an important role in assessment of the measures of administrative liability. Thus, on several occasions the Constitutional Court came to a conclusion that where a provision imposing a severely excessive minimum level for an administrative fine did not allow for the imposition of a less excessive fine, such provision was not in compliance with the Constitution. The constitutional defect arose because the provision did not allow for any assessment as to the nature of the administrative violation committed, the financial situation of the perpetrator, and any other relevant circumstances which played a role in imposing a fair and proportionate punitive measure.⁷⁸

47. The Amendments to the NGO law fail to meet the standard of proportionality in a number of respects. Under the Amendments, the obligation to register as a foreign agent casts an exceedingly wide net, capturing a potentially large number of organizations engaged in legitimate activities within its ambit. As indicated above, the sweeping character of this net is facilitated by the over broad and vague descriptions of "political activity", 'receiving money or other assets from a foreign source' and 'forming of public opinion'. The law serves a preventive purpose giving rise to a "chilling effect", imposing an obligation to register as a foreign agent and extra burdensome requirements following from such status, even before an NGO has applied for foreign funding and while it remains hypothetical as to whether the funding will be granted. It also applies to the receipt of any funds from a foreign source, irrespective of the nature of the donor organization. Despite these wide and loose criteria, the Amendments to the NGO Law do not provide for the possibility for an NGO registered as a foreign agent to be struck out of the list. This condition is unacceptable. In *Stankov and United Macedonian Organization Ilinden v Bulgaria*⁷⁹ the ECtHR observed that: "Sweeping measures of a preventive nature to suppress freedom of assembly and expression [...] do a disservice to democracy and often even endanger it."

48. The Amendments to the NGO Law carry the possibility of severe administrative sanctions consisting in heavy fines, criminal sanctions (including imprisonment), as well as the possibility to impose a (temporary) ban on the activities of a very wide range of NGOs that do not comply with the requirement to register as a foreign agent. In view of the absence of specific criteria to ensure that the severity of sanctions imposed corresponds to the specific threat to the protected interests, such excessive punitive measures are likely to be disproportionate. Such sanctions cannot be typically considered the least intrusive measures available to achieve the protection of the interests at stake, even if those interests could in fact be clearly identified.

49. The severity of the chilling effect of the law on a wide range of NGOs carries with it an adverse impact and substantial impairment to the exercise of the rights to freedom of association and expression. That impact is widespread, and of long duration, with serious consequences for democratic debate and participation in the Russian Federation, that are disproportionate to any legitimate aim pursued by the law. The impact is not much mitigated by the provision that bans on organizations may be temporary. In *Christian Democratic People's Party v. Moldova*,⁸⁰ the ECtHR underlined the disproportionality of the measure in that case: "the temporary nature of the ban is not of decisive importance in considering the proportionality of the measure, since even a temporary ban could reasonably be said to have a 'chilling effect' on the party's right to exercise its freedom of expression and to pursue its political goals."

⁷⁸ Judgments of the Constitutional Court of the Russian Federation: 13 February 2013 No 4-P; 17 January 2013, No 1-P

⁷⁹ *Stankov and United Macedonian Organization Ilinden v Bulgaria*, op cit. footnote 43, para 97

⁸⁰ *Christian Democratic People's Party v. Moldova*, op cit. footnote 18, para 77

50. The ICJ considers that the severity of the punitive measures for NGOs that fail to register as “foreign agents” in accordance with the law, as well as the additional requirements imposed on those that do, cannot be justified as the least restrictive measures necessary in the circumstances. There does not appear to be an articulated legitimate aim for these measures. However, even if there were reasons to justify them, the Amendments to the NGO law fail grant a discretion which to the responsible authorities or courts to impose less excessive measures where appropriate. Given the wide range of NGOs directly affected by the law, and the even wider group on whose exercise of their freedom of association and expression the law is likely to have a chilling effect, the ICJ considers that the measures are disproportionate to any aims to which they might be directed.

D. Conclusions

51. The ICJ considers that:

- the Amendments to the NGO Law impose multiple, significant restrictions on the rights to freedom of association and of expression;
- the Amendments to the NGO Law are insufficiently precise to satisfy the principle of legality and the requirement of prescription by law, given the breadth of the Law’s scope and the potential for the arbitrary application of measures affecting freedom of association and expression;
- no legitimate aim has been articulated by the authorities that could allow for permissible restriction of rights guaranteed in relevant international treaties;
- in its practical application, the wide scope of the law, and the severity of the measures which may be imposed under its terms, unnecessarily and disproportionately interfere with rights to freedom of association and expression, in violation of the Russian Federation’s international human rights law obligations.

52. Consequently, the Amendments to the NGO Law as they are currently elaborated impose excessive and illegitimate restrictions on rights protected in international human rights law instruments which are binding on the Russian Federation, including the ECHR and ICCPR.

On behalf of the International Commission of Jurists

Sir Nicolas Bratza



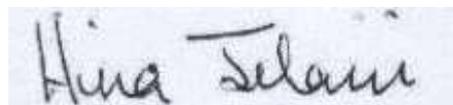
Justice Azhar Cachalia



Justice Radmila Dacic



Hina Jilani



Annex 1: The International Commission of Jurists

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.