

## **Russian Federation:**

Report on the Constitutional Court Proceedings and Judgment on the “Foreign Agent” Amendments to the NGO Law



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## I. INTRODUCTION

1. Amendments to the Russian Federation NGO Law, introduced in 2012 by Law 121-FZ ("Amendments to the NGO Law"),<sup>1</sup> require Russian NGOs that receive foreign funding and engage in "political activity" to register as "foreign agents", impose additional reporting and administrative obligations on NGOs registered as foreign agents, and provide sanctions for non-compliance with these requirements.<sup>2</sup>

2. The law, and its application in practice, has given rise to serious concerns of violations of the rights of freedom of association and expression of Russian NGOs and their members. The compatibility of the Amendments to the NGO law with these rights, protected in international human rights law binding on the Russian Federation, was analyzed in an Opinion of the International Commission of Jurists (ICJ) of January 2014, by a panel of ICJ Commissioners, comprising Sir Nicolas Bratza, former President of the European Court of Human Rights; Justice Azhar Cachalia, Judge of the Supreme Court of Appeals of South Africa; Justice Radmilia Dacic, Judge of the Supreme Court of Serbia, and Hina Jilani, advocate of the Supreme Court of Pakistan and former UN Special Representative on Human Rights Defenders. The Opinion concluded that the amendments impose excessive and illegitimate restrictions on rights to freedom of association and expression as protected *inter alia* under articles 10 and 11 of the European Convention on Human Rights (ECHR) and articles 19 and 22 of the International Covenant on Civil and Political Rights (ICCPR).

3. In 2013, the then Ombudsman of the Russian Federation, Vladimir Lukin,<sup>3</sup> brought proceedings before the Constitutional Court of the Russian Federation challenging the constitutionality of the Amendments to the NGO law. The Ombudsman, on the basis of complaints submitted to him by NGOs affected by the law, alleged that the Law On Non-commercial Organizations No 7-FZ of 12 January 1996 as amended by Law 121-FZ of 2012 and other related legislative provisions, is incompatible with the Constitution of the Russian Federation.

4. This report analyses the hearing of the case before the Constitutional Court, in March 2014, which was observed by the ICJ. It assesses whether the decision of the Constitutional Court has addressed the human rights violations affecting Russian NGOs and their members in connection with enforcement of the Amendments to the NGO Law. The report first sets out, in Part II, the international human rights law and standards relevant to the case, as analyzed in the ICJ Opinion published in January 2014. In Part III it describes the proceedings before the Constitutional Court, including the applications and the hearing in the case. In Part IV, it describes and analyses the decision of the Constitutional Court, in particular in light of relevant international human rights law. Finally, Part V presents conclusions as to the compatibility of the law with the Russian Federation's international human rights law obligations, in light of the Constitutional Court's judgment, and contains recommendations of the ICJ.

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<sup>1</sup> Law 121-FZ on the Amendment of the Legislation of the Russian Federation in respect of regulation of activities of Non-

<sup>2</sup> Law No 7-FZ 'On Non-Commercial Organizations' from 12 January 1996 (in its version amended by Law 121-FZ), Art 2.6.

<sup>3</sup> A new Ombudsman of the Russian Federation, Ella Pamfilova, took office on 18 March, 2014.

## **II. ICJ OPINION ON COMPLIANCE OF THE AMENDMENTS TO THE NGO LAW WITH INTERNATIONAL HUMAN RIGHTS LAW AND STANDARDS**

5. The Opinion of the ICJ of January 2014 assessed whether the Amendments to the NGO law were compatible with the international human rights law obligations of the Russian Federation to respect and protect the rights to freedom of association and expression. Both rights are protected under international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention for the Protection of Human Rights and Fundamental Freedoms, to which the Russian Federation is a party and which it is bound to implement in good faith.

6. 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 right to freedom of association is also guaranteed under article 22 (1) of the 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 European Convention on Human Rights (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."

7. 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 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 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".

8. 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 set out 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 the restriction serves a pressing social need and can be shown to be proportionate to its aim.

### ***Restrictions on ECHR and ICCPR rights***

9. In its Opinion of January 2014, the ICJ first analysed the Law on the Amendments and its implementation in practice in light of the rights to freedom of expression and association, with a view to determining whether and how the Law affects these rights - in other words, whether it amounts to a restriction on either or both of these rights. The Opinion concluded that the Amendments to the NGO Law interfered with the rights of both Russian NGOs which have chosen to register as a foreign agents and those that have not.<sup>4</sup>

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<sup>4</sup> ICJ, Opinion on the Russian Federation Amendments to the NGO Law on Foreign Agents, <http://www.icj.org/russia-amendments-to-the-ngo-law-on-foreign-agents-violate-rights-to-freedom-of-association-and-expression/>, para.51.

10. In reaching this conclusion, the ICJ noted that under the Amendments, NGOs obliged to register as foreign agents, are subject to administrative burdens additional to those that affect all NGOs. These burdens include an obligation to submit additional reports to the Ministry of Justice and to perform additional annual audit checks.<sup>5</sup> In its Opinion, the ICJ concluded that such administrative requirements amount to interference with rights 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.<sup>6</sup> This conclusion is supported by jurisprudence of the European Court of Human Rights, which recognises that the imposition of administrative burdens may engage rights under article 11 ECHR.<sup>7</sup>

11. Furthermore, where an organization has chosen to comply with the law and has registered, 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. For example, the Amendments to the NGO Law *de facto* prohibit the NGOs registered as foreign agents to circulate in any way written (published) materials without visible indication that these materials originate from a “foreign agent.” In placing such restrictions on publication, the Law interferes with freedom of expression, “an integral part of which is the freedom to publish written documents and books”.<sup>8</sup>

12. As regards those NGOs which do not register as foreign agents, the Amendments to the NGO Law have a significant impact on their ability to seek and receive financial support from any foreign source, and thereby interfere with their freedom of association.<sup>9</sup> Organisations may have to opt not to seek financial support from abroad, in order not to fall under the obligation to register as a foreign agent. Thus, Russian NGOs face an unacceptable choice to refrain from seeking financial support from abroad, which in itself may threaten their survival; to register as a foreign agent, which is likely to impair their capacity to function effectively; or to suffer punitive measures for failure to enrol in the list of foreign agents.<sup>10</sup>

13. Furthermore, both administrative and criminal sanctions for failure to comply with the requirements imposed on the NGOs falling under the definition of a foreign agent<sup>11</sup> amount to an interference with rights to freedom of association and expression.<sup>12</sup>

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<sup>5</sup> 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 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 on the internet to be publicly accessible (para 3.1 en 3.2 of previous version of the NGO Law).

<sup>6</sup> ICJ Opinion, op cit, paras. 14-16.

<sup>7</sup> ECtHR, *Martin Balluch v Austria* (dec.) App no 4471/06, 25 September 2012, para.24; *Kasparov and Others v Russia*, App No 21613/07, 3 October 2013, para.84; *Ezelin v France*, App no 11800/85, 26 April 1991, para.39; *Baczowski and others v Poland*, App no 1543/06, 3 May 2007, para.67; *Djavit An v Turkey*, App no 205652/92, 20 February 2003, para.57.

<sup>8</sup> ICJ Opinion, op cit para.17; ECtHR, *Ekin Association v France*, App no 39288/98, 17 July 2001, para 42. See also, European Commission on Democracy through Law (Venice Commission) and OSCE Office for Democratic Institutions and Human Rights (OSCE/OIDHR), 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.

<sup>9</sup> ECtHR, *Ramazanova and Others v Azerbaijan*, App no. 44363/02, 1 February 2007, para.59; *Report of the Special Rapporteur on the right to freedom of peaceful assembly and association, Maina Kiai*, A/HRC/23/39, 24 April 2013, para.16; UN Declaration on Human Rights Defenders, article 13.

<sup>10</sup> ICJ Opinion, op cit, para.21.

<sup>11</sup> Article 19.34 of the Code of Administrative Offences provides as follows: (1) for operating without registration as a foreign agent, an NGO answering the requirements of a foreign agent shall be subject to an administrative fine amount to from 100 thousand to 300 thousand rubles for physical persons and from 300 thousand to 500 000 rubles for legal entities; (2) for publishing or spreading by an NGO-foreign agent materials without indication that those materials were published and/or spread by a foreign agent, officials of this NGO or an NGO itself can be subject to a fine amount respectively from 100 till 300 thousand rubles or from 300 thousand to 500 thousand rubles. Article 330.1 of the

### **Permissibility of restrictions on rights**

14. The Opinion then turned to an analysis of the permissibility of these restrictions on rights under international human rights law.

15. As to the requirement under Articles 10 and 11 ECHR as well as 19 and 20 ICCPR that restrictions on rights to freedom of association and expression are only justified when adequately and clearly prescribed by law in such a manner as to render the consequences of a given action reasonably foreseeable, the ICJ Opinion found the Amendments to the NGO Law to include broad and vague terms and to lack foreseeability. Thus they do not meet relevant standards established by the ECHR and the ICCPR as well as the case-law of the European Court of Human Rights and the UN Human Rights Committee.<sup>13</sup> The ICJ found that vagueness of specific provisions of the Amendments (including definitions of “foreign funding” and “political activity”, or “forming a public opinion”) lead to a lack of clarity, and therefore, foreseeability in application of the disputed legislation. Russian NGOs have found themselves in the situation where they cannot predict with a sufficient degree of certainty whether or not they will possibly face sanctions for failure to register as a foreign agent.<sup>14</sup>

16. The ICJ found that neither the legislative authorities which drafted the law nor the judicial authorities that interpreted it had put forward arguments to establish that the restrictions on the rights to freedom of association and expression serve any of the legitimate aims specified under relevant articles of the ECHR or the ICCPR.<sup>15</sup>

17. Furthermore, even if the Amendments could be considered to pursue a legitimate aim, the ICJ Opinion considered that the measures were not necessary in a democratic society, as they did not serve a pressing social need, and failed to meet the standard of proportionality in a number of respects.<sup>16</sup> The Opinion noted that for the restrictions on rights to be justified, it must be shown that there was a real and not only a hypothetical danger to the legitimate aim pursued and that less intrusive measures would be insufficient to achieve this purpose.<sup>17</sup> Insufficient reasons had been provided by the Russian authorities for the need to restrict rights under the Amendments to the NGO Law. The Opinion noted that the law affects a very wide range of organisations in accordance with broad and uncertain definitions of “foreign agent” and carries the possibility of severe sanctions for failure to comply with the law. Such excessive punitive measures were likely to be disproportionate. Furthermore, it noted that the severity of the chilling effect of the Amendments to the NGO Law on rights to freedom of association and expression, was disproportionate to any aims to which it might be directed.<sup>18</sup>

18. Thus, the ICJ concluded that the requirements imposed on the Russian NGOs in the Amendments to the NGO Law violate the rights to freedom of expression and freedom of association as prescribed in relevant provisions of ECHR and ICCPR. In particular, the interferences with the rights do not meet the principle of legality, do not pursue a legitimate aim and in any case are neither necessary in a democratic society nor proportionate to any such aims.

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Criminal Code sets up grounds for criminal liability for malicious avoidance of enrolment in the list of foreign agents providing that this crime can be punished with up to two years of imprisonment.

<sup>12</sup> ICJ Opinion, op cit, para.19; ECtHR, *Christian Democratic People's Party Moldova*, App No 28793.02, 14 February 2006, para.47; *Skiba v Poland*, App no 10659/03, 7 July 2009.

<sup>13</sup> ECtHR, *Koretskyy v Ukraine*, App no 40269/02, 3 April 2008, para.47; *Zhechev v Bulgaria*, App No 57045/00, 21 June 2007, para.55; *Tebieti Muhafize Cemiyeti and Israfilov v Azerbaijan*, App no 37083/03, 8 October 2009, para.62; UN Human Rights Committee, General Comment No 34, Article 19: Freedom of opinion and expression, para.25.

<sup>14</sup> ICJ Opinion, op cit, paras. 24-35.

<sup>15</sup> ICJ Opinion, op cit, para. 37.

<sup>16</sup> ICJ Opinion paras. 41-50.

<sup>17</sup> Human Rights Committee, *Lee v Republic of Korea*, (1119/2002) ICCPR, A/60/40 vol II (20 July 2005) 174, para.7.2.

<sup>18</sup> ICJ Opinion, op cit, para.50.

### III. PROCEEDINGS BEFORE THE CONSTITUTIONAL COURT

#### ***Applications to the Constitutional Court***

19. The compliance of the Amendments to the NGO Law with the Constitution of the Russian Federation was challenged in a number of complaints lodged before the Constitutional Court of the Russian Federation which were joined in the same set of proceedings, heard by the Constitutional Court on 6 March 2014. Under Russian law, the Ombudsman is authorised to bring a complaint before the Constitutional Court on behalf of any person who has lodged before the Ombudsman a complaint regarding violation of their human rights. Acting pursuant to these powers in the interest of four Russian NGOs who had complained to him, the Ombudsman lodged a complaint with the Constitutional Court in which he alleged that the Amendments to the NGO Law and other provisions of law violated the rights of the NGOs and the rights of their members to freedom of association and freedom of expression. In particular, the Ombudsman took the view before the Constitutional Court that amended articles 2(6)<sup>19</sup>, 32(7)<sup>20</sup> of the NGO Law and article 19.34(1) of the Code of Administrative Offences<sup>21</sup> were incompatible with the Constitution. The complaint submitted by the Ombudsman alleged that the circumstances of the violation of the rights of the applicants were as follows.

20. The LGBT Cinema-festival "Bok-o-Bok" (Side-by-Side), which promotes LGBT rights and operates in Saint-Petersburg, was found by the public prosecutor's office, to satisfy the criteria for registration as a foreign agent and therefore its head was subject to a fine of 400 000 RUB (about 10 000 EUR) for failure to enrol the NGO in list of foreign agents.<sup>22</sup> The Kujbushevskij District Court of Saint-Petersburg upheld this finding in its judgment of 26 July 2013. It held that the NGO had been receiving foreign funding in 2011-2013, while been engaged in political activity which involved in particular spreading through means of its own website or published materials information amounting to agitation and was therefore subject to registration as a foreign agent.

21. The head of the Kostroma Centre in Support to Public Initiatives was subject to a fine of 100 000 RUB (about 2500 EUR) for failure to enrol the Centre in the list of foreign agents. This local NGO had organised a set of roundtable seminars where participants, including diplomats from the USA embassy in Russia, discussed Russian-American relations. The Sverdlovskij District Court of Kostroma found, in its judgment of 12 August 2013, that the roundtable organised by the NGO was a political action. In addition, the Court considered that the NGO engaged in political activity by publishing the results of local election monitoring on its website and when the head of the management board of the NGO served as an observer in the course of local elections.

22. The Regional Public Organization Amur Ecological Club "Ulukitkan" received a legal notice informing it of its liability for failure to respect the amended provisions of the NGO Law. This NGO, which was involved in ecological activities, received in 2011 a foreign grant to support one of its projects. Although this grant was received 1 year before the Amendments to the NGO Law came into force, the NGO was informed that it met the criteria for registration as a foreign agent. Attempts to appeal the legal notice in the local courts were unsuccessful.

23. The head of the NGO Association "In Support of Voters' Rights" ("Golos"), which operated to promote fair and open elections, was subject to a fine for failure to enrol in the list of foreign

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<sup>19</sup> Article 2(6) of the NGO Law provides the definition of a foreign agent.

<sup>20</sup> Article 32(7) of the NGO Law amended by the Law 121-FZ provided as follows: non-profit organizations intended to perform functions of a foreign agent after its state registration shall be obliged to submit to the authorized body an application on enrolment to the list of foreign agents. Law 147-FZ amended article 32(7) by including a provision authorizing the relevant body to register NGOs as foreign agents ex officio, without their consent and application.

<sup>21</sup> Article 19.34 of the Code of Administrative Offences provides as follows: (1) for operating without registration as a foreign agent, an NGO answering the requirements of a foreign agent shall be subject to an administrative fine amount to from 100 thousand to 300 thousand rubles for physical persons and from 300 thousand to 500 000 rubles for legal entities; (2) for publishing or spreading by an NGO-foreign agent materials without indication that those materials were published and/or spread by a foreign agent, officials of this NGO or an NGO itself can be subject to a fine amount respectively from 100 till 300 thousand rubles or from 300 thousand to 500 thousand rubles.

<sup>22</sup> Code of Administrative Offences, article 19.34(1).

agents. In particular, the courts agreed that promotion, in cooperation with the European Commission, of the draft Election Code, was 'political activity' for the purposes of the "Amendments to the NGO Law". An award to Golos from an international NGO was recognised as foreign funding, even though Golos had not accepted the prize money.

24. Four persons joined their complaints with the complaint of the Ombudsman regarding the incompatibility of certain provisions of the amended NGO Law. In particular, the Kostroma Centre in Support to Public Initiatives; Mrs Kuzmina L.G. – head of International Public Foundation of Assistance for Development of Civil Society "Golos-Povolzhie"; and Mr Yukechev, "the Institute of Press Development Siberia" joined their complaints with the complaint of the Ombudsman. The complaint of fourth individual, Mr. Smirenskij, head of the NGO "Muravjevskij park", was found to be inadmissible since the judgments of the local courts in his case, which served as a ground to bring a complaint before the Constitutional Court, had been quashed on appeal.

### ***Nature of the complaints to the Constitutional Court***

25. In his complaint before the Constitutional Court, the Ombudsman contended that the requirements imposed by the Amendments to the NGO Law on a wide range of Russian NGOs receiving foreign funding were incompatible with the Constitution. The Ombudsman's complaint was joined by the Kostroma Centre in Support to Public Initiatives, Mrs Kuzmina, and Mr Yukechev, representing "the Institute of Press Development Siberia". The applicants challenged provisions of the Amended Law of NGOs and separately complained regarding the Amendments to the NGO law<sup>23</sup> itself, as well as legislative measures amending the Code of Administrative Offences as regards liability for failure to register as a foreign agent<sup>24</sup>, and amended provisions of the Law On Public Associations that obliged Russian public associations to register as a foreign agent when they satisfy the same criteria established for NGOs<sup>25</sup>.

26. The applicants alleged that the Amendments to the NGO Law were incompatible with the articles of the Constitution which prohibit discrimination<sup>26</sup> and derogation of personal dignity<sup>27</sup>, protect the right to freedom of speech<sup>28</sup>, the right to freedom of association<sup>29</sup> and the right to a legal remedy, establish the principle of presumption of innocence<sup>30</sup>, the right not to incriminate oneself and principles of limitations of constitutional rights.<sup>31</sup> The alleged grounds of incompatibility of the above provisions with the Constitution were similar in all joined complaints and can be summarised as follows.

### ***Discrimination***

27. In their complaints, the applicants submitted, first, that the disputed law aimed to select a group of Russian NGOs on which there would be imposed additional administrative reporting

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<sup>23</sup> The Ombudsman challenged, in his complaint, the NGO law as amended; whereas the complaints from the NGOs also challenged the amending law itself (Law 121-FZ article 1-2).

<sup>24</sup> Code of Administrative offences (amended), article 19.34.

<sup>25</sup> Law On Public Associations, article 29 (6).

<sup>26</sup> Article 13 states in paras 1 and 4 respectively: "1. In the Russian Federation ideological diversity shall be recognized. 4. Public associations shall be equal before the law". Article 19 provides in paragraph 2 that: "The State shall guarantee the equality of rights and freedoms of man and citizen, regardless of sex, race, nationality, language, origin, property and official status, place of residence, religion, convictions, membership of public associations, and also of other circumstances. All forms of limitations of human rights on social, racial, national, linguistic or religious grounds shall be banned."

<sup>27</sup> Article 21 in para 1 reads: "1. Human dignity shall be protected by the State. Nothing may serve as a basis for its derogation."

<sup>28</sup> Article 29 paras 1 and 3 reads: "1. Everyone shall be guaranteed the freedom of ideas and speech; 3. No one may be forced to express his views and convictions or to reject them".

<sup>29</sup> Article 30 states: in para 1: "1. Everyone shall have the right to association, including the right to create trade unions for the protection of his or her interests. The freedom of activity of public association shall be guaranteed".

<sup>30</sup> Article 49 states in para 1: "1. Everyone accused of committing a crime shall be considered innocent until his guilt is proved according to the rules fixed by the federal law and confirmed by the sentence of a court which has come into legal force".

<sup>31</sup> Article 55 para 3: "3. The rights and freedoms of man and citizen may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and security of the State."

requirements as well as a requirement to be enrolled in the list of foreign agents. It was alleged that such selection on the grounds of receiving foreign funding amounted to discrimination against those Russian NGOs which receive funding from a foreign source and thus prevented those NGOs from enjoyment of the rights to freedom of speech and freedom of association. Therefore, according to the applicants, in this respect the Amendments to the NGO Law were incompatible with the prohibition on discrimination in Articles 13 and 19 of the Constitution.

#### *Stigmatization*

28. Another ground of alleged incompatibility with the Constitution was that a requirement to be enrolled in the list of foreign agents leads to stigmatization of an NGO, contrary to articles 21(1) (the right to personal dignity), article 49 (the presumption of innocence) and article 51 (freedom from self-incrimination) of the Constitution. According to the applicants, by enrolling in the list, an NGO must incriminate itself by representing itself as a "foreign agent", a notion which is widely understood as "a spy" or as someone representing a foreign interest which is contrary to those of Russia. Being registered as a foreign agent is widely considered equating to disloyalty to the interests of the Russian Federation.

#### *Lack of foreseeability*

29. A further alleged ground of non-compliance of the Amendments to the NGO Law with the Constitution was lack of foreseeability of the provisions of the law. According to the applicants, such notions as "a political activity" and "foreign funding" were not clearly interpreted either in the Amendments to the NGO Law nor in any other supporting legislative acts. Therefore, the NGOs concerned in the case were deprived of the possibility to foresee, in accordance with the principle of legality, the consequences of their behaviour, and in particular to understand, on the basis of the provisions of the Amendments to the NGO Law, whether or not they satisfied the requirements of a "foreign agent" and therefore had to be enrolled in the list and to fulfil the relevant reporting requirements.

#### *Disproportionality of sanctions*

30. Finally the applicants alleged that the administrative liability sanctions provided for in article 19.34 of the Code of Administrative Offences for failure to comply with an obligation to register as a foreign agent were not proportionate to the severity of the offence for which they were imposed. The lack of a minimum sanction provided in law did not allow the lower courts to take into account the specific circumstances of the case, including the personal circumstances of a perpetrator. Thus, the applicants claimed, imposing heavy administrative fines for failure to register as a foreign agent violates the principle of proportionality.

### ***Constitutional Court hearing***

31. The hearing of the Constitutional Court took place on 6 March 2014 in Saint Petersburg. The case was heard by a panel of 19 judges of the Constitutional Court. Representatives of each of the applicants and the representatives of the bodies which issued or signed the contested law were present during the hearing and offered oral explanations of their positions. The Ombudsman of the Russian Federation was represented by his deputy, while the rest of the applicants were represented by their legal advisors.

32. In light of the concerns already raised by the ICJ in its Opinion on the Amendments to the NGO Law, and recognising the importance of the case for the protection of rights to freedom of association and freedom of expression in Russia, a team of the ICJ observers, including ICJ Commissioner Gulnora Ishankhanova, attended the hearing of the Constitutional Court. The purpose of the observation was to monitor the proceedings in light of the Russian Federation's international obligations to uphold rights to freedom of association and expression.

#### *Oral arguments presented by the applicants*

33. The hearing began with oral arguments presented by the representatives of the applicants. The oral observations presented by the applicants can be summarised as follows:

- The amendments to the NGO Law amount to a violation of the rights to freedom of assembly and freedom of expression. First, the disputed law contributes to the chilling effect on Russian NGOs by imposing an additional administrative burden and constraining them in

applications for funding to foreign donors. Furthermore, the definition of a 'foreign agent' in the amended NGO Law lacks clarity and therefore legal certainty, which is essential for the provision to comply with the principle of legality. Finally, the nature and scope of administrative liability for violation of the Amendments to the NGO Law does not allow the possibility to assess the severity and danger of the offence in each particular case, therefore the sanctions provided do not serve their purpose and are not adapted to the individual circumstances of each case.

- The term ("a foreign agent") is not formulated with enough precision, as its common civil-law understanding suggests an agent/principal relationship, while the NGOs concerned were not agents of any financing parties and did not work in their interests or on their instructions. The existing case-law however showed that, when examining similar cases under the Amendments to the NGO Law, courts had no regard to the civil-law meaning of this term.

- The disputed Amendments to the NGO Law amount to a violation of the freedom of expression. In particular, where NGOs refuse to register, the "political" activity of any member of an NGO, even where the member acted in his or her personal capacity, was considered as activity of the entire organization, as a result of which the NGO, and the head of the NGO, could be subjected to administrative penalties.

- As a result of the introduction of the new concept ("foreign agent"), the law now treats differently some of the legal entities belonging to one and the same category (NGOs). Discrimination is constituted by unjustified different treatment of NGOs on the basis of their activities. Thus, for example, the Amendments to the NGO Law provide that fostering and supporting science does not amount to political activity, while fostering and supporting education does.

- By enrolling in the list of foreign agents, an NGO is required to incriminate itself by confessing to certain negative activities (potential espionage, disloyalty, treachery), which amounts to a violation of Sections 49 and 51 of the Constitution.

- The case-law imposing the law with retroactive effect constitutes a violation of principle of legality and has increased the chilling effect of the Law.

34. The arguments offered in oral observations of the representatives of the State Duma, the Federation Council and the President can be summarised as follows:

- Being registered as a foreign agent does not impose any restrictions on the activities of an NGO (neither in terms of registration nor financing).

- "Foreign agent" is not a negative term. Being a foreign agent neither amounts to any confession of guilt by an NGO nor does it mean that the State gives a negative assessment to the activities of NGOs that receive funding from foreign organizations. The registration of NGOs as foreign agents is merely a form of State control securing the transparency of their activities as a form of public control. Given that certain regulation of NGOs had been in place before the Amendments to the NGO law, it would not be incompatible with the Constitution to increase such regulation.

- Interference with rights and freedoms under the Amendments to the NGO law is justified. In this case, such interference is aimed at the protection of State sovereignty; hence, the purpose of the interference is legitimate.

- The legislator is free to establish special reporting and registration requirements in respect of specific categories of organizations, which does not amount to discrimination against them or infringement of their rights.

- The Law gives a definition of political activity, which lacks any uncertainty whatsoever; its estimative nature cannot be regarded as a flaw; rather, it helps to reveal the individual nature of a case. For example, according to the Representative of the President, delivering lectures is an implicitly political activity.

- In respect of the proportionality of the sanctions: administrative sanctions meet the requirements of necessity and proportionality; they are adequate to their effects. Ms. Vasilyeva, representative of the Prosecutor General's Office, argued in this respect that NGOs "receive enormous funding", so they have no problem paying significant fines.

#### IV. DECISION OF THE CONSTITUTIONAL COURT

35. On 14 April, 2014 the Constitutional Court issued its decision concerning the Amendments to the NGO Law. The decision, which found the Amendments to the NGO Law to be constitutional, except in respect of the disproportionality of sanctions, was made by a majority of 18 judges of the Court. A dissenting opinion, finding the disputed provisions incompatible with the Constitution, was delivered by Judge Vladimir Yaroslavtsev. The Court limited its review to compatibility with the relevant provisions of the Constitution of two specific sets of norms:

- 1) the rules regulating registration of an NGO as a foreign agent, including the definition of a foreign agent as provided in article 2.6 of the Amended NGO Law;
- 2) the provisions regulating administrative liability for failure to comply with an obligation to register as a foreign agent.

#### ***Discrimination and stigmatization***

36. The Court did not accept that imposing an obligation to register as a foreign agent on a group of Russian NGOs led to discrimination and stigmatization of any member of this group, which would be contrary to, *inter alia*, articles 21 and 13 of the Constitution, prohibiting discrimination and protecting the dignity of the person. First, the Court stated, where alleged discrimination and stigmatization of NGOs was concerned, that: “[s]election of a group of NGOs - foreign agents - was motivated by the actual fact of receiving by these NGOs of foreign funding and has the intention to identify them as special entities involved in political activity in the territory of the Russian Federation. Such recognition does not pursue an aim to designate any threat posed by the NGOs to the public institutions, therefore the wording “foreign agent” does not involve any negative stereotypes or connotation.”<sup>32</sup>

37. Holding that there was no interference with the rights of NGOs and their members to freedom of association and expression, the Court stressed<sup>33</sup> that since an obligation to be registered as a foreign agent exists only where an NGO has indeed intended to engage in political activity, such obligation cannot be regarded as an interference with the right to freedom of association. Where the Ministry of Justice or prosecutor’s office takes measures against an NGO in connection with the violation of its obligation under these provisions, the NGO has a remedy available through appeal to the courts of any decisions of the prosecution, and appeal to higher courts of decisions of courts of first instance in respect of the NGO’s obligation to enrol in the list of foreign agents.<sup>34</sup>

38. In its conclusion that the requirement to be registered as a foreign agent neither led to any stigmatization of or discrimination against an NGO, nor interfered in any other manner with the rights to freedom of association and expression, the Constitutional Court did not rely on relevant case-law of the European Court of Human Rights, which has repeatedly found that the imposition of administrative burdens can engage rights under article 11 ECHR. Thus for example, in *Martin Balluch v Austria*, where the organiser of an event failed to comply with a legal requirement to notify the authorities of the event, and was subsequently fined, the ECtHR found that this obligation to notify the authorities could in principle constitute an interference with article 11 ECHR since it was “a hidden obstacle to the protected freedom”.<sup>35</sup> The conclusion of the Constitutional Court, based on the assumption that where an NGO has de jure the right to continue its activities once it is registered as a foreign agent, its rights are not hindered in any way, contradicts the position of the ECtHR expressed in *Kasparov v. Russia*, that, in respect of rights under article 11 ECHR “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.”<sup>36</sup>

39. The Court’s finding that the requirement to register as a foreign agent does not lead to stigmatization of an NGO, is contrary to the views of the Venice Commission expressed in

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<sup>32</sup> The decision of the Constitutional Court No 10-P of 8 April 2014, para 3.1, p. 22.

<sup>33</sup> The decision of the Constitutional Court No 10-P of 8 April 2014, para 3.2, pp. 32-34.

<sup>34</sup> The decision of the Constitutional Court No 10-P of 8 April 2014, para 3.2, p. 33.

<sup>35</sup> ECtHR, *Martin Balluch v. Austria* App no 4471/06, 25 September 2012, para 24.

<sup>36</sup> ECtHR, *Kasparov and Others v. Russia*, App no 21613/07, 3 October 2013, para 84. See also *Ezelin v France*, App no 11800/85, 26 April 1991, para.39; *Baczowski and others v Poland*, App no1543/06, 3 May 2007, para.67.

Opinions on the NGO laws of both the Russian Federation and Kyrgyzstan (On the Draft Law Amending the Law on Non-commercial organizations and other legislative acts of the Kyrgyz Republic<sup>37</sup> and Opinion on Federal Law n. 121-fz on non-commercial organisations ("law on foreign agents")).<sup>38</sup> In its opinion on the Russian Law, the Venice Commission underlined that "the use of the term "foreign agent" is highly controversial. By bringing back the rhetoric used during the communist period, this term stigmatises the NCOs to which it is applied, tarnishing their reputation and seriously hampering their activities."<sup>39</sup>

### **Lawfulness of the aim pursued**

40. The Court underlined in paragraph 3.2 of the judgment that the disputed provisions pursue a lawful aim and therefore are not incompatible with, *inter alia*, articles 29 and 30 of the Constitution, protecting the rights to freedom of expression and association. In particular, the Court emphasised that "[t]he federal legislator [by imposing this obligation] sought to pursue openness and transparency in activities of the organizations intending to engage in political activity in the territory of the Russian Federation in order to influence decision-making and state policy pursued by state bodies".<sup>40</sup> A second lawful aim identified by the Court was protection of State Sovereignty. The Court stressed that: "Since receiving of foreign funding does not exclude a possibility to use these financial resources to influence the state bodies of the Russian Federation in the interests of donor organizations, legislative measures taken to select NGOs pursuing the function of a foreign agent comply with the protection of state sovereignty as provided in the Constitution (preamble; article 3(1))".<sup>41</sup> It is notable, however, that the Constitutional Court did not explain clearly why and in which particular manner the measures to be taken under the Amendments would be effective in securing greater openness in the operation of Russian NGOs or protecting state sovereignty.

41. As regards the compatibility of the Amendments with the international human rights law obligations of the Russian Federation, it is important to note that the aims put forward by the Constitutional Court – greater openness and the protection of state sovereignty – are not in themselves included in the exhaustive list of legitimate aims in articles 10.2 and 11.2 ECHR and articles 19 and 22 of the ICCPR. Therefore the identification by the Constitutional Court of these aims, as justification for the constitutionality of the Amendments, is not sufficient to comply with the international human rights law requirement that the measures concerned should pursue a legitimate aim. If the Russian Federation were to argue, in respect of compliance with the ICCPR or ECHR, that protecting national sovereignty or securing openness fell within one of the aims specified in the relevant articles of the ICCPR or ECHR, such as protection of national security, then the Russian authorities would need to provide clear explanation of how this might be so, and clear justification as to how the measures themselves were designed to serve the legitimate treaty aim. It is the understanding of the ICJ that no such justification has been provided by the Russian national authorities in the course of the legislative process through which the amendments were adopted;<sup>42</sup> neither has the judgement of the Constitutional Court provided such explanation or justification.

### **Meaning of "foreign agent" and the principle of legality**

42. In respect of the argument that the disputed provisions lack the necessary clarity and amount to a violation of articles 1(1)<sup>43</sup>, 4(2)<sup>44</sup>, 6(2)<sup>45</sup>, 15(2)<sup>46</sup> and 19(1)<sup>47</sup> of the Constitution,

<sup>37</sup> 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.

<sup>38</sup> Opinion on Federal Law n. 121-fz on non-commercial organisations ("law on foreign agents"), on Federal Laws n. 18-fz and n. 147-fz and on Federal Law n. 190-fz on making amendments to the criminal code ("law on treason") accessed on 4 July 2014 at <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2014\)025-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)025-e).

<sup>39</sup> *ibid*, para.132.

<sup>40</sup> The decision of the Constitutional Court No 10-P of 8 April 2014, para 3.2, p. 28.

<sup>41</sup> The decision of the Constitutional Court No 10-P of 8 April 2014, para 3.2, p. 28.

<sup>42</sup> ICJ Opinion, *op cit*, para.37.

<sup>43</sup> Article 1(1) of the Constitution provides as follows: "The Russian Federation - Russia is a democratic federal law-bound State with a republican form of government."

<sup>44</sup> Article 4(2) of the Constitution provides as follows: "The Constitution of the Russian Federation and federal laws shall have supremacy in the whole territory of the Russian Federation."

the Court considered that the definition of a foreign agent is clear enough to meet the requirement of foreseeability. The Court held that an NGO can be considered to be a foreign agent when it receives foreign funding and is engaged in the organisation of or participation in political actions which aim to influence state decision-making processes and state policies, as well as forming of public opinion in regard to such processes or policies.

43. In respect of the definition of "foreign funding", the Court stressed that any funding or assets received from a foreign source fall under this definition for the purposes of the disputed Law. It held that as "[n]either temporal (duration, consistency), nor quantitative (amount), nor type-related scope of grants play any role in assessment, there is therefore no possibility for arbitrary assessment of the received funding".<sup>48</sup> However, according to the Court "it is important to note that funds must not only be sent to but also must be accepted by an NGO: where an NGO is returning funds to a foreign donor, especially before it engages in political activity, an NGO is not obliged to enrol itself in the list of foreign agents".<sup>49</sup>

44. The Court seemed to narrow the possibilities for an NGO to be considered as a foreign agent in one respect, by stressing that the mere potential for an NGO to be engaged in political activity does not mean that the NGO will necessarily exercise this possibility. According to the Court "an obligation to enrol in the list of foreign agents arises only when an NGO indeed intends to engage in political activity after receiving foreign funding. Due to the presumption of lawfulness and good faith, an NGO has to fulfil this obligation in advance, before engagement in political activity and on the basis of its own interpretation of its intentions. The burden of proof lies on the state authorities."<sup>50</sup> However, the Court underlined that, as regards engagement in political activity: "An NGO's intentions can be "objectively" proven on the basis of its statutory, programme or any other official documents, as well as public declarations of their official representatives which include calls for acceptance, amendments or cancellation of any decisions of state bodies, calls for public assemblies sent by this NGO to local or state authorities, or any other acts of social activity aimed at the organization or realization of political actions which seek to influence the decision-making of state bodies."<sup>51</sup>

45. It is also significant that the definition of the political activity of an NGO was narrowed in one other sense by the Court when it clarified that the aim to influence state decision-making processes and state policies must be pursued by and on behalf of an NGO itself and not only by one its members, in order for the NGO to be considered to be involved in political activity. Therefore, participation of NGO members in political activity in their private capacity, especially where such participation runs contrary to the decisions of the NGO, cannot be considered as political activity of the NGO itself.<sup>52</sup>

46. In respect of the definition of political activity, the Court underlined that "the forms of engagement in political activity can be different: besides participating in public assemblies, demonstrations, marches and picketing, political activity can involve pre-election agitation, agitation regarding future referenda, the spread, including by use of modern information technologies, of their own assessments of decisions taken by state bodies and state policy pursued by them, and other activities, an exhaustive list of which cannot be provided in legislation".<sup>53</sup> The Court further stated that: "a basic criteria for the assessment of whether an act of an NGO can be considered as political was whether this act aims to influence state policies

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<sup>45</sup> Article 6(2) of the Constitution provides as follows: "Every citizen of the Russian Federation shall enjoy in its territory all the rights and freedoms and bear equal duties provided for by the Constitution of the Russian Federation."

<sup>46</sup> Article 15(2) of the Constitution provides as follows: "2. The bodies of state authority, the bodies of local self-government, officials, private citizens and their associations shall be obliged to observe the Constitution of the Russian Federation and laws."

<sup>47</sup> Article 19(2) of the Constitution provides as follows: "2. The State shall guarantee the equality of rights and freedoms of man and citizen, regardless of sex, race, nationality, language, origin, property and official status, place of residence, religion, convictions, membership of public associations, and also of other circumstances. All forms of limitations of human rights on social, racial, national, linguistic or religious grounds shall be banned."

<sup>48</sup> The decision of the Constitutional Court No 10-P of 8 April 2014, para 3.3, p. 37.

<sup>49</sup> cit. op footnote 29, p. 37.

<sup>50</sup> The decision of the Constitutional Court No 10-P of 8 April 2014, para 3.2, p. 32.

<sup>51</sup> The decision of the Constitutional Court No 10-P of 8 April 2014, para 3.2, p. 33.

<sup>52</sup> The decision of the Constitutional Court No 10-P of 8 April 2014, para 3.1, p. 24.

<sup>53</sup> The decision of the Constitutional Court No 10-P of 8 April 2014, para 3.3, p. 38.

(directly or via forming public opinion), and besides that whether this act aims to create a public response and attract the attention of state bodies and civil society".<sup>54</sup> However the Court underlined that areas of activities excluded by the Amendments from the definition of political activity (such as scientific activity, culture, health protection, ecology, etc) do not amount to political activity even where such activity is intended to influence state policy and state politics in one of those areas.

47. Under both the ECHR and the ICCPR, as noted above, any restriction on rights to freedom of association or expression must be adequately prescribed by law. To comply with this standard, the measures must be provided for in law; the relevant legal provision must be accessible to the individual; it must be sufficiently precise to enable the person concerned reasonably to foresee the consequences which a given action may entail under the law;<sup>55</sup> and the law must provide adequate safeguards against arbitrary interference with the relevant rights.<sup>56</sup> As noted above, the ICJ concluded in its Opinion, that the Amendments to the NGO law failed to meet this standard, since the wide and unclear definition of "political activity" as well as of other terms in the law, meant that NGOs were unable to predict with any certainty whether or not they are required to register as "foreign agents", or when they would be liable to criminal or administrative penalties under the law.<sup>57</sup> Furthermore, the broad terms in which the law was formulated left room for inconsistent or arbitrary application of the law by courts.

48. Although the Constitutional Court considered the definition of a "foreign agent" sufficiently precise, it did not take into account various interpretations of this definition by domestic courts. Thus, for example, where the Court admitted that the NGOs engaged in activities which can not be recognised as political<sup>58</sup> are excluded from the requirement to be registered as foreign agents, local courts or prosecution offices considered that a number of NGOs involved in ecological activities, conducting social research, etc fall under the definition of "a foreign agent". The ICJ, in its previous Opinion, referred to the cases of 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.<sup>59</sup> The Irkutsk NGO "Centre of Independent Social Research and Education" was warned by the prosecution that pursuing activities in accordance with its articles of association, namely, providing 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. Also the case of the Amur Ecological Club "Ulukitkan" can serve as an example of over-broad interpretation of "political activity" and disregard of the list of activities which are explicitly excluded from this notion under paragraph 6 article 2.<sup>60</sup> In similar circumstances, the ECtHR has found in the case of *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*<sup>61</sup> that where "the Government have not submitted any examples of domestic judicial cases which would provide a specific interpretation of these provisions [...] 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."

### **Proportionality of sanctions**

49. In paragraph 4.2 of the decision, the Court addressed the question of whether administrative sanctions for failure to fulfil obligations imposed by the Amendments to the NGO Law are compatible with the provisions of the Constitution protecting equality before the law and courts (article 19 (paragraphs 1 and 2)) and prohibiting retroactive effect of the rules

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<sup>54</sup> cit. op footnote 34, p. 38.

<sup>55</sup> ECtHR, *Sunday Times v the United Kingdom*, App 6538/74, 26 April 1979, para 47-49.

<sup>56</sup> ECtHR, *Huvig (and Kruslin) v. France*, App 11105/84, 24 April 1990, para 29.

<sup>57</sup> ECtHR, *Zhechev v Bulgaria*, op cit, para.55.

<sup>58</sup> cit op footnote 11.

<sup>59</sup> <http://www.wwf.ru/resources/news/article/11191>

<sup>60</sup> Para 6 of art 2: 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'

<sup>61</sup> ECtHR, *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, App no 37083/03, 8 October 2009, para 62

imposing liability (article 54).<sup>62</sup> In particular, the Court underlined<sup>63</sup> the importance of the principle of prohibition of retroactive effect. Administrative sanctions can be imposed only where the grounds of administrative liability occurred after the Amendments to the NGO Law had come into force.

50. In respect of the question whether the administrative sanctions imposed by the disputed provisions are consistent with the principle of proportionality, the Court stated that:

“In application of the provisions imposing administrative liability, local courts are obliged to take into account the scope and consequences of the organized political actions, as well as other circumstances which define the severity of a committed act, and impose the maximum fine only where a lesser fine does not serve to prevent commitment of new acts both by a perpetrator or by other persons”.<sup>64</sup> In this respect the Court found that:<sup>65</sup> “the minimum sanction [provided in article 19.34(1) of the Code of Administrative Offences] does not give room for a thorough assessment of the severity of a violation, financial situation of a perpetrator, a degree of his guilt and other circumstances which allow individualization of sanctioning and therefore was not compatible with the Constitutional provisions such as, among others, establishing principle of proportionality in respect of the lawful interference with the rights protected in the Constitution (article 55(3)),<sup>66</sup> principle of equality before the law and court (article 19 (1,2)) and prohibition of rights abuse (article 17(3)).”<sup>67</sup>

51. The ruling of the Court regarding non-proportionality of sanctions confirmed earlier existing case-law of the Court. Thus, on several occasions the Constitutional Court concluded that, where a provision imposing a highly 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.<sup>68</sup>

### ***Issues not addressed in the judgment of the Court***

52. Not all of the concerns regarding compatibility of the Amendments to the NGO Law with international human rights law, that are noted in part II above, were addressed by the Constitutional Court, and indeed not all were raised in the complaints before the Court. The issues raised by the applicants in their complaints included discrimination and stigmatization of NGOs, together with lack of foreseeability of the impact of the law and non-proportionality of sanctions. These issues were addressed in the judgment of the Court. However the Court limited its analysis of the nature and impact of the interference with the right to freedom of association, to the question of whether the disputed provisions amounted to discrimination and stigmatization of the NGOs and/or their members.

53. Issues which were not addressed in detail in the judgment of the Constitutional Court include the question of whether the disputed Law interfered with the rights to freedom of association and freedom of expression of Russian NGOs and their members by limiting their possibilities to operate effectively in light of their obligation to register as foreign agents or by imposing additional administrative obligations on them. Neither did the Court consider whether the obligation to register as a foreign agent or additional obligations to indicate, on all materials published by an NGO registered as a foreign agent, that those materials are published by a foreign agent, amounted to an interference with freedom of expression. While concluding that the registration as a foreign agent does not prevent an NGO from engaging in types of activities considered as “political” or seeking foreign funding, the Court did not address any other form of interference with the rights to freedom of association and expression of the NGOs.

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<sup>62</sup> Article 54 of the Constitution provides: “1. A law introducing or aggravating responsibility shall not have retrospective effect. 2. No one may bear responsibility for the action which was not regarded as a crime when it was committed. If after violating law the responsibility for that is eliminated or mitigated, a new law shall be applied.”

<sup>63</sup> The decision of the Constitutional Court No 10-P of 8 April 2014, para 4.1, p. 43.

<sup>64</sup> The decision of the Constitutional Court No 10-P of 8 April 2014, para 4.2, p. 47.

<sup>65</sup> The decision of the Constitutional Court No 10-P of 8 April 2014, para 4.2, p.49.

<sup>66</sup> cit. op footnote 31

<sup>67</sup> Article 17(3) provides: “3. The exercise of the rights and freedoms of man and citizen shall not violate the rights and freedoms of other people.”

<sup>68</sup> Judgments of the Constitutional Court of the Russian Federation: 13 February 2013 No 4-P; 17 January 2013, No 1-P.

### ***Necessity and proportionality***

54. Significantly, although the Court addressed the question of whether the disputed Amendments to the NGO Law pursued a lawful aim (for example to achieve greater openness in operation of NGOs or to protect national sovereignty), the Court did not – since it had already found that there was no interference with freedom of association - address whether the restrictions under the law were necessary and proportionate to achieve these declared aims. The Constitutional Court judgment therefore omits any analysis of one of the most significant points in regard to the compliance of the amendments to the NGO law with international human rights law. As noted above, the ICJ, in its Opinion, analysed the Amendments in light of the international human rights law principles of necessity and proportionality, and concluded that the measures under the law fail to meet these standards, since they did not serve a pressing social need, nor were they proportionate to a legitimate aim. As regards the existence of a pressing social need, even before the Amendments to the NGO Law entered into force, Russian NGOs were already obliged to report regularly to the relevant authorities.<sup>69</sup> As regards the proportionality of the measures, 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. Furthermore, the law gives rise to a "chilling effect", imposing an obligation to register as a foreign agent and 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.

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<sup>69</sup> See outline of existing and amended obligations op cit footnote 5.

## V. RECENT DEVELOPMENTS

70. Since the judgment of the Constitutional Court was issued, legislation has been enacted by the Russian Federation which has changed the procedure for designation as a foreign agent. Under Law 147-FZ, which was adopted on 4 June 2014 and entered into force on 6 June 2014, the Ministry of Justice is authorised to register, of its own initiative, Russian NGOs that fall under the definition of “foreign agent” in the 2012 Amendments to the Foreign Agents law. Thus the law no longer relies on NGOs to themselves request their registration as foreign agents. The law has already begun to be implemented, with a number of Russian NGOs being registered by the Ministry of Justice.<sup>70</sup> By removing the element of choice, however limited, for NGOs in whether or not to register as foreign agents, the new law risks more widespread violations of freedom of association and expression in the designation of “foreign agents”, as it seems likely that greater numbers of NGOs will be registered by the Ministry of Justice against the will of the NGOs themselves. The ICJ is concerned that the prescriptive designation of NGOs by the Ministry of Justice, within the current legal framework, is likely to lead to arbitrary and disproportionate interference with these rights. In particular, although an NGO registered as a foreign agent has a legal remedy following registration as a foreign agent, since it can appeal the decision of the Ministry of Justice before the courts, the appeal procedure (as the ICJ has observed in several appeals under the 2012 Amendments) may last up to several months. Furthermore, current legislation does not provide a possibility for removing an NGO from the list of foreign agents even if, for example, an NGO which has been enrolled in the list subsequently refuses all foreign funding or ceases the activity which was considered political and served as reason for its enrolment on the register.

71. These latest changes to the legal framework for designation as a “foreign agent” brought about by the adoption of Law 147-FZ raise the possibility of further applications to the Constitutional Court regarding violations of rights to freedom of association and expression. Indeed such applications are likely in that, in its assessment of the Constitutionality of the 2012 Amendments to the NGO law, the Court underlined that the registration as a foreign agent remains dependent on the voluntary intention of an NGO to register as a foreign agent, and under the 2014 Amendments, this will no longer be the case.

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<sup>70</sup> Information Portal of the Ministry of the Russian Federation: <http://unro.minjust.ru/NKOForeignAgent.aspx>.

## VI. CONCLUSIONS AND RECOMMENDATIONS

### **Conclusions**

55. The ICJ is concerned that the Constitutional Court judgment does not fully address the incompatibilities of the amendments to the NGO law, with the international human rights law obligations of the Russian Federation.

56. Nevertheless, the ICJ welcomes a number of specific findings of the Constitutional Court in this case which address particular problems that have arisen in the application of the Amendments to the NGO Law. In particular, the Court narrowed the definition of “political activity”, by finding that the activity of a member of an NGO in his or her own capacity cannot be considered as a political activity of the NGO itself. In respect of the definition of a foreign funding under the Law, the Court explained that a financial transaction not accepted by an NGO cannot be considered as funding in the light of the definition of a foreign agent.

57. Furthermore, the ICJ fully supports the finding of the Court that the punitive measures provided under the Amendments to the NGO Law lack proportionality.

58. The ICJ notes that although the scope of the Court’s decision was primarily focused on the compatibility of the disputed provision with the Constitution of the Russian Federation, the Court did refer in its decision to the provisions of the European Convention on Human Rights, the jurisprudence of the European Court of Human Rights and to the recommendations of the Committee of Ministers of the Council of Europe. However, the ICJ is concerned that the decision of the Constitutional Court does not sufficiently remedy the incompatibility of the Amendments to the NGO law with international human rights law in a number of respects.

### **Interference with freedom of association and expression**

59. First, the ICJ is concerned that the Court has underestimated the serious impact that the Amendments to the NGO law have on the exercise by NGOs and their members of their rights to freedom of association and assembly. According to the Court, the Russian NGOs facing the necessity to register as foreign agents are neither discriminated against in comparison with those NGOs which do not fall under this obligation, nor stigmatised. The Court underlined in particular, that because Russian NGOs can continue to receive foreign funding or even while being registered as a foreign agent, they are not limited in their activities including those of a political nature and the obligation to register occurs only after an NGO itself intends to engage in political activity, this obligation does not amount to either discrimination, nor stigmatization and therefore provisions of the Amendments to the NGO Law establishing this obligation are in compliance with articles of the Constitution prohibiting discrimination (article 19), proclaiming and protecting human dignity (article 21), and protecting right to freedom of association (article 30).

60. However, the ICJ is concerned that this interpretation neither reflects the practical reality of the situation in which NGOs find themselves. Following the adoption of the Amendments, although, as a matter of law, the Russian NGOs falling under the obligation to register as a foreign agent are not prohibited from engaging in activities which can be considered as “political” under the Amendments to the NGO Law and can continue to seek foreign funding from foreign donors, in reality the implications of registering as a foreign agent have been considered to be so debilitating that, so far, the NGOs forced to be registered as foreign agents have chosen to proceed to self-liquidation to avoid being branded as “a foreign agent”.<sup>71</sup> In particular, the NGOs ordered to register as foreign agents fear the stigma of such registration, and the directors and members of such NGOs anticipate possible prosecution on the grounds of amended article 275 of the Criminal Code<sup>72</sup> which provides criminal responsibility for treason.

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<sup>71</sup> SPB Memorial, Bok-o-Bok, Women of Don.

<sup>72</sup> Amended article 275 of the Criminal Code read as follows: “High treason, that is committed by a citizen of the Russian Federation acts of espionage, disclosure to a foreign state, an international or foreign organization, or their representatives of information constituting a state secret that has been entrusted or has become known to that person through service, work, study or in other cases determined by the legislation of the Russian federation, any financial,

Law 190-FZ<sup>73</sup> of 12 November 2012 widened the definition of treason, by adding to the list of actions constituting state treason: "financial, material and technical, consultative or other assistance to a foreign state, an international or foreign organisation". The potential impact of the Law 190-FZ amending provisions regulating responsibility of treason on freedom of expression was addressed in the Opinion of the Venice Commission adopted at its 99<sup>th</sup> plenary session on 13-14 June 2014.<sup>74</sup> The Venice Commission considered it a matter of particular concern that the new definition of treason could be used by authorities to silence critics.

61. As the ICJ has described in its Opinion and mentioned in this report in para 38, case law of the ECtHR and HRC establish that not only the law, but the real impact of the measures taken by the state is important for assessment of whether these measures can be considered as interfering with the rights to freedom of association and expression. These findings follow the general principle, established by the ECtHR, that Convention rights must be protected in ways that are practical and effective, not theoretical and illusory. Thus, for example, where it concerned obstacles to receiving financial support from foreign donors, the ECtHR in *Ramazanova and Others v. Azerbaijan*<sup>75</sup> 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 in Azerbaijan. Without proper financing, the association was not able to engage in charitable activities which constituted the main purpose of its existence." By contrast, the Constitutional Court relied only on existing *de jure* provisions without taking into account existing *de facto* circumstances which hinder the ability to function properly of the Russian NGOs forced to be registered as foreign agents.

62. The ICJ is particularly concerned at the Court's dismissal of the argument that registration of an NGO as a foreign agent, stigmatises the organisation and therefore has a detrimental effect on the work of the NGO its members. Instead the Court concluded that since registration of an NGO pursues a lawful aim, this automatically deprives the notion of foreign agent of any negative connotation. NGOs receiving foreign funding do however find themselves under pressure and are widely considered disloyal to the interests of the state of Russia and as acting in the interests of foreign donors. The Venice Commission, in its Opinion on the Amendments to the NGO Law, refers to the results of the opinion poll, organised by the Levada-Centre in Russia, which confirms that the notion "foreign agent" still has a negative connotation in a large part of population.<sup>76</sup> In his dissenting opinion, Judge Yaroslavtsev also agreed that such registration leads to stigmatisation of the NGOs, stating that: "such legislative provision presumes a negative assessment of [NGO-foreign agent] by the State, thus this provision relies on negative attitude to the activity an NGO in question engages in."<sup>77</sup>

### **Prescription by law**

63. The Court decided that the disputed Law satisfies the principle of legal clarity and foreseeability, on the basis of its finding that the definition of a foreign agent is clear, and there are no difficulties in understanding when an NGO has to be registered as a foreign agent. However, the ICJ considers that definition of 'political activity' offered by the Court is extremely wide and is not clearly limited to the types of activities which can generally be considered political. In particular, by stating that "a basic criteria for assessment whether an act of an NGO can be considered as political was [...] whether this act aims to create public response and attract attention of state bodies and civil society", the Court seemed to agree with a very broad definition of political activity which did not contribute to the clarity of the definition.<sup>78</sup> The ICJ agrees with the dissenting opinion of Judge Yaroslavtsev that the "case-law of the local court in

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material, technical, consultative or other assistance to a foreign state, an international or foreign organization, or their representatives in activities against the security of the Russian Federation"

<sup>73</sup> Law 190-FZ of 12 November 2012 "On Amendments to the Criminal Code and article 151 of the Code of Criminal Procedure".

<sup>74</sup> cit op footnote 28.

<sup>75</sup> ECtHR, *Ramazanova and Others v. Azerbaijan*, App no. 44363/02, 1 February 2007, para 59.

<sup>76</sup> Cit. op footnote 38, paras 54-55.

<sup>77</sup> Dissenting opinion of Judge Yaroslavtsev, the decision of the Constitutional Court No 10-P of 8 April 2014, p. 71.

<sup>78</sup> cit. op footnote 9.

application of [this provision] demonstrates that law-enforcement bodies follow an excessively broad notion of “political activity”, which includes different types of social activity “forming of public opinion regarding any issues and informing about it wide circle of citizens”, “political education and tutoring”, “organization, financing and participation in and events in order to express and form opinions”, “stating demands regarding issues of interior and foreign politics”.<sup>79</sup> Furthermore, the ICJ notes that the Constitutional Court’s ruling on this issue is at odds with that of the European Court of Human Rights in the case *Zhechev v. Bulgaria*; it underlined that “the term “political” is “inherently vague and could be subject to largely diverse interpretations”<sup>80</sup>

64. The ICJ is also concerned that the Court interpreted the definition of a foreign funding very broadly, underlining that “neither temporal (duration, consistency), nor quantitative (amount), nor type-related scope of grants play any role in assessment”.<sup>81</sup>

### ***Legitimate aim and necessity in pursuit of a legitimate aim***

65. It is of particular concern to the ICJ that the Court did not provide reasoning for its finding that the Amendments to the NGO law have the aim of securing greater openness in the operation of NGOs in the Russian Federation and protecting State sovereignty, nor did it provide any analysis of whether or how the measures served a legitimate aim under international human rights law. The Court did not explain why the previously existing NGO laws did not satisfy the demands of openness in the operation of the NGOs, including NGOs applying for grants from foreign donor organisations, and in which manner the additional administrative obligations imposed by the Amendments to the NGO law would assist in protecting sovereignty or secure greater openness. In his dissenting opinion, Judge Yaroslavtsev referred to this issue, stating that “Imposing of this obligation [to register as a foreign agent] does not demonstrate any objective and reasonable justification, as the relevant provisions [regarding control over activities of the NGO] were [already] provided in detail in the Law on NGOs”.<sup>82</sup>

66. As to the possible threat to the state sovereignty, the Court appears to suggest that the mere possibility that receipt of foreign funding will be used to influence government on behalf of foreign organisations justifies the restrictions under the law. The Court found that “since receiving of foreign funding *does not exclude* a possibility to use these financial resources to influence the state bodies [...] in the interests of donor-organizations, [the disputed Law] complies with the protection of state sovereignty” [emphasis added].<sup>83</sup> This approach appears contrary to the principle of legal certainty, and suggests that NGOs can be designated as foreign agents on grounds of potential rather than actual action, an interpretation of the law which would be highly likely to lead to its arbitrary application.

67. Significantly, the question of proportionality of the restriction arose before the Constitutional Court only in respect of the proportionality of punitive measures (administrative sanctions). It is however, regrettable that, as the Court did not consider that there was any interference with rights of NGOs or their members in any other manner (it expressly rejected such interference in regard to allegations of discrimination, and stigmatization) it did not assess the necessity or proportionality of the interference with human rights of the registration requirement and consequential requirements.

68. In summary, therefore, in the assessment of the ICJ:

- The judgment of the Constitutional Court is based on an assumption, which the real experience of NGOs suggests is incorrect, that the Amendments to the NGO law do not interfere with the freedom of association and expression of NGOs, since an NGO registered as a foreign agent may continue to operate freely, and is not stigmatized by this registration.

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<sup>79</sup> cit. op footnote 76, p. 66.

<sup>80</sup> ECtHR, *Zhechev v. Bulgaria*, App. No 57045/00, 21 June 2007, para 55.

<sup>81</sup> cit. op footnote 34.

<sup>82</sup> cit. op footnote 53, p. 70.

<sup>83</sup> The decision of the Constitutional Court No 10-P of 8 April 2014, para 3.2, p. 29.

- This assumption does not take into account existing case-law of the ECtHR or the HRC which take a broader view of the range of measures that may amount to restrictions on rights to freedom of association and expression. Thus, the ECtHR has held that “the term ‘restriction’ in paragraph 2 of Article 11 and of Article 10 may refer to a wide range of measures<sup>84</sup> including restriction of ability to seek financial support<sup>85</sup>, punitive measures<sup>86</sup>, measures amounting to chilling effect<sup>87</sup>.”

- The definition of “political activity” adopted by the Constitutional Court, has not sufficiently clarified or narrowed the definition in the Amendments to the NGO law to be consistent with requirement that restrictions on the rights to freedom of expression and association be prescribed by law, in accordance with the principle of legality. Instead, the Constitutional Court’s ruling may even further widen the reach of the definition. This means that it is almost impossible for the directors and members of an NGO in receipt of foreign funding to foresee whether or in what circumstances the activities of the NGO are such to make it fall within the definition of “foreign agent”.

- The Court did not provide reasoning for its finding that the Amendments to the NGO law have the aim of securing greater openness in the operation of NGOs in the Russian Federation and protecting State sovereignty. Nor did the Court acknowledge that in any case, neither of these aims falls within the scope of permissible grounds for restrictions of the rights to freedom of expression or association under international human rights law.

- Neither did the Court’s decision clarify whether the disputed Amendments imposing additional administrative burdens on NGOs considered to be “foreign agents” (such as additional audit checks, inspections and the requirement to ensure that published materials identify the NGO as “a foreign agent”) were indeed necessary in a democratic society. Apart from the sanctions under the Administrative Code, it did not clarify whether such measures considered by the ICJ and others to be interferences with the rights to freedom of association or freedom of expression of Russian NGOs were proportionate to lawful aims of the Amendments.

69. The ICJ therefore considers that the Constitutional Court’s judgment has not addressed the aspects of the Amendments to the NGO law, which constitute or facilitate violations of the Russian Federation’s obligations under international human rights law to respect the rights to freedom of expression and freedom of association.

### **Recommendations**

72. The ICJ considers that, following the judgment of the Constitutional Court, the 2012 Amendments to the NGO Law remain in violation of the Russian Federation’s obligations under international human rights law, and should be repealed. The further amendments to the law, of 2014, which build on the system of “foreign agent” registration established by the 2012 amendments, should likewise be repealed.

73. For as long as NGO Law as amended in 2012 and 2014 remains in force, the ICJ urges the Ministry of Justice, the prosecutor’s office and other relevant public authorities to ensure that the law is applied in such a way that NGOs are only designated as foreign agents where it can be clearly demonstrated that there is a need for such regulation of their activities based on a legitimate aim recognised under the ECHR and the ICCPR, and that such regulation would be the least restrictive measure that could be taken in the circumstances.

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<sup>84</sup> ECtHR, *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.

<sup>85</sup> ECtHR, *Parti Nationaliste Basque-Organisation Regionale D’Iparralde v. France*, 71251/01, 7 July 2007, para 38.

<sup>86</sup> ECtHR, *Christian Democratic People’s Party v. Moldova*, App no 28793/02, 14 February 2006, para 47.

<sup>87</sup> ECtHR, *Baczowski and others v. Poland*, App no 1543/06, 3 May 2007, para 67.

74. The ICJ is concerned that in several recent cases, Russian courts continue to apply excessively broad definition of a "foreign agent", even broader than that of the Constitutional Court. The ICJ further urges the Russian Federation authorities to ensure that sufficient guidance is made available publicly as to the definition of "foreign agent" to enable NGOs to foresee to a reasonable degree whether and how they will be affected by the law. This guidance shall take into account approach chosen by the Constitutional Court as well as the guarantees provided in international human rights law documents.

75. The ICJ recalls that, since the European Convention on Human Rights and the International Covenant on Civil and Political Rights impose binding legal obligations on the Russian Federation, Russian courts should consider and apply national legislation compatibly with the rights contained in these treaties.

76. In applying the 2012 and 2014 laws, and in the application of the judgment of the Constitutional Court, therefore, Russian Courts should take into consideration the guarantees of the rights to freedom of association and expression under Articles 10 and 11 of the ECHR and Articles 19 and 22 of the ICCPR, as well as the authoritative interpretation of the scope and nature of those guarantees by the European Court of Human Rights and UN Human Rights Committee.

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