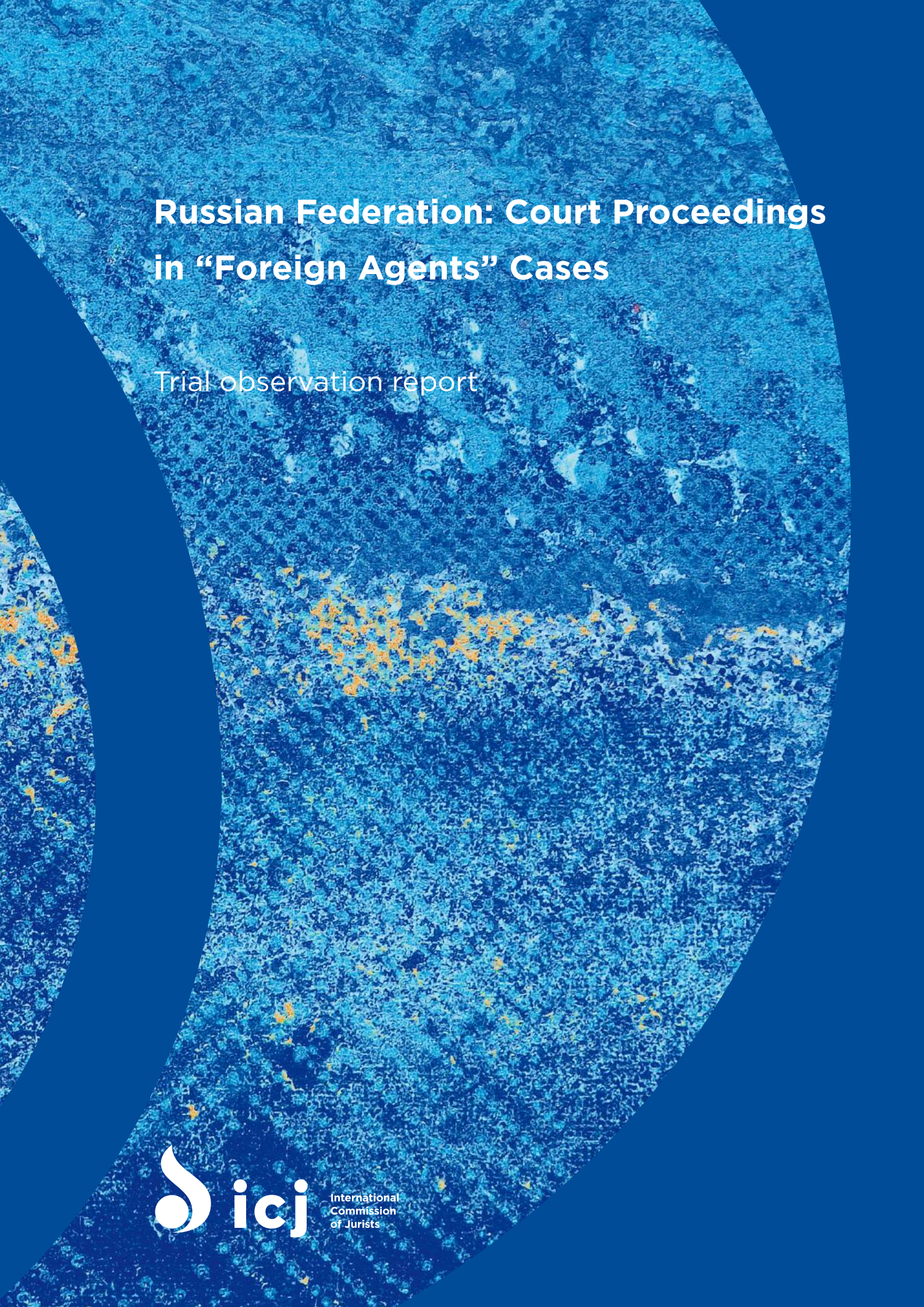
Russian Federation: Court Proceedings in "Foreign Agents" Cases

Trial observation report



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.

® Russian Federation: Court Proceedings in "Foreign Agent" Cases - Trial observation report

Published in March 2015

International Commission of Jurists
P.O. Box 91
Rue des Bains 33
Geneva
Switzerland

Painting by Roger Pfund

Russian Federation: Court Proceedings in “Foreign Agents” Cases

Trial observation report

Table of Contents

CHAPTER I – INTRODUCTION

This report analyses four cases concerning the implementation of the 2012 Amendments to the Russian NGO Law. It is based on court hearings observed by the International Commission of Jurists (ICJ) in 2013-2014 in each of these cases, as well as information provided by lawyers and NGOs in Russia. The report assesses the compliance of the hearings the ICJ observed with the right to a fair hearing as guaranteed under international human rights instruments including the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights or ECHR) and the International Covenant on Civil and Political Rights (ICCPR), treaties to which Russia is a party, and with which it is thus bound to comply. The report focuses, in particular on some aspects in the proceedings which gave rise to concern that the right to a fair hearing was being breached.

Chapter I of the report contains background, including information about the enactment of the 2012 Amendments to the NGO laws and reaction to those amendments. Chapter II of the report outlines the circumstances of each of the four cases which the ICJ observed and highlights some of the main issues of concern during the observations, Chapter III provides an analysis of some of the issues common to the proceedings in the four cases observed, focussing on concerns about their failure to meet Russia's international human rights law obligations, in particular to respect and ensure the right to a fair hearing.

Background

Introduction of the 2012 Amendments to the NGO Law

On 20 July 2012, two weeks after the submission by a group of parliamentarians of a draft law to the State Duma, the Duma adopted amendments to the law on Non-governmental organisations: "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". [1] The amendments required Russian NGOs that receive foreign funding and "engage in political activity" to register as "foreign agents"; imposed additional reporting and administrative obligations on NGOs registered as foreign agents, and established penalties for non-compliance with these requirements.[2] Under Article 2 paragraph 6 of the amended law, 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)". "Political activity" is defined as including "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". The law however excludes from the concept of political activity academic, cultural, artistic activity,

[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. 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).

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

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.

The Law, according to the Explanatory Note, aimed:

> "to ensure openness and transparency in the activities of non-profit organizations which perform the functions of a foreign agent and aim[ed] at organization of due public control over non-profit organizations which carry out political activity on the territory of the Russian Federation and are financed from foreign sources".[3]

The Explanatory Note proclaimed that the law " [did] not worsen the situation of non-profit organizations, introducing necessary publicity and transparency in financing from foreign sources of Russian non-profit organizations involved in political activities".[4]

The law attracted heavy criticism, however, including from Russian human rights institutions and international human rights bodies and mechanisms and it was negatively received by Russian NGOs.

The Ombudsman of the Russian Federation, in his annual report, stated in this regard: "[m]uch in the law has raised doubt among the Russian human rights community. [...] It is impossible, in particular, not to note the extremely broad interpretation of the notion of 'political activity', which risks to be applied almost to all human rights organisations in our country".[5]

The Human Rights Council under the President of the Russian Federation in its opinion on the Draft Law stated: "[t]he Council continues to believe that Federal Law № 121-FZ, adopted without broad discussion and aimed at transforming NGOs which operate under the law into the 'foreign agents', is completely redundant and legally meaningless".[6]

Following a detailed analysis of the draft of the law (which was not amended in substance) in the light of international law, another Legal Opinion, posted on the Presidential Human Rights Council's website, concluded that "[i]t should be stated that the adoption of this law will lead to a breach of international standards in the field of international legal regulation of non-profit organizations and the relevant obligations undertaken by the Russian Federation in this field".[7]

---

[3] Explanatory note to the draft federal law "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", http://asozd2.duma.gov.ru/main.nsf/(ViewDoc)?OpenAgent&work/dz.nsf/ByID&0C05ED49C136DEEF43257A2C00596CAF.

[4] Explanatory note to the draft federal law "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".

[5] The Report of the Plenipotentiary on Human Rights of the Russian Federation of 2012, page 156.

[6] Opinion of the Council under the President of the Russian Federation on Civil Society and Human Rights on the draft Federal Law N109968-6, http://www.president-sovet.ru/upload/files/zaklyuchenie_soveta_109968-6.php.

[7] Opinion on the draft Federal Law "On the Amendment of the Legislation of the Russian Federation in respect of regulation of activities of Non-governmental Organizations Performing Functions of Foreign Agent", http://www.president-sovet.ru/structure/group_detst/materials/zaklyuchenie_na_proekt_federalnogo_zakona_o_nko.php?print=Y.

Indeed, even the Minister of Justice speaking in the Duma said that "the law, which obliges non-commercial organisations to enlist themselves as foreign agents contradicts the spirit of legislation on NGOs".[8]

The law was also criticised internationally, including by the Council of Europe's European Commission for Democracy through Law (known as the Venice Commission.[9]

In January 2014, the ICJ published a Legal Opinion assessing compliance of the 2012 Amendments to the law with international human rights law. The Legal Opinion concluded that the Law was not compatible with rights to freedom of expression and association guaranteed under Articles 10, 11 of the ECHR and 19, 22 of the ICCPR. In particular, the Legal Opinion concluded that the administrative burdens imposed by the Amendments interfered with rights to freedom of association and expression,[10] and that the term "foreign agent" was likely to stigmatize NGOs impeding their effective operation,[11] including by forcing them not to seek financial support from abroad [12] or possible punitive measures imposed.[13] The Opinion found that the restrictions on the rights to freedom of association and expression "do not meet the principle of legality, do not pursue a legitimate aim and in any case are neither necessary in a democratic society not proportionate to any such aims".[14]

The NGO community reacted to the new law by refusing to register as "foreign agents", which then triggered court proceedings of two types: those which were initiated by NGOs against requirements to register as "foreign agents" and those initiated by state authorities seeking NGOs' registration.

[8] The Head of the MoJ defends NGOs, http://lenta.ru/news/2013/01/16/nko/, 16 January 2013.

[9] For example, the Venice Commission concluded that the term foreign agent was "highly controversial" (para. 132), that the declared aim of transparency of funding received from abroad "cannot justify measures which hamper the activities of NCOs operating in the field of human rights, democracy and the rule of law" (para. 133), besides "legal sanctions should only be applied to NCOs in case of serious wrongdoing on their side and, as ruled by the Constitutional Court of the Russian Federation, shall be always proportional to this wrongdoing" (para. 134). The Venice Commission noted that "the practice of its interpretation by public authorities has been so far rather disparate, adding to the uncertainties surrounding the meaning of the term" (para. 135) and that following the adoption of the law NGOs were subjected to "numerous extraordinary inspections, with the legal ground of these inspections remaining unclear and the extent of documents required during them differing quite substantively" (para. 136), Opinions no. 716-717/2013, 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") Of the Russian Federation Adopted by the Venice Commission at its 99th Plenary Session (Venice, 13-14 June 2014).

[10] According to Article 32(3) of the NGO Law in its amended version, NGOs which fall under the definition of 'foreign agent' (Article 2(6)) 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 in all 'materials' published or distributed by a such NGO a notification that these materials are published or distributed by a foreign agent. According to Article 32(4.6), NGOs registered as foreign agents are subject to unplanned inspections carried out by relevant authorities. However, according to the provisions of Article 32(3) 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 and 3.2 of the previous version of the Law on Non-Commercial Organizations).

[11] ICJ, Opinion on the Russian Federation Amendments to the NGO Law on Foreign Agents, http://www.icj.org/russiaamendments-to-the-ngo-law-on-foreign-agents-violate-rights-to-freedom-of-association-and-expression/, para. 17.

[12] ICJ Opinion, op cit para. 10.

[13] *Ibid*, para. 13.

[14] *Ibid*, para. 18.

Additionally, the Ombudsman filed a complaint with the Constitutional Court of the Russian Federation claiming in particular that the Amendments to the NGO Law and other provisions of law were contrary to the Constitution of the Russian Federation and violated the constitutional 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), 32(7) of the NGO Law and article 19.34(1) of the Code of Administrative Offences were incompatible with the Constitution.[15]

The law was also challenged by 11 NGOs before the European Court of Human Rights on grounds that it was contrary to Russia's human rights obligations under the European Convention on Human Rights. [16]

Environment in which cases were heard

The developments following the adoption of the law reflected the uneasiness with which the law was received. Despite initial hesitation by the authorities in applying the new amendments,[17] a number of legal proceedings against NGOs followed and soon grew significantly in number. In addition, the Ombudsman's report points out that following a brief period of inaction "[…] controlling bodies, including the Ministry of Justice of Russia, started indiscriminate checks of Russian NGOs, paralyzing for a long period their statutory activities. The reasons for the checks have not been reported, the volume of documents requested estimated at thousands of pages, the deadlines for their submissions were the strictest, often unattainable."[18]

As of 30 April 2013, according to news reports, in 57 regions of Russia 270 organisations were checked by the Prosecutor's Office;[19] but the actual number of checks was believed to be far greater. For example, in St. Petersburg alone, the Prosecutor's Office reportedly planned to check more than five thousand organisations. [20] According to Order №125 / 27p of 5 August 2013, in St. Petersburg, NGOs were put in the same category with "radical" and "destructive" unregistered organisations: a special mobile group was established by the Prosecutor's Office in order to check compliance by "public and other non-profit organizations, including unregistered public and religious associations of radical and destructive orientation, with legislation including on foreign agents and combating extremism".[21] "Total checks" of more than four thousand organisations were reportedly planned in Novosibirsk Region.[22]

Understanding the law was a challenge for all those who were expected to implement it. While the Ministry of Justice was struggling with the application of

[15] ICJ, Russian Federation: Report on the Constitutional Court Proceedings and Judgment on the "Foreign Agent" Amendments to the NGO Law, http://www.icj.org/russian-federation-report-on-the-constitutional-court-proceedings-and-judgment-on-the-foreign-agent-amendments-to-the-ngo-law, para 19.

[16] "Foreign agents" head to the European Court, http://www.kommersant.ru/doc/2121718.

[18] The Report of the Plenipotentiary on Human Rights of the Russian Federation of 2013, page 156.

[19] A list of prosecutorial checks of NGOs as of April 30, 2013 of 270 organizations from 57 regions of Russia, http://openinform.ru/fs/j_photos/openinform_405.pdf.

[20] The Prosecutor's Office is planning on checking more than five thousand organisations, http://rapsinews.ru/incident_news/20130319/266766595.html.

[21] The Prosecutor's Office of the Russian Federation and the Prosecutor's Office of St. Petersburg, Order, 05.08.2013 №125 / 27p, http://openinform.ru/fs/j_photos/openinform_432.pdf.

[22] Novosibirsk Prosecutor's Office will check more than four thousand NGOs, http://ria.ru/society/20130326/929069583.html.

the vague terms of the law, it was the courts that were required to adjudicate on disputes about the meaning of the term "foreign agent", which had been previously unknown to the Russian legal system and whose meaning under the legislation was unclear. As noted above, on the dockets of Russian courts, were a growing number of legal proceedings relating to the application of the law – initiated by prosecutors against NGOs who refused to register as "foreign agents" and challenges brought by NGOs.

The increasing zealousness with which the law was being implemented by the 'controlling bodies', mainly two influential state agencies – the Ministry of Justice and the Prosecutor's Office - was evident and could not have gone unnoticed by many and most importantly by judges.

Courts were under pressure: on the one hand, influential state bodies were making unprecedented checks on NGOs throughout the country, and on the other hand when faced with adjudicating cases about the implementation of the law, there was no clarity of the meaning of key and broad terms of the law itself. Thus, not only were the terms of the law itself highly problematic,[23] but the general climate in which the court hearings were conducted was not conducive to their interpretation and application in accordance with Russia's international human rights obligations.

The Constitutional Court Ruling

The Constitutional Court held a hearing of the Constitutional challenge by the Ombudsman of the Russian Federation (brought on behalf of a number of Russian NGOs) to of the Law 121-FZ of 2012 and other related legislative provisions, on 14 April 2014.[24] ICJ observers were present at the hearing, and the ICJ issued a report on the hearing and the judgment in the case.[25]

The Constitutional Court's ruling on the Ombudsman's complaint, could have clarified the meaning of the law. In the expectation that this would happen, court hearings in "foreign agent" cases, including in cases which the ICJ observed, were postponed on several occasions awaiting the judgement of the Constitutional Court.

The Constitutional Court, however, found the amendments to the Law to be constitutional with the exception of the proportionality of sanctions imposed. The Court did not agree with the Ombudsman that the Law raised issues of discrimination. It did not consider that its application violated the rights to freedom of association or expression, nor that the law was stigmatising.

The Court noted 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".[26] It stressed that "[s]ince receiving of foreign funding does not exclude a possibility to use these financial resources to influence the state bodies of the Russian Federation in

[23] See ICJ, Opinion on the Russian Federation Amendments to the NGO Law on Foreign Agents, http://www.icj.org/russiaamendments-to-the-ngo-law-on-foreign-agents-violate-rights-to-freedom-of-association-and-expression/.

[24] Russian Federation: Report on the Constitutional Court Proceedings and Judgment on the "Foreign Agent" Amendments to the NGO Law, para. 3.

[25] *Ibid*.

[26] The decision of the Constitutional Court No 10-P of 8 April 2014, para 3.2, p. 28.

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)).”[27]

On the issue of whether the law was consistent with principle of legality, (requiring laws to be sufficiently precise and unambiguous so as to enable individuals to be able to foresee its impact and to prevent abuses of power) the Court held that the language of the law was sufficiently clear to meet the requirement of foreseeability. As to the elements of the law related to receiving funding, the Court, while finding no problem with the terms of the law *per se*, clarified that "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".[28]

In regard to the element of engaging in "political activity" the Court noted that "[a]n 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."[29] Importantly, the Court clarified that in relation to this law, action by members of NGOs in their private capacity, cannot be considered as "political activity" of the NGO itself, rather the activity must be taken by and on behalf of the organisations[30]

It concluded that the designation or status of an NGO as a "foreign agent" did not prevent NGOs from engaging in activities considered to be "political" or to seek foreign funding.

Some aspects of the Law were not touched upon by the Court, including the question of whether the limitation of NGOs' and their members' capacity to operate effectively by obliging them to register as 'foreign agents' interfered with the rights to freedom of association and freedom of expression,[31] or whether an obligation to indicate, on all materials published that the latter were published by "a foreign agent", amounted to an interference with freedom of expression.[32]

The ICJ's report on the Constitutional Court proceedings and judgment welcomed "a number of specific findings of the Constitutional Court which address particular problems that have arisen in the application of the Amendments to the NGO Law"[33] and supported the finding that punitive measures under the Amendments lacked proportionality.[34] Nevertheless, the ICJ expressed concern that "[…] the Constitutional Court judgment [did] not fully address the incompatibilities of the amendments to the NGO law, with the international human rights law obligations of the Russian Federation"[35] and concluded that the "[…] judgment ha[d] not addressed the aspects of the Amendments to the NGO law, which constitute or facilitate violations of the Russian Federation's obligations under international

[27] Ibid.
[28] Ibid, para 3.3, p. 37.
[29] The decision of the Constitutional Court No 10-P of 8 April 2014, para 3.2, p. 33.
[30] *Ibid*, para 3.1, p. 24
[31] ICJ, Russian Federation: Report on the Constitutional Court Proceedings and Judgment on the "Foreign Agent" Amendments to the NGO Law, para. 53.
[32] *Ibid*.
[33] *Ibid*, para 56.
[34] *Ibid*, para 57.
[35] *Ibid*, para. 55.

human rights law to respect the rights to freedom of expression and freedom of association".[36]

The ICJ recommended *inter alia* that for as long as the NGO Law with the 2012 and 2014 amendments remains in force, the Ministry of Justice, the prosecutor's office and other relevant public authorities should "[...] 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".[37]

Application of the amendments in court proceedings

Administrative and civil proceedings were used to enforce the requirement under the Law on NGOs that certain NGOs register as "foreign agents".[38] As required by the law, the authorities applied two main criteria when initiating proceedings regarding an NGO's status as a foreign agent: (a) that the NGO received foreign/international funding/property and (b) that the NGO engaged in 'political activity'.[39] As the ICJ noted in its Legal Opinion on the law, the application of both of these criteria in practice is likely to give rise to violations of rights to freedom of association and freedom of expression.[40]

Under the legislation, the Ministry of Justice, (the body authorized to carry out control over activities of NGOs in the Russian Federation[41]), when it became aware of the violation of a law by an NGO, could issue a legal notice containing a warning of violation with a request to cease the violation.[42] The Prosecutor was also authorized to warn NGOs regarding a possible violation of the law by way of legal notices.[43] A legal notice served as a warning not to proceed with a certain activity, which could amount to a violation of the law. An NGO, which had received a legal notice, could appeal to the courts against its issuance.[44]

An NGO (as well as its directors), which engages in "political activity" and receives foreign funding without being registered as a foreign agent, faces both administrative and criminal liability under the law. Administrative fines of up to

[36] *Ibid*, para 69.
[37] *Ibid*, para 73.
[38] Federal Law No 7-FZ 'On Non-Commercial Organizations' of 12 January 1996, Articles 2.6. and 31.2.
[39] Non-profit organization, with the exception of a political party, is considered to participate in political activity carried out on the territory of the Russian Federation, if regardless of the goals and objectives outlined in its founding documents, it is involved (including through funding) in organizing and conducting political actions with the goal of influencing decision-making by public authorities aimed at changing public policy pursued by them, as well as in the forming of public opinion for such purposes.

By political activity does not include activities in the field of science, culture, art, health care, prophylaxis and health protection, social support and protection of citizens, protection of motherhood and childhood, social support for people with disabilities, promoting healthy lifestyles, physical culture and sport, protection of flora and wildlife, charity activities, as well as activities for the promotion of philanthropy and volunteerism. (Article 2(6) – Law on NGOs)
[40] See ICJ, Opinion on the draft Federal Law "On the Amendment of the Legislation of the Russian Federation in respect of regulation of activities of Non-governmental Organizations Performing Functions of Foreign Agent"
[41] Regulations of the Government of the Russian Federation of 11 July 2012, No 705, para. 3; Ministry of Justice Website, Guide to NGOs, http://minjust.ru/ru/siteguide/for_public_organizations.
[42] Regulations of the Government of the Russian Federation of 11 July 2012, No 705, para. 5.
[43] Federal Law No 2202-1, "On Prokuratura of the Russian Federation" of 17 January 1992 Article 24.
[44] Regulations of the Government of the Russian Federation of 11 July 2012, No 705, para. 13.

300 000 roubles (physical persons) and 500 000 roubles (legal entities) may be imposed for carrying out activities without being registered as a "non-governmental association performing a function of a foreign agent" or publishing or spreading materials that do not indicate that is the material has been published or distributed by a "non-governmental association performing a function of a foreign agent".[45] Publishing or distribution by an NGO of media-materials without indication that those materials were published and/or distributed by a foreign agent, can lead to the head of an NGO or the NGO itself being fined, respectively, 100 to 300 thousand roubles and 300 thousand to 500 thousand roubles.[46] A number of Russian NGOs which were subject to administrative fines in accordance with these provisions applied to the courts seeking to quash the findings of administrative liability.

However, in cases where NGOs were successful in having such administrative liability quashed by the courts, Regional Prosecutor's Offices brought further legal proceedings against the NGOs concerned through civil suits. These civil suits were brought under Article 46 of the Code of Civil Procedure, [47] which allows prosecutors or state and municipal bodies[48] to take proceedings on behalf of an "undefined group of persons" whose rights or interests require protection.

New Amendments to the NGO Law in 2014

As the proceedings related to the 2012 amendments to the law were taking place across the country, new amendments were initiated and the law was further modified. Law 147-FZ of 4 June 2014 (which entered into force on 6 June 2014) authorised the Ministry of Justice, on its own motion, to register NGOs as "foreign agents". Thus, in accordance with these amendments, the law no longer relies on NGOs to request their registration as foreign agents.

From the time of the adoption of the 2012 amendments until January 2015, 32 organisations, most of which are human rights NGOs, have been registered by the Ministry as "foreign agents".[49]

This change of procedure in fact made many if not most of the pending proceedings on the foreign agents Law moot, as the main point at issue in most cases was refusal of NGOs to register as a "foreign agent".

[45] The Code of Administrative Offences of the Russian Federation, Article 19.34 (1).

[46] *Ibid*, Article 19.34 (2).

[47] The law on Prokuratura, *op cit*, allows prosecutors to bring a claim before a judge where it is necessary a) to protect rights and legitimate interests of citizens; b) in case if a rights and legitimate interests of significant amount of persons are violated or c) where a violation had specific effect on society), Articles 27(4), 35(3). In this procedure a prosecutor is not an applicant, but only brings a claim on behalf of those whose rights are allegedly violated (although a prosecutor enjoys procedural rights as fictional "procedural" applicant).

[48] Civil Procedure Code of the Russian Federation, Article 46.

[49] Information of the Registry of NGOs, which perform the functions of a foreign agent, http://unro.minjust.ru/NKOForeignAgent.aspx.

CHAPTER II – CASES OBSERVED BY THE ICJ

To obtain first-hand information about the application of the 2012 amendments to the NGO law, and its interpretation by Russian courts, the ICJ observed hearings in four cases from November 2013 to May 2014 on the interpretation of the definition of a "foreign agent". These were the cases of the NGOs Women of Don, Vykhod (Coming Out), Memorial and Public Verdict. This section describes the facts and the legal proceedings in each case.

Women of Don

Women of Don is an NGO established in Novocherkassk, in the Rostov Region of the Russian Federation.[50] The NGO is active in fields including women's rights, gender equality and human rights defence in the Northern Caucasus.[51]

After the Amendments to the NGO Law came into force in 2012, Women of Don underwent an inspection carried out by the local prosecution.[52]

In October 2013, the local prosecutor filed civil proceedings against Women of Don before the Novocherkassk City Court of the Rostov Region.[53] The proceedings were filed on behalf of "an unidentified number of persons" whose interests, it was claimed, needed to be protected.[54] In the claim, the prosecutor argued that the NGO was obliged to register as a "foreign agent" under the 2012 amendments to the NGO law because it engaged in "political activity" while receiving funding from a foreign source.[55]

The civil proceedings against Women of Don were opened in October 2013 and ended in May 2014, when, in its judgment of 14 May 2014, Novocherkassk City Court accepted all the claims of the prosecutor and ordered Women of Don to register as a "foreign agent". [56]

The ICJ observed hearings in the case on 19 March, 7 April and 14 May 2014. These were the main hearings in the case, during which the witnesses were heard, evidence was considered, the parties made oral pleadings, and the Court announced its judgment.

---

[50] Information on "Women of Don", published on the website <http://www.donwomen.ru/en/o-nas/>

[51] Information on projects of "Women of Don, <accessed at <http://www.donwomen.ru/en/category/4_projects/>

[52] In March 2013 a number of representatives of local prosecution office, the FBR, the economic crimes department and the fire protection service participated in the inspection of the NGO where they checked, among other things, licenses for software owned by the NGO, financial documents and reports. The director of "Women of Don" was informed that the inspection was carried out upon the request of the General Prosecutor's office. As a result of this inspection, "Women of Don" was subject to an administrative fine for various violations found by the inspectors. (http://sos-hrd.org/node/120#.VFd8vr7Zjww). The NGO however was not at that time charged with a violation of any of the NGO Law's provisions (: http://sos-hrd.org/node/174#.VFd8677Zjww).

[53] Social Information Agency, The Prosecution Demands to Recognize Women of Don a Foreign Agent, http://www.asi.org.ru/news/prokurory-trebuyut-priznat-soyuz-zhenshhiny-dona-inostranny-m-agentom/.

[54] Criminal Procedure Code of the Russian Federation, Article 45.

[55] See descriptive part of the Judgment of the Novocherkassky City Court of Rostov Region, 14th May 2014, dossier nr 2-87/14.

[56] Judgment of the Novocherkassky City Court of Rostov Region, 14th May 2014, dossier No 2-87/14.

During the proceedings, the prosecutor claimed that Women of Don was obliged to register as a "foreign agent" under the 2012 amendments to the NGO law.

The following arguments were presented to support the claim that the NGO engaged in "political activity" and received funding from foreign sources.

It was claimed that a private conversation by the Director of the NGO with a prisoner constituted "forming public opinion" and therefore amounted to "engaging in political activity". In particular it was alleged that the Director of Women of Don, Valentina Cherevatenko, acting in her capacity as a representative of the NGO, during an inspection of a local detention facility organized by a Regional Public Watch Committee, discussed with one of the prisoners, Mr. Solntsev, the possibilities for amendments to penitentiary legislation regulating the rights and obligations of detainees. This allegation was supported by an application purported to have been submitted by the detainee to the local prosecution office. It was alleged that in this application, the detainee had claimed that the Director of Women of Don had discussed with him the possibility of amendments to the relevant legislation and had encouraged him to take action in support of these amendments.

It was also claimed that posting of reports, on the website of Women of Don was evidence of "forming public opinion". The reports included a report on round-table seminars on police reform in Russia, Although the round-table seminars reported on had taken place before the Amendments to the NGO Law entered into force, the report in question was published two weeks after the Amendments became applicable. In addition, the on-line posting of reports submitted to the Ministry of Justice was also alleged to represent "political activity"; these published reports submitted to the Ministry of Justice contain information about previous activities of the NGO. According to the prosecution, these reports contained information of events organized by the NGO, including the round tables, and therefore fell under the definition of "political activity" under the Law on NGOs.

Regarding the receipt of foreign funding, the prosecution argued that in 2012-2013, Women of Don had received approximately 200,000 USD as a grant from the McArthur Foundation.

In their written and oral submissions to the Court, the Women of Don admitted that they had received foreign funding but claimed that they had never engaged in "political activity" and therefore were not under an obligation to register as a "foreign agent". In particular, Women of Don claimed the following.

With regard to the claim that the director of Women of Don discussed with a prisoner, Mr Solntsev, the possibility of amendment of penitentiary legislation, the representative of Women of Don denied that this alleged discussion had ever taken place. Women of Don requested the prosecutor to present before the court a copy of the application allegedly submitted by the detainee before a local prosecution office. However, this request was refused by the prosecutor, with reference to protection of privacy of the author of the application. Women of Don unsuccessfully appealed against this refusal to present the application before the Court, in separate proceedings.[57] Later in the proceedings the defence also requested that Mr Solntsev's witness testimony be heard in the Court. The prosecution argued that he had been transferred to another facility and the Court denied the request, apparently on this basis. When the director of the detention facility later testified before the Court that, in fact, Mr Solntsev had not been

[57] Judgment of Novocherkassk City Court of 2 September 2013, Dossier nr. 2-2964/13.

transferred, the decision not to hear Mr Solntsev as a witness, was not revised by the Court.

In respect of the seminars it had organized and reported on, including on-line, Women of Don claimed that those reports, which described those seminars, did not have the attributes of political activity as required in article 2 paragraph 6 of the Amended Law on NGOs because they did not pursue the aim of influencing a decision-making process of state bodies or of forming public opinion with that same purpose. The same argument was made in respect of the reports submitted to the Ministry of Justice, which were published on Women of Don's website. The defence argued that it could not be considered to be "political activity" as this report was published as part of the obligations of any NGO to the Ministry of Justice and did not pursue the aim of influencing any decision-making process.

Women of Don requested the Court to commission an expert study of the documents published on the Women of Don website in order to assess whether or not the documents supported the allegations of the prosecution that the NGO engaged in "political activity". The Court commissioned the expert opinion, which was submitted to the Court.

The defence also explained that Valentina Cherevatenko (the Director of the NGO), had participated in an inspection arranged by a Regional Public Watch Committee (PWC) in relation to a complaint submitted on behalf of Mr Solntsev to the PWC. Mr Solntsev's complaint alleged the failure to provide him with a uniform as required by law, sleeping arrangements, and other issues of his treatment in prison.

The defence clarified that Valentina Cherevatenko participated in the inspection in her capacity as a member of the local PWC, not in her capacity as Director of Women of Don. The defence also clarified in Court that PWCs are independent public organizations, created and acting on the basis of the Federal Law 76-FZ, which entered into force on 1 September 2008.[58] Their members are appointed on the basis of elections and do not receive any compensation for their services.[59] Members of the PWC act exclusively on behalf of the PWC within their competences as provided in the Law 76-FZ, with no regard to their other competencies or public positions.

During the witness testimony, both Valentina Cherevatenko and the employee of Women of Don who had been present at the meeting with Mr Solntsev, informed the Court that during the meeting, the PWC representatives had discussed only the grounds of the prisoner's complaint which had been the reason for arranging the meeting, including providing him with a uniform, and sleeping arrangements. According to both witnesses' testimonies, neither during this meeting nor before or after, did the Valentina Cherevatenko or any other employee of Women of Don discuss any amendments to penitentiary legislation.

In particular, in response to questioning from the defence, the Director of Women of Don, Valentina Cherevatenko, testified that as part of a PWC inspection on 1 March 2013 she participated in a meeting about Mr Solntsev's complaint to the PWC. She stated that Mr Solntsev's complaints were addressed, he thanked her and the others, but that two months later, he submitted an application to the Prosecutor's Office, in which he alleged that she "tried to engage him in political

[58] Federal Law of 10th June 2008, No 76-FZ "On Public Control for Respect of Human Rights in Penitentiary Facilities and Support of Prisoners, Detained in Penitentiary Facilities".

[59] Law "On Public Control for Respect of Human Rights in Penitentiary Facilities and Support of Prisoners, Detained in Penitentiary Facilities", Article 10.

activity during this meeting". Valentina Cherevatenko also referred to indications in the complaint of Mr Solntsev's wife, that he had a record of mental illness.

Witness testimony was also given by the head of the local PWC, Mr Petrashets. He was not present during the meeting with Mr Solntsev, but he stated that within a month of the complaint he met him during one of his visits to the penitentiary facility and asked him about the application he had submitted to the prosecution.

The head of the local PWC told the Court that the inspection of the PWC had taken place on the basis of the application which Mr Solntsev's spouse submitted to the PWC. The complaint concerned loss of personal belongings and failure to provide him with a uniform. He told the Court that, after this visit, Mr Solntsev complained to the prosecutor, that the director of Women of Don had persuaded him to start activities on amending penitentiary legislation. The head of the PWC testified that, during another visit to the prison, he had discussed this complaint with the prisoner. According to him, Mr Solntsev on that occasion stated that he did not remember what the complaint to the prosecutor was about, and advised him to contact the prosecution office for any information about the complaint. The head of the PWC told the Court that other prisoners in the facility informed him that Mr Solntsev had received preferential treatment, such as extra family visits, without any visible grounds for such treatment.

The Court then heard testimony from the deputy head of the detention facility, Mr Zyryanov, who clarified that he was present during an inspection organised by the PWC. During the testimony he said that he did not remember in detail what in particular was discussed during the meeting with the prisoner.

The defence presented a copy of a report to the Court made as a result of an inspection organised by Presidential Council for Civil Society and Human Rights arranged in April-May 2013 (after the visit of the representatives of the PWC with Mr Solntsev had taken place).

The defence noted that in the report, made soon after the visit of PWC, it was stated that Mr Zyryanov confirmed to a representative of the Council for Civil Society and Human Rights that Valentina Cherevatenko never discussed legislative amendments with any of the prisoners. Mr Zyryanov confirmed to the Court that the report was correct in this respect. Asked whether he had been present throughout the whole of the meeting between the PWC representatives and Mr Solntsev, he said that he had had to leave the room at one point to make a telephone call regarding the prisoner's uniform. Asked by the defence lawyer whether the representatives of the PWC had discussed with Mr Solntsev any other topics than those which were raised in his complaint to PWC, Mr Zyryanov said that "during the meeting, discussion concerned the prisoner's complaint, when I had to leave and was coming back I heard something regarding politics, maybe the President's portrait, I do not remember exactly".

After all the witnesses' testimonies had been heard, the defence requested the Court to acquire the records from a local mental health institution to confirm whether Mr Solntsev had indeed had any mental illness. They alleged that this would confirm that he would not be able to make a to the Prosecution on his own. The prosecution opposed this request. The Court denied the request, but agreed to acquire the prisoner's personal dossier from the detention facility.

In its judgment of 14 May 2014, the Novocherkassk City Court of Rostov Region accepted the claims of the prosecutor in full and ordered Women of Don to register

as a "foreign agent".[60] In particular, the Court accepted the claim of the prosecutor that seminars and media events organized by Women of Don were political actions aimed at "influencing the decision-making by state bodies intended to change state policy pursued by them". According to the Court, "any type of action aimed at influencing the society, including critical articles calling for far-reaching public reaction, comments on legislative drafts, and round tables" can be considered as political activity. Thus, the Court considered that a round-table seminar organized by an NGO amounts to political activity *inter alia* where it "reflects the necessary conclusions not in laconic final resolutions, but in a systematic indoctrination of the participants involved, who develop the acquired ideas in their routine vital activities".

The Court also accepted the contention of the prosecutor that reports, published online, which the NGO had submitted to the Ministry of Justice and to donor organizations, containing information about roundtable seminars, were evidence of the NGO's engagement in political activity.

Before the Novocherkassk City Court, the representatives of Women of Don stated that the NGO was not planning to register as a foreign agent and would prefer to begin a self-liquidation procedure before the judgment entered into force.

Even before Women of Don could submit their appeal against the judgment of 14 May 2014, the NGO was enrolled in the list of the foreign agents under the 2014 amendments to the NGO law (Federal Law 147-FZ), which were adopted on 4 June 2014 and came into force two days later. As noted above, under Law 147-FZ, the Ministry of Justice was granted the authority to enrol NGOs in the list of "foreign agents" on its own initiative. Thus the NGO had been enrolled on the list as a "foreign agent" even before the judgment of the 14 May 2014 became final.

On 8 July 2014, Justice of the Peace of Novocherkassk ruled in separate proceedings on the claim submitted by Ministry of Justice against Women of Don. It found that Women of Don had failed to register independently as a foreign agent and imposed on the NGO an administrative fine of 300 000 roubles.

In July 2014, Women of Don filed a complaint challenging the decision of the Ministry of Justice to enroll it as a foreign agent. On 9 December, Zamoskovretsky District Court of Moscow ruled in favour of the Ministry of Justice. On 13 January 2015, Women of Don filed an appeal to the Moscow City Court against the decision of the Zamoskovoretsky District Court. As of February 2015, Women of Don's, appeal before the Moscow City Court is pending.

Vykhod (Coming Out)

The NGO Vykhod (Coming Out) was an NGO operating in Saint Petersburg, involved in the defence of the rights of LGBT persons, providing legal and psychological assistance within the LGBT community in Saint Petersburg.[61]

In spring of 2013 a local Prosecutor's Office organized an inspection of the NGO with the purpose of verifying Vykhod's compliance with the rules regulating activities of NGOs.[62]

[60] Judgment of the Novocherkassk City Court of Rostov Region, 14th May 2014.

[61] Official website, http://comingoutspb.com/ru/about.

[62] Rapid Response Centre for the Protection of Human Rights Defenders,, <http://sos-hrd.org/node/129#.VFeA4L7Zjwx>.

Later the same year, the district prosecutor of the Admiraltejsky District of Saint Petersburg submitted before the Justice of the Peace of Saint Petersburg a civil claim, requesting the Court to oblige the NGO to register as a "foreign agent" under the 2012 amendments to the NGO law. On the 19 June 2013, a Justice of the Peace in Saint Petersburg found that Vykhod fell within the definition of a "foreign agent" and ordered it to pay an administrative fine of 500 000 roubles (approx. 11 000 EUR) for its failure to register as a "foreign agent".

On 25 July 2013, the Vasileostrovsky District Court of Saint Petersburg quashed the judgment of the Justice of the Peace and sent the case for re-hearing. A year later, on 21 July 2014, the Vasileostrovsky District Court found that Vykhod satisfied the definition of "foreign agent" and refused to grant an appeal to the decision of the local prosecutor.[63]

According to the prosecutor,[64] Vykhod satisfied the criteria of foreign agent as it:

- Allegedly received two financial grants from the Netherlands Embassy in Russia for realization of projects combatting LGBT-discrimination;
- Engaged in political activity by publishing a brochure "LGBT discrimination: what, how and why?"[65] and due to the participation of one of the members of its Board of Directors in demonstrations organized on 21 January 2013, during which participants protested against LGBT discrimination, and, among other things, against the draft amendments to the Code of Administrative Offences, establishing the engagement in LGBT propaganda among minors an administrative offence.

The ICJ observed court proceedings before the Vasileostrovsky District Court on 15 March and 16 April 2014. On both occasions, the Court did not discuss the merits of the case but had to decide on whether to grant the request of the applicant (the prosecutor) to add new evidence to the case file. On both occasions Vykhod , the defendant, opposed admittance of the evidence.

In particular, on 15 March, the prosecutor in the proceedings requested that the Court add to the case-file the entire case-file of the proceedings before the Justice of the Peace, that concluded in the judgment of 19 June 2013, that had been quashed on appeal by Vasileostrovsky District Court. Vykhod, the defendant, opposed the admission of the entire case-file, on grounds that the judgment of the Justice of the Peace had never entered into force and therefore the documents included in the case-file had to be considered as new documents in these new proceedings. In response, the prosecutor argued that the documents in the case-file had been already assessed before a court and therefore did not have to be assessed again by the Court. The Vasileostrovsky District Court granted the prosecution's motion, and authorized admission to the case-file of the entire case-file of the proceedings before the Justice of the Peace, on the grounds that these documents had been already assessed in the previous proceedings.

In its judgment of 21 July 2014[66] the Vasileostrovsky District Court accepted the claims of the prosecutor that Vykhod fell within the definition of a "foreign agent". The Court found that the published brochure "LGBT discrimination: what, how and

[63] Judgment of the Vasileostrovsky District Court of Saint Petersburg, 21st July 2014, dossier nr 2-360/14

[64] Position of the prosecution was quoted in the Descriptive part of the Judgment of Vasileostrovsky District Court, 21st July 2014, dossier nr 2-360/14.

[65] Text of the brochure: <http://comingoutspb.com/assets/files/Diskriminatsia.pdf >.

[66] Judgment of Vasileostrovsky District Court of Saint-Petersburg, 21st July 2014, dossier nr 2-360/14

why?",[67] "although it did not contain a direct call for influencing decision-making or changing state policies by state bodies, to a certain extent, without doubt, it aimed to form public opinion to achieve these purposes". Furthermore, the Court stated that the Law on NGOs, and, in particular, article 2(6), did not require as a criterion of "political activity", that the purpose of forming public opinion had necessarily to be achieved.

Another ground for accepting the claim of the prosecutor that Vykhod had engaged in "political activity" was that not only had one of the members of the NGO participated in demonstrations against legislative amendments to the Code of Administrative offences, but also, according to the Court, the persons who applied for approval of the demonstrations, were activists of the LGBT movement in Saint-Petersburg, and had contributed to the content of the brochure "LGBT discrimination: what, how and why?" The Court accepted these arguments of the prosecution, stating, that: "these circumstances point out in an indirect way that representatives of Vykhod participated in the demonstrations".

On the basis of the above-mentioned arguments, the Court found it established that Vykhod engaged in "political activity" and therefore had to be registered as a "foreign agent". The Vasileostrovsky District Court judgment also expressed the view that the registration as a "foreign agent" did not amount to a violation of the rights of an NGO. According to the Court, such registration serves a lawful aim of providing openness in the activities of the NGO and does not lead to any restrictions in its activities.

Vykhod appealed the judgment of the Vasileostrovsky District Court before the Saint-Petersburg City Court. However, to avoid being registered as a "foreign agent", by October 2014 Vykhod had completed the procedure of self-liquidation and was removed from the list of the registered NGOs.

Human Rights Defense Centre Memorial[68]

The Human Rights Defence Centre Memorial is an NGO carrying out human rights, charity and educational projects. It is one of the oldest and best-known NGOs in Russia. It was established in 1993 and operates in Moscow as a branch of the International Memorial group.

After the amendments on "foreign agents" came into force in November 2012, Memorial was one of the NGOs inspected by the prosecution.[69] As a result of the inspection,[70] the Moscow Prosecutor's Office issued a recommendation (legal notice) which required Memorial to register as a foreign agent.

The Moscow prosecution based its conclusion that Memorial fell under the definition of a "foreign agent" because one of its projects focused on an analysis of cases of political prosecution in modern Russia. The project included launching a webpage where cases of political prosecution were documented. The recommendation of the prosecution requiring registration as a foreign agent stated that "information contained on the website ovdinfo.org was not based on any objective data, but on the contrary, just presented specific cases of prosecution for

[67] LGBT Discrimination: What, how and why?, K. Kirichenko, M. Sabunayeva, St. Petersburg, 2013, http://deti-404.com/sites/default/files/diskriminaciya.pdf.

[68] About "Memorial": http://www.memo.ru/s/62.html

[70] Front Line Defenders, Information on the inspections carried out in Memorial, <http://sos-hrd.org/node/142#.VFeD1b7Zjww>

the administrative or criminal offence connected to violations of public order. Furthermore, Russian legislation did not contain provisions regulating prosecution on political grounds".

Memorial appealed against the recommendation of the prosecution before Zamoskvoretsky District Court. The hearings in the case were postponed twice (both times upon the motions of the applicant (Memorial)), pending the outcome of the cases challenging compliance of the amended Law on NGOs with Constitution of the Russian Federation (pending before the Constitutional Court) and with the ECHR (pending before the European Court of Human Rights).

The ICJ observed two hearings in these proceedings, on 18 November 2013 and 15 April 2014. On both occasions, the hearing on the merits was postponed to future dates, and the hearing involved only a consideration of the postponement of motions of the applicants, without any hearing on the merits.

The judge scheduled to hear the case on 15 April 2013 reported herself sick and the case was transferred, ten minutes before the start of the hearings, to another judge.

At the beginning of the hearing on 15 April 2013, the representative of the applicant submitted a motion to move the proceedings to a bigger room, taking into account the interest in the hearing by a number of observers who wished to be present. However, instead of discussing this motion, the judge simply postponed the hearing for another month, to 23 May 2013.

The claim of Memorial was dismissed by Zamoskvoretsky District Court in a judgment of 23 May 2014.[71] In its judgment, the Court found that Memorial satisfied the requirements of a "foreign agent" due to the fact that it had been receiving foreign funding and pursued an activity considered by the Court to be political. In particular, the Court found it established that Memorial's project, ovdinfo.ru project, (related to providing information on cases of political prosecution in Russia) met the criteria of "political activity".

On 21 July 2014, before the judgment of the Zamoskvoretsky District Court entered into force and before Memorial's appeal against this judgment to the Moscow City Court had been heard, the Ministry of Justice, exercising its powers under the 2014 amendments to the NGO Law (under Law 147-FZ, which entered into force on 6 June 2014), on its own initiative enrolled Memorial on the list of "foreign agents". [72]

On 12 September 2014, The Moscow City Court issued its judgment on the appeal of the ruling of the Zamoskvoretsky District Court. It dismissed the appeal and confirmed the judgment.[73]

Memorial has challenged the decision of the Ministry of Justice to register it as a foreign agent before the Zamoskvoretsky District Court, under the 2014 amendments to the NGO law.[74]

[71] Judgment of the Zamoskvoretsky District Court of Moscow, 23d May 2014.

[72] Information of the Registry of NGOs, which perform the functions of a foreign agent, <http://unro.minjust.ru/NKOForeignAgent.aspx>.

[73] Judgment of Moscow City Court, 12 September 2014, No 33-19745/2014.

[74] NGOs included on the register as "foreign agents" are at suit (and will be at suit) with the Ministry of Justice, http://www.memo.ru/d/204425.html.

Public Verdict

Public Verdict Foundation is a Moscow-based NGO involved in human rights advocacy.[75] The NGO focuses on providing legal support and consultation to victims of police abuse.

Public Verdict coordinated a working group of NGOs, created on the initiative of the Council under the President of the Russian Federation for Human Rights and Development of Civil Society, which developed proposals for reform of the Ministry of Interior. The materials developed by the Working Group were to be submitted to the Ministry of Internal Affairs. It was also extensively involved in providing legal aid to accused persons in criminal proceedings in the "Bolotnaya" case, relating to arrests of political protesters in Moscow. [76]

In circumstances similar to Memorial, in the spring 2013, Public Verdict received a recommendation (legal notice) from the prosecution to register as a foreign agent.[77] This recommendation had been issued as a result of an inspection organized in March and April 2013 to verify compliance of the activities of Public Verdict with NGO legislation.[78] It was based on the prosecution's finding that Public Verdict received foreign funds and engaged in political activity, consisting of attempts to form public opinion regarding reform of the Ministry of Internal Affairs.

Public Verdict appealed against the recommendation before the Moscow Zamoscvoretsky Court. The ICJ observed the proceedings on two occasions, on 18 November 2013 and 15 April 2014. On both occasions, the hearing was postponed to a later date, first on the motion of the applicant (on grounds of the pending challenges of the 2012 amendments to the Law on NGOs before the Russian Constitutional Court and the European Court of Human Rights). The second time, the hearing was postponed due to the illness of the judge.

The ICJ was not present when the hearing on the merits of the application took place. However, it was reported that the hearing on 5 June 2014 took place in the absence of Public Verdict's representatives. [79] The judge reportedly did not allow Public Verdict's lawyers to enter the courtroom because they both had arrived ten minutes after the hearing started. In this regard, Public Verdict stated that the hearing had started at exactly 9 a.m., at the same time when the public entrance to the court building was opened. No one (neither lawyers nor the public) could enter the court building before 9a.m. It reportedly also takes approximately 5-7 minutes to register at the entrance to the court and to go through a police check. The hearing had also taken place in a the room on the third floor, therefore it took the lawyers ten minutes to go through registration and police check proceedings and arrive in the room. In contrast, representatives of the prosecution (as well as police) were able to enter the court building before the general public and therefore were present in the room at 9 am. The judge in the proceedings reportedly did not take into account the applicants' lawyers' explanation of late arrival and proceeded without their participation.

[75] General information about the NGO, http://publicverdict.ru/topics/about_us/6002.html.

[76] The "Bolotnaya Square" Case, http://bolotnoedelo.info/en/the-bolotnaya-square-case.

[77] Statement of the Front Line Defenders regarding prosecution of "Public Verdict", accessed at <http://sos-hrd.org/node/289#.VFpakr7Zjww>.

[78] Information about a complex check of the "Public Verdict" Foundation, 26 March 2013, http://publicverdict.ru/topics/found/10980.html.

[79] Public Verdict Foundation reports about violations of the rights of the participants of a judicial process, http://www.memo.ru/d/199563.html.

The claim of Public Verdict was dismissed in a judgment of 27 June 2014.[80] In its judgment, the Zamoskvoretsky District Court accepted the arguments of the prosecution and found that Public Verdict met the criteria of a "foreign agent", since the NGO was engaged in political activity while receiving foreign funding. The Court concluded that Public Verdict's participation in the Working Group of Russian NGOs engaged in drafting proposals within the framework of the Ministry of Interior reform, amounted to political activity.

On 21 July 2014, before the judgment of the Zamoskvoretsky District Court entered into force and the appeal against this judgment had been heard, the Ministry of Justice enrolled Public Verdict on the list of foreign agents on the Ministry's own initiative, exercising powers under the 2014 amendments to the NGO law (Law 147-FZ), which entered into force on 6 June 2014. [81]

.

[80] Judgment of the Zamoskvoretsky District Court of Moscow, 27 May 2014.

[81] Information of the Registry of NGOs, which perform the functions of a foreign agent: < http://unro.minjust.ru/NKOForeignAgent.aspx>.

CHAPTER III – LEGAL ANALYSIS

This part of the report analyses the proceedings the ICJ observed and monitored in 2013-2014 concerning the 2012 amendments to the NGO Law, in light of international standards guaranteeing the right to a fair hearing and the right to an effective remedy for violations of human rights, including as guaranteed under the Article 6 of the ECHR and Article 14 of the ICCPR (right to fair hearing), and under Article 13 of the ECHR and Article 2(3) of the ICCPR (guaranteeing the right to a remedy for violations of rights).

As a preliminary point, it should be noted that the right to a fair hearing applies in civil cases (as well as in criminal cases) under article 14 ICCPR and article 6 ECHR. The civil proceedings initiated in regard to registration as a foreign agent under the NGO laws fall within the scope of the guarantee under these treaties since they determine the civil rights and obligations of the NGOs concerned and of their members.[82]

The right to equality of arms

Equality of arms is an integral element of the right to a fair hearing which, according to the European Court of Human Rights, "requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."[83] This principle of "fair balance between the parties" is applicable to both civil and criminal cases [84] and "serves as a procedural means to safeguard the rule of law".[85]

The principle of an adversarial hearing requires that both parties have knowledge of and the opportunity to comment on the observations filed or evidence adduced by the other party.[86] A failure to disclose material evidence in the proceedings may therefore lead to a violation of the right to a fair hearing. In *Kress v France*, the Grand Chamber of the European Court of Human Rights affirmed that, in all proceedings within the scope of Article 6.1, "the concept of a fair trial also means in principle the opportunity for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed, … with a view to influencing the court's decision."[87]

---

[82] Proceedings concerning membership and registration of NGOs have been found by the European Court of Human Rights to amount to proceedings determning civil rights and obligations and therefore to fall within the scope of the Article 6.1 right to a fair hearing: *Sakelloropoulos v Greece*, Application no 38110/08, 6 January 2011; *APEH Ulolzotteinek Szovetsege v Hungary*, Application No.32367/96, 5 October 2000; As to the scope of application of Article 14 ICCPR, see Human Rights Committee, General Comment No.32, The right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007, para.16.

[83]. See, for example, among many others, *Dombo Beheer vs. Netherlands*, App no 14448/88, 27 October 1993, para 3

[84] Human Rights Committee, General Comment 32, the Right to Equality Before Courts and Tribunals and to a Fair Trial, UN Doc. CCPR.C.GC.32, 23 August 2007, para.13; ECtHR, *Feldbrugge v the Netherlands*, para.44; ECtHR, *Werner v Austria*, App. No. 138/1996/757/956, para.66;

[85] Human Rights Committee, General Comment 32, the Right to Equality Before Courts and Tribunals and to a Fair Trial, UN Doc. CCPR.C.GC.32, 23 August 2007 para. 2.

[86] ECtHR, *McMichael v United Kingdom*, App. No.16424/90, para.80; *ECtHR, Vermeulen v Belgium*, Application no. 19075/91, para.33;

[87] ECtHR, *Kress v France*, Application no. 39594/98, para.74. The Human Rights Committee has clarified that this is also the case under Article 14 of the ICCPR, Human Rights Committee, General Comment 32, the Right to Equality Before Courts and Tribunals and to a Fair Trial, UN Doc. CCPR.C.GC.32, 23 August 2007, para.13; See UN HRC, *Äärelä and Näkkäläjärui v. Finland* (779/1997) UN DocA/57/40, para. 7.4; *J.J. v Netherlands*, Application no. 9/1997/793/994, Judgment of the European Court of Human Rights, para. 43.

The ICJ is concerned that not all of the proceedings under the NGO Law respected the principle of equality of arms.

In particular, in the case of Women of Don, the ICJ is concerned at the decisions of the Court not to require the prosecutor to disclose yet to admit in evidence a copy of the complaint of Mr. Solntsev, and to refuse to grant the motion of Women of Don to call Mr Solntsev as a witness in the proceedings.

While the Court refused to require the text of the complaint to be disclosed, and the Court refused to permit Mr Solntsev to be called as a witness in the proceedings, the prosecution relied on the substance of the complaint to support the argument that Women of Don engaged in political activity- an essential element of the definition of "foreign agent" under the 2012 amendments to the NGO law. As recipient of the complaint of Mr Solntsev, the prosecution was able to see and assess or challenge this evidence, while in the absence of a disclosure of a copy, the defence was not.

The Court appeared to base its decision on the disclosure of the complaint on the protection of privacy of Mr Solntsev. The European Court of Human Rights has stated that:

> "In certain cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest however only such measures restricting the right of the defence which are strictly necessary are permissible under article 6.1".[88]

In this case however, the Court did not explain how or why it determined that his privacy would be violated if the complaint was disclosed or if he were to be called as a witness, and why lesser measures would not suffice.

Concern of the ICJ is heightened by the fact that the Court did not change its view on these issues after four witnesses were heard, each of whom supported the position of the defence that the director of Women of Don had never engaged in the discussion with Mr Solntsev concerning amendments to penitentiary legislation, nor after it had been established through the evidence of the prison administrator that Mr Solntsev had not been transferred to another facility.

The fact that the Court's finding that Women of Don engaged in political activity was based in part on the existence of the complaint of Mr Solntsev, which had been admitted in evidence, and which the defence had not had the opportunity to examine, heightens the concern that the rulings of the Novocherkassk City Court on these issues were inconsistent with respect for the right to equality of arms.

The ICJ is also concerned that in the case concerning Public Verdict, the proceedings violated the principle of equality of arms and the right to effective participation, as a result of the refusal of the Zamoskvoretsky District Court to allow the NGO's lawyers to participate in the hearing that took place on 5 June 2014. The European Court of Human Rights has underlined in civil cases the right to participate properly in proceedings before the tribunal[89], which imposes on a state an obligation to make all necessary steps to ensure such participation. It is also established that the principle of equality of arms may be breached where only one of the parties is present or is legally represented at a hearing.[90] As noted above, Public Verdict's representatives were refused access to the hearing by the

[88] ECtHR, *Jasper v United Kingdom,* Judgement , 16 February 2000, para. 52.
[89] ECtHR, *Mantovanelli v. France,* Application No 21497/93, 18 March 1994, para. *33.*
[90] See ECtHR, *Martine v France*, Application No.58675/00, para.50.

Court due to their absence from the courtroom at 9 am, while the prosecutor, who was able to enter the court building earlier than the lawyers for the defence, was able to be present. In light of the information available to the ICJ, the Court's decision in this regard appeared inappropriate and disproportionate (including in range of other options which could have been available to the Court to address the issue) and had the effect of placing the NGO at a substantial disadvantage as regards the other party to the proceedings, (the prosecutor), contrary to respect for the right to equality of arms.

Admissibility of evidence

The right to a fair hearing by an independent and impartial tribunal guaranteed under Article 6 of the ECHR and Article 14 of the ICCPR, among other things "place[s] the 'tribunal' under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision."[91]

Although, in international human rights law, the admissibility and assessment of evidence are considered to be primarily matters for regulation in national law and practice,[92] nevertheless, evidence must be presented and assessed in such a way as to ensure a fair hearing. [93] National courts must conduct a proper examination of the evidence adduced by the parties.[94]

In the case of Vykhod, as described above, the Vasileostrovsky District Court accepted by motion of the prosecution as evidence in the proceedings, a dossier from a previous case concerning the same NGO. The Court accepted the entire dossier from the previous case, on the grounds that this evidence "had been already reviewed by the court", although this review had taken place in separate proceedings, the decision in which had not entered into force, since it had been quashed on appeal. In this regard, the ICJ is concerned that the new evidence was accepted without assessment by the Court in the case before it, and Vykhod was not given the possibility to challenge this evidence, on the grounds that it had been assessed previously by a judge in a different set of proceedings.

As noted above, in the proceedings against Women of Don, the prosecution based its claim that Women of Don engaged in "political activity" in part on the basis of a complaint it alleged that Mr Solntsev had submitted alleging that the director of Women of Don tried to engage him in political activity. Although it was central to the case, (and eventually to the Court's ruling thereon) no copy of this complaint was disclosed, and the Court refused to call Mr Solntsev as a witness to present his testimony.

These decisions do not appear to have been re-evaluated notwithstanding the fact that, in the course of the proceedings, several witnesses suggested in their testimonies that Mr Solntsev might have suffered from a mental disorder; one of the witnesses who discussed with Mr. Solntsev the circumstances where he submitted his complaint, testified that a month after the complaint had been submitted, Mr Solntsev was not able to remember its content; and another testimony referred to preferential treatment received by Mr Solntsev after the complaint against Women of Don had been submitted. These testimonies could

[91] ECtHR, *Kraska v. Switzerland*, Application No 13942/88, 19 April 1993, para. 30.
[92] HRC, *Romanov v. Ukraine*, 842/1998, 30 October 2003, para. 6.4.
[93] ECtHR, *Schenk v Switzerland*, App no 10862/84, para 46
[94] ECtHR, *Van de Hurk v the Netherlands*, Application no. 16034/90, para.59

have given rise to doubt regarding the reported allegations of Mr Solntsev and demonstrate the importance of having his statement admitted as evidence in the proceedings. [95] Furthermore, the decision not to call Mr Solntsev as a witness when the principle grounds of the Prosecution's objection and the apparent grounds for the Court's decision – that he had been transferred to a distant facility - was incorrect, according to the prison administrator .[96] The Court's ruling on the substance of the case, however relied, in large part, upon the alleged complaint of Mr Solntsev.

For these reasons, the ICJ considers that the decisions not to admit Mr Solntsev's complaint nor to allow him to be called as a witness, was inconsistent with the right to a fair hearing.

Assessment of evidence and arguments

The European Court of Human Rights has also clarified that for the right to a fair hearing to be guaranteed effectively, the court has a "duty to examine effectively the grounds, arguments and evidence adduced by the parties".[97]

Thus, in the case of *Kuznetsov and others v Russia,* where the members of a local community of Jehovah's witnesses, complained of unlawful interference with their freedom of association, and alleged before the European Court of Human Rights that the judge in local proceedings was biased against them, and did not admit, without further explanation, some of the evidence presented by them, the European Court of Human Rights found that the applicants' right to a fair hearing was breached because "[t]he judgments of the domestic courts did not address their submissions […] and remained silent on […] crucial point. […]. That approach permitted the domestic courts to avoid addressing the applicants' main complaint." [98]

In the case of *Pronina v Ukraine,* where the applicant complained that in the dispute proceedings with a local social welfare authority concerning the size of her social pension, domestic courts failed to examine her arguments in full, the European Court of Human Rights held that even though the local courts enjoy a wide margin of appreciation in deciding which arguments to address, "by ignoring [specific point of the applicant] altogether, even though it was specific, pertinent and important, the courts fell short of their obligations". [99]

In the light of the obligation to effectively address arguments and evidence of both parties, the ICJ is concerned at the findings of the courts in the cases of Women of Don, Memorial and Public Verdict. In the Women of Don proceedings, the ruling of Novocherkassk City Court did not refer to the arguments of the defense, supported by both witness testimonies and alternative expert report. On the contrary, the Court entirely relied in the ruling on the allegations of the prosecution and expert report, supporting the arguments of the prosecution. In the cases of Memorial and

[95] In regard to the admission of hearsay evidence in a criminal case, the Grand Chamber of the ECtHR has held, in *Al-Khawaja v UK,* 15 December 2011, App no 26766/05, para 147 that admission of hearsay evidence, especially where it is the sole or decisive evidence, is permissible only where counterbalanced by strong procedural safeguards.

[96] The ECtHR has stressed the importance of a court giving reasons for the refusal to call a witness, in the absence of which the refusal is likely to be considered arbitrary: *Wierrzbicki v Poland*: application no.24541/94, para.45

[97] *Dulaurans v France*App 34553/97, 21 March 2000, para 33; *Krasna v Switzerland*, application no 13942/88 para.30; *Van der Hurk v the Netherlands*, Application no. 16034/90, para.59

[98] ECtHR, *Kuznetsov and others v Russia*, App no 184/02, 11 January 2007, para 84

[99] ECtHR, *Pronina v Ukraine*, 18 July 2006, App no 63566/00, para 25.

Public Verdict, both applicants argued in their submissions that they do not fulfil the function of agents in respect of their foreign donors and therefore could not be considered as their agents. The Court, however did not address this argument in either of the rulings.

Reasons for Decisions

The ICJ recalls that clear and thorough reasoning of a court judgment serves as one of the important guarantees of the right to fair trial by an independent and impartial court.[100] The right to a reasoned judgement is a safeguard for the rule of law and against arbitrariness.[101]

In *Tatishvili v. Russia,* the European Court of Human Rights held that "judgments of courts and tribunals should adequately state the reasons on which they are based. Even though a domestic court has a certain margin of appreciation when choosing arguments in a particular case and admitting evidence in support of the parties' submissions, an authority is obliged to justify its activities by giving reasons for its decisions". [102]

Although the national courts are not obliged to answer every argument raised in the proceedings, the European Court of Human Rights has held that "if a submission would, if accepted, be decisive for the outcome of the case, it may require a specific and express reply by the court in its judgment"[103]. Thus in the case of *Hiro Balani v. Spain*, the Court observed that "in the absence of specific and express reply [to an applicant's submission] it was impossible to ascertain whether the Supreme Court simply neglected to deal with the submission or whether it intended to dismiss it and, if that were its intention, what its reasons were for so deciding". [104]

The ICJ is concerned that, in particular, the decision of the Novocherkassk City Court in the case of Women of Don fails to meet international human rights law standards on reasoned decisions. As the ICJ stated publicly at the conclusion of the proceedings, the ruling, which amounted to severe restriction of the rights to freedom of expression and association, was not clearly reasoned, and appeared to be based on assumptions derived only from unclear philosophical and sociological concepts and un-authoritative dictionary definitions.[105] Furthermore, the judgment uncritically drew from an expert opinion, whilst omitting reference to some of the key witness testimonies.

Consistency of the judgments with the judgment of the Constitutional Court

[100] HRC, General Comment 32, para. 29.
[101] *Apitz Barbera et al v Venezuela*, Inter-American Court (2008), para. 78.
[102] ECtHR, *Tatishvili v. Russia*, Application no 1509/02, 22 February 2007para 58.
[103] ECtHR, *Ruiz Torija v Spain*, 9 December 1994, Application no 18390/91, paras 29-30.
[104] ECtHR, *Hiro Balani V. Spain*, 9 December 1994, Application no 18064/91, para 28; See also *Buzescu v Romania*, Application no.61302/00, para.67.
[105] ICJ Statement, Russian Federation: ICJ expresses concern at court judgment ordering registration as a foreign agent, 5 June 2014, http://www.icj.org/russian-federation-icj-expresses-concern-at-court-judgment-ordering-registration-as-a-foreign-agent/.

The ICJ notes that in all the proceedings which it observed,[106] the courts relied heavily on the arguments of the prosecution, even when they were at odds with the ruling of the Constitutional Court.[107]

For example, the ruling of the Constitutional Court of the Russian Federation in its decision of 8 April 2014 unequivocally stated that participation of NGO members in political activity in their private capacity could not be considered as political activity of the NGO itself.[108] However the Court in Women of Don appeared to consider that an act of Valentina Cherevatenko, undertaken in her personal capacity as an elected member of the local WPC rather than in her capacity as the Director of Women of Don– in this case a visit to a prisoner – could be admitted as evidence of engagement of the NGO in political activity. Furthermore the Court, found that the application of the prisoner alleging the contents of a conversation between him and Valentina Cherevatenko, served as a sufficient proof of the NGO's engagement in political activity.

Similarly, in the case related to Vykhod, accepting the claim of the prosecution that the demonstration organized by a member of the LGBT movement in Saint-Petersburg was evidence of political activity of Vykhod, the Court did not provide sufficient reasoning that indicated that the NGO itself played a role in organizing the demonstration. Rather stating that "the circumstances in an indirect way" point to the NGO engaging in organizing a demonstration and therefore in political activity, the Court seemingly neglected the ruling of the Constitutional Court, contained in the judgment of 8 April 2014, where it observed that: "the aim to influence state decision-making processes and state policies must be pursued by an NGO itself and not only one its members, in order for the NGO to be considered to be involved in political activity." [109]

Reasoning relating to human rights concerns raised by the parties

In the cases of Memorial and Public Verdict, the ICJ noted that in both judgments the Zamoskvoretsky District Court found that the legal notice of the prosecution (requiring the NGOs to register as foreign agents) was not contrary to the right to freedom of association guaranteed under Article 11 of the ECHR and Article 55 paragraph 3 of the Constitution[110] "considering that compliance with the legislation regulating activity of NGOs-foreign agents directly affects national security and public safety". However, in neither of these two judgments did the Zamoskvoretsky District Court provide any assessment of the circumstances which might justify this interference with the right to freedom of association and failed to provide any specific arguments in support of its conclusion that the obligation to

[106] Apart from the observation of cases presented above, the ICJ has followed the trials of several other NGOs which either challenged in the proceedings the decisions or legal notices of local prosecution offices or were defendants in the civil proceedings initiated by a prosecutor. In those cases, including, among others, cases of Anti-Discrimination Centre Memorial, Saratov Centre of Social Policy and Gender Studies, NGO Association "In Support of Voters' Rights" ("Golos"), Kostroma Centre in Support of Public Initiatives local courts on different grounds admitted that the NGOs satisfy the requirements of foreign agents

[107] See above in both cases, the court found that contrary to the position expressed by the Constitutional Court in its judgment of 8th April 2014, the activity of one of the members of the NGO (such as a visit to a penitentiary facility, or participation in a picketing) undertaken in personal capacity can serve as a proof of engagement of the NGO itself in political activity as required for registration as a foreign agent.

[108] The decision of the Constitutional Court No 10-P of 8 April 2014, para 3.1, p. 24

[109] The decision of the Constitutional Court No 10-P of 8 April 2014, para 3.1., p. 24

[110] The Constitution of the Russian Federation, Article 55.

register as a foreign agent is necessary in the interests of national security and/or public safety.

In this regard, the ICJ notes that the European Court of Human Rights has held that particular rigour is required in the reasoning of decisions in regard to human rights arguments raised by the parties. In *Wagner and JMWL v Luxembourg*, the Court held that "even though the courts cannot be required to state the reasons for rejecting each argument of a party … they are nonetheless not relieved of the obligation to undertake a proper examination of and respond to the main pleas put forward by that party. Where, in addition, those pleas deal with the "rights and freedoms" guaranteed by the Convention and the Protocols thereto, the national courts are required to examine them with particular rigour and care.[111] The ICJ considers that this standard has not been met in the analysis of human rights issues in the Memorial and Public Verdict cases.

Retroactive application

In number of the cases the courts, contrary to the principle of legality, applied the Amendments to the NGO Law on Foreign Agents with a retroactive effect, qualifying activities of the NGOs which had taken place before the amendments entered into force, as political activity.

For example, in the case of Women of Don, it was held that the report on a round table seminar, which was organized two and a half months before the amended Law on NGOs entered into force, fell under the definition of political activity. The same approach was taken in the case of ADC Memorial in Saint Petersburg,[112] where the domestic courts found that the report submitted to UN Committee against Torture, long before the amendments entered into force, nevertheless amounted to a political activity, as "the materials in question have remained published on the website of the NGO even after the amendments to the Law on NGOs had entered into force".

These rulings run counter to the ruling of the Russian Constitutional Court, which held that: "[…] carrying out by a non-profit organization, which acts as a foreign agent, and not included on the register of non-profit organizations acting as a foreign agent, of political activity should lead to administrative responsibility […] only in such a case where the act (action, inaction) took place after the entry into force of the Federal Law of November 12, 2012 № 192-FZ".[113]

Arbitrariness of interpretation of the term "foreign agent"

As highlighted in its Legal Opinion on the 2012 Amendments to the NGO law, the ICJ is concerned that the term "foreign agents" is vague and falls afoul of the principle of legality. It raises two related but distinct issues in relation to the principle of legality. First, it renders the application of the law insufficiently foreseeable to meet the requirement that any interference with freedom of association or freedom of expression must be adequately prescribed by law. Second, it raises the risk and facilitates arbitrary application of the law, thereby

[111] Wagner and J.M.W.L. v. Luxembourg, Application no. 76240/01, 28 June 2007, para.96.

[112] Judgment of Lenisky District Court of Saint-Petersburg, 12 December 2013, dossier No 2-1835/13.

[113] The decision of the Constitutional Court No 10-P of 8 April 2014, para 4.1.

interfering with freedom of association and expression in ways that are not necessary in a democratic society or proportionate to a legitimate aim.[114]

The conduct of the proceedings in the four cases observed by the ICJ heightens and reinforces these concerns. In each of the four cases, activities which NGOs could not have reasonably foreseen would be considered to be political, were interpreted as such by the courts.

The case of Women of Don is a striking example of an overly broad interpretation of the term "political activity". In particular, the ICJ considers that it would have been rather difficult if not impossible to foresee that a conversation, even if it indeed had taken place, with a prisoner in a private setting involving a person who at the time was not representing the NGO would amount to an act intended to lead to "a change of public opinion". Equally, it would have been unforeseeable that the posting on-line of a report submitted to the Ministry of Justice, which simply described the organization's earlier activities, could or would be considered to be "political activity". The Prosecution's language suggests that in the case of Memorial, the fact that the information on the website "was not based on any objective data" mattered in terms of finding it to amount to political activity.

Similarly, in the case of Public Verdict Vykhod, it would have been unforeseeable that involvement in the initiative of the Human Rights Council under the President of the Russian Federation, an official advisory body of the President, would be considered to constitute "political activity" of the organization, and that the participation of some of its members in a demonstration would be considered to be an "indirect" political activity of the organization itself.

These examples demonstrate the breadth and inconsistency in interpreting the definition of "political activity" which, in all four of the cases observed, led to findings that the NGOs concerned were required to register as "foreign agents". In the view of the ICJ, these findings raise serious concerns in regard to respect for the rights to the freedom of association and freedom of expression of the NGOs and their members, and the respect for the rights of the NGOs to fair proceedings before independent and impartial courts.

Impediment to an effective appeal and the right to an effective remedy

In all of the proceedings observed by the ICJ, the NGOs had challenged the propriety of their registration as a foreign agent. In all the proceedings the courts of first instance had found that the NGOs received foreign funding and pursued political activity, and therefore, fell under the definition of a foreign agent, under article 2(6) of the amended NGO Law.

The Russian Code of Civil Procedure allows for an appeal with review in full of all factual and legal issues raised before the court of first instance. In three of the cases the NGOs in question submitted the appeal before the relevant courts. The appeal of Women of Don was registered on 5 June 2014, and the appeals of both Memorial and Public Verdict were registered on 21 July 2014.

[114] ICJ, Opinion on the Russian Federation Amendments to the NGO Law on Foreign Agents, http://www.icj.org/russiaamendments-to-the-ngo-law-on-foreign-agents-violate-rights-to-freedom-of-association-and-expression/, para. 31.

As detailed above, however, the Ministry of Justice exercised its authority under the 2014 amendments to the Law of NGOs (Federal Law 147-FZ "On the amendments to the Law of NGOs", which was adopted on 4 June 2014 and came into force two days later) to enroll the NGOs in these cases on the list of foreign agents on its own initiative.

The Ministry of Justice took such action in these cases before the appeals from the judgments of the first instance courts had been heard and decided.

The European Court of Human Rights has found in several cases that introduction of new legislation in the course of legal proceedings, that determines the outcome of those proceedings in a way which benefits the state, may violate the right to a fair hearing. Although in principle the State is not precluded from regulating by new legislative provisions rights arising under laws previously in force, the principle of the Rule of Law and the right to a fair hearing preclude interference by the legislature designed to influence the judicial determination of a dispute. In the case of *Papageorgiou v Greece*,[115] for example, new legislation was enacted when the case was before the appeal courts. The Court found a violation of Article 6.1 because "the enactment of [the legislation] at such a crucial point in the proceedings resolved the substantive issues for practical purposes and made carrying on with the litigation pointless".[116]

Furthermore states are under an obligation to ensure that both law and practice provide for an effective remedy in respect of allegations of violations of human rights such as, in these cases, violations of the rights to freedom of association and freedom of expression.[117]

In this regard, the ICJ considers that the registration of NGOs as foreign agents before their appeal of first instance court decisions had been heard, raises concerns under both the right to a fair hearing (Article 6 ECHR and Article 14 ICCPR) , and the right to an effective remedy for violations of human rights (Article 13 ECHR, Article 2.3 ICCPR).

Conclusions

International standards on the independence of the judiciary recognize that judges play an essential role in constraining executive and legislative power[118] and thereby upholding human rights and the Rule of Law.[119] The "foreign agent" amendments to the Russian NGO laws, couched in vague and unpredictable terms and with clear potential for arbitrary application in violation of human rights, were particularly in need of such review in their application by the courts. That the

[115] Case of Papageorgiou v. Greece, Application no24628/94, para. 38.

[116] *Ibid*, para.38.

[117] UN Human Rights Committee, General Comment 31 on the Nature of the General Obligation imposed on State Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para.15

[118] Legal Commentary to The ICJ Geneva Declaration, Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis, http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf, page 5.

[119] Principle B.3(c) and Article 16.1 of the Paris Minimum Standards of Human Rights Norms in a State of Emergency; Principle 1(b) of the Singhvi Declaration; Principle 10(b) of the Beijing Statement on the Independence of the Judiciary in the LAWASIA Region; Principle 24(b) of the Council of Europe Recommendation No. R(2009)19 of the Committee of Ministers to Member States on the role of public prosecution in the criminal justice system; Principle 4 of the UN Basic Principles on the Role of Lawyers; Chapter VII.59 of the Council of Europe Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities.

judiciary did not in practice operate to constrain the executive and legislature in regard to this legislation is illustrated by the four cases analyzed in this report.

The courts' consideration of these cases was beset with procedural flaws, leading to inconsistent and apparently arbitrary decisions. Compounding the vague and unpredictable terms of the legislation, the courts neglected procedural protections, such as the principle of equality of arms, that should have ensured fair consideration of the cases, and adopted wide interpretations of the terms of the legislation, sometimes without adequate reasoning.

The ICJ considers that these procedural shortcomings, taken together, may have led to breaches of the internationally protected rights to a fair hearing and to an effective remedy of the NGOs concerned. Most significantly, these violations of procedural rights have led to limitations on freedom of association and freedom of expression of the NGOs and their members, which the ICJ considers to be excessive, arbitrary and contrary to Russia's international human rights law obligations.

Commission Members

March 2015 (for an updated list, please visit www.icj.org/commission)

President:

Prof. Sir Nigel Rodley, United Kingdom

Vice-Presidents:

Prof. Robert Goldman, United States
Justice Michèle Rivet, Canada

Executive Committee:

Prof. Carlos Ayala, Venezuela
Justice Azhar Cachalia, South Africa
Prof. Jenny E. Goldschmidt, Netherlands
Ms Imrana Jalal, Fiji
Ms Hina Jilani, Pakistan
Ms Karinna Moskalenko, Russia
Prof. Mónica Pinto, Argentina

Other Commission Members:

Professor Kyong-Wahn Ahn, Republic of Korea
Justice Adolfo Azcuna, Philippines
Mr Muhannad Al-Hasani, Syria
Dr. Catarina de Albuquerque, Portugal
Mr Abdelaziz Benzakour, Morocco
Justice Ian Binnie, Canada
Sir Nicolas Bratza, UK
Prof. Miguel Carbonell, Mexico
Justice Moses Chinhengo, Zimbabwe
Prof. Andrew Clapham, UK
Justice Radmila Dicic, Serbia
Justice Elisabeth Evatt, Australia
Mr Roberto Garretón, Chile
Prof. Michelo Hansungule, Zambia
Ms Sara Hossain, Bangladesh
Ms Gulnora Ishankanova, Uzbekistan
Mr. Shawan Jabarin, Palestine
Justice Kalthoum Kennou, Tunisia
Prof. David Kretzmer, Israel
Prof. César Landa, Peru
Justice Ketil Lund, Norway
Justice Qinisile Mabuza, Swaziland
Justice José Antonio Martín Pallín, Spain
Justice Charles Mkandawire, Malawi
Mr Kathurima M'Inoti, Kenya
Justice Yvonne Mokgoro, South Africa
Justice Sanji Monageng, Botswana
Justice Tamara Morschakova, Russia
Prof. Vitit Muntarbhorn, Thailand
Justice Egbert Myjer, Netherlands
Justice John Lawrence O'Meally, Australia
Justice Fatsah Ouguergouz, Algeria
Dr Jarna Petman, Finland
Prof. Victor Rodriguez Rescia, Costa Rica
Mr Belisario dos Santos Junior, Brazil
Prof. Marco Sassoli, Italy-Switzerland
Justice Ajit Prakash Shah, India
Mr Raji Sourani, Palestine
Justice Philippe Texier, France
Justice Stefan Trechsel, Switzerland
Prof. Rodrigo Uprimny Yepes, Colombia

ISBN 978-92-9037-207-3

International Commission of Jurists

P.O. Box 91
Rue des Bains 33
CH 1211 Geneva 8
Switzerland

t +41 22 979 38 00
f +41 22 979 38 01
www.icj.org