

BEFORE THE THIRD SECTION
EUROPEAN COURT OF HUMAN RIGHTS

Ecodefence and others v. Russia

Application no. 9988/13 and 48 other applications

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERNATIONAL COMMISSION OF JURISTS
(ICJ) AND AMNESTY INTERNATIONAL

INTERVENERS

***pursuant to the Registrar's notification dated 5 September 2017 that the Court
had granted permission under Rule 44 § 3 of the Rules of the European Court of
Human Rights***

2 October 2017

I. Introduction

In this submission, the International Commission of Jurists (ICJ) and Amnesty International provide the Court with an analysis, based on international law sources, of (a) the scope of application of rights to freedom of expression and association guaranteed under Articles 10 and 11 of the European Convention on Human Rights (ECHR or the Convention) to restrictions on the activity of non-governmental organisations (NGOs); (b) application of the principle of legality to such restrictions; (c) the legitimacy of the aim, necessity and proportionality of measures regulating NGOs, including restrictions on funding, burdensome reporting requirements, sanctions and the stigmatizing effect of labelling NGOs as “foreign agents”; and (d) the scope of permissible restrictions under Article 18 of the ECHR, particularly the question of interferences used for purposes other than those which fall under Articles 10 and 11 of the Convention.

This submission addresses the obligations of State parties to the ECHR with account taken of the other international law obligations, such as those under the International Covenant on Civil and Political Rights (ICCPR) as well as other relevant standards under international law. This Court has established through its jurisprudence that rights protected under the Convention are not construed in a vacuum,¹ but shall be interpreted in light of and in harmony with other international law standards and obligations.²

II. Application of Articles 10 and 11 of the ECHR to the regulation of NGOs

The right to freedom of association includes the freedom of individuals to come together and form a collective entity and pursue a common goal, an important element of a healthy civil society, as has been recognized by this Court.³ Freedom of association protects, among other things, the right of individuals to form organisations for the defence and promotion of human rights. The right to freedom of association includes as well the right of groups to access funding and hold resources. Article 13 of the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote, and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders) particularly stresses the right of associations to solicit, receive and utilize financial resources.⁴

In interpreting and applying Article 22 of the ICCPR, both the UN Human Rights Committee and the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association have stressed the importance of safeguarding the capacity of NGOs to engage in fundraising activities, and have argued that funding restrictions that impede the ability of associations to pursue their statutory activities constitute an interference with Article 22 of the ICCPR.⁵ Furthermore, Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) expressly provides for an obligation of States to engage in “international assistance and co-operation, especially economic and technical” in achieving the full realization of the rights protected under the ICESCR. Such assistance and cooperation includes the financial support of NGOs engaged in activities to achieve the full realization of those rights.⁶

The right to freedom of expression, under both Article 10 of the ECHR and Article 19 of the ICCPR, protects the right of all people to seek, receive, and impart information of any form, including political discourse, commentary on one’s own and on public affairs, journalism, cultural and artistic expression, teaching, and religious discourse.⁷

¹ ECtHR, *Öcalan v. Turkey*, Application No. 46221/99, 12 May 2005, para. 163.

² ECtHR, *Demir and Baykara v. Turkey*, Application No. 34503/97, 12 November 2008, para. 67.

³ ECtHR, *Sidiropoulos and others v. Greece*, Application no. 26695/95, para. 40; ECtHR, *Gozelik and others v. Poland*, Application no. 44158/98, para. 88.

⁴ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (hereinafter, Declaration on Human Rights Defenders), Adopted by General Assembly Resolution A/RES/53/144, Art 13.

⁵ Human Rights Committee, *Viktor Korneenko et al v. Belarus*, Communication No. 1274/2004, U.N. Doc. CCPR/C/88/D/1274/2004, 10 November 2006, para 7.2; Report of the Special Rapporteur on the right to freedom of peaceful assembly and of association, 24 April 2013, UN Doc. A/HRC/23/39, para. 16.

⁶ Report of the Special Rapporteur on the right to freedom of peaceful assembly and of association, 21 May 2012, UN Doc. A/HRC/20/27, para. 69.

⁷ Human Rights Committee, General Comment No. 34: Article 19 (Freedom of Opinion and Expression), 12 September 2011, UN Doc. CCPR/C/GC/34, para. 11.

Importantly, international protection of the right to freedom of expression applies not only to information and ideas that are favourably received or regarded as inoffensive, but also to those that offend, shock or disturb the State or any sector of the population.⁸ The right of those representing NGOs to exercise their right to freedom of expression when addressing matters of public interest is also considered as requiring particular protection, since in this regard NGOs play a role similar to that of the media.⁹ This Court has observed that "freedom of thought and opinion and freedom of expression, guaranteed by Articles 9 and 10 of the Convention respectively, would thus be of very limited scope if they were not accompanied by a guarantee of being able to share one's beliefs or ideas in community with others, particularly through associations of individuals having the same beliefs, ideas or interests".¹⁰

Article 6 of the Declaration on Human Rights Defenders particularly affirms the right of everyone to know, seek, obtain, receive and hold information about all human rights.¹¹ The UN Human Rights Committee, in relation to article 19 of the ICCPR, has observed that the right to freedom of expression encompasses "the expression and receipt of communications of every form of idea and opinion capable of transmission to others [including] discussion of human rights".¹² Critically, the Declaration on Human Rights Defenders highlights the right of human rights defenders to develop and discuss new human rights ideas and principles, and to advocate their acceptance.¹³ The UN Special Rapporteur on the situation of human rights defenders has also highlighted the crucial importance of the rights to freedom of expression and association to the work of human rights defenders, as without these they would not be able to perform their monitoring and advocacy work to promote and protect human rights, including by discussing and developing new human rights ideas.¹⁴

Role of civil society organisations

It is well recognized under international human rights standards that civil society organisations, including NGOs, play an essential role in fostering debate on matters of public importance, including public policy. The Vienna Declaration and Programme of Action recognised the important role of NGOs in the promotion and protection of human rights. It emphasised that "non-governmental organizations and their members genuinely involved in the field of human rights should enjoy the rights and freedoms recognized in the Universal Declaration of Human Rights, and the protection of the national law. These rights and freedoms may not be exercised contrary to the purposes and principles of the United Nations. Non-governmental organizations should be free to carry out their human rights activities, without interference, within the framework of national law and the Universal Declaration of Human Rights".¹⁵

The Council of Europe's Recommendation of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe stresses the "essential contribution made by NGOs to the development and realization of democracy",¹⁶ a principle that is also recognized in the Fundamental Principles on the Status of Non-governmental Organisations in Europe.¹⁷ Similarly, the Declaration on Human Rights Defenders acknowledges the important role of civil society organisations in contributing to "the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals".¹⁸

⁸ ECtHR, *Handyside v. United Kingdom*, Application No. 5493/72, 7 December 1976, para 49.

⁹ ECtHR, *Vides Aizsardzibas Klubs v. Latvia*, Application No. 57829/00, 27 May 2004, para 42.

¹⁰ ECtHR, *Chassagnou and others v. France*, Application No. 2833/95 and 28443/95, 29 April 1999, para. 100

¹¹ Declaration on Human Rights Defenders, op cit., Art. 6.

¹² Human Rights Committee, General Comment No. 34: Article 19 (Freedoms of Opinion and Expression), 12 September 2011, UN Doc. CCPR/C/GC/34, para 30.

¹³ Declaration on Human Rights Defenders, op cit., Article 7.

¹⁴ Report of the Special Rapporteur on the situation of human rights defenders, 28 July 2011, UN Doc. A/66/203, paras. 29, 43 and 56.

¹⁵ Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna, 25 June 1993, para. 38, para. 52.

¹⁶ Recommendation of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, CM/Rec(2007)14, 10 October 2007.

¹⁷ Fundamental Principles on the Status of Non-governmental Organisations in Europe and explanatory memorandum, 13 November 2002.

¹⁸ Declaration on Human Rights Defenders, op cit, preamble.

The Declaration on Human Rights Defenders further articulates the importance of the rights to freedom of association and expression for the work of human rights defenders and civil society organisations. Articles 6-8 of the Declaration underline the importance of the right of everyone, alone or in association with others, to the development and discussion of principles and ideas concerning human rights and their advocacy.¹⁹ Such participation may take different forms, including, among others, seeking and obtaining information; human rights advocacy; engaging in governance and the conduct of public affairs and submitting proposals for policy and legislative reform.

In its jurisprudence on the right to freedom of association, this Court has attributed a high value to the role of NGOs in promoting and debating matters of public interest. In *Vides Aizsardzibas Klubs v. Latvia*, the Court determined that an NGO engaged in environmental protection had the role of a “watchdog”, which was “essential for a democratic society”.²⁰ This Court has also applied reasoning underlining that conclusion to NGOs working on the advocacy of political reform. In *Zhechev v. Bulgaria*, the Court found a violation of Article 11 after the State had refused the registration of an NGO on the ground that it was engaged in political activity and therefore was subject to registration as a political party. The Court clarified that “associations [...] including those protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or asserting a minority consciousness, are also important to the proper functioning of democracy”.²¹ The Court added that it “is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively”.²²

In this regard, the rights to freedom of expression and of association are closely linked, since “the implementation of the principle of pluralism is impossible without an association being able to express freely its ideas and opinions”.²³ Therefore, Article 11 must be also considered in the light of the guarantees established under Article 10 ECHR.²⁴

Administrative burdens

The imposition of administrative burdens has been found to interfere with rights under Article 11 of the ECHR on a number of occasions. In *Martin Balluch v. Austria*, where an organiser of a public event was later fined for non-compliance with a requirement to notify authorities regarding public assemblies as provided in a regional Road Act, the Court observed that such measures may in principle constitute “a hidden obstacle to the protected freedom”.²⁵ In that case, the Court considered it necessary to examine whether “an obligation [imposed on the applicant] encroached upon the essence of the right to freedom of assembly” or in other words if it “has or could have an effect on the right to assemble”. In *Kasparov and Others v. Russia*, in respect of the restriction to the right to freedom of assembly, the Court emphasized “that the interference does not need to amount to an outright ban, legal or de facto, but can consist in various other measures taken by the authorities”.²⁶ Thus, in *Ezelin v. France*, the administrative measure imposed on the applicant in connection with his refusal to give evidence before the judge regarding an assembly in which he took part, amounted to a restriction of the right to freedom of assembly. In that case, the Court made it clear that “the term ‘restriction’ in paragraph 2 of Article 11 and of Article 10 should not be read only as precluding measures - such as punitive measures - taken not before or during but after a meeting”.²⁷

Other examples where such measures were identified as interfering with Article 11 of the

¹⁹ Declaration on Human Rights Defenders, op cit, articles 6, 7, 8.

²⁰ ECtHR, *Vides Aizsardzibas Klubs v. Latvia*, op cit, para. 42.

²¹ ECtHR, *Zhechev v. Bulgaria*, Application No. 57045/00, 21 June 2007, para. 35.

²² ECtHR, *Zhechev v. Bulgaria*, op cit, para. 35.

²³ ECtHR, *Gorzelik and others v. Poland*, Application no. 44158/98, para 91.

²⁴ ECtHR, *Young, James and Webster v. UK*, Application No. 7601/76 and 7806/77, 13 August 1981, para. 57; *Ezelin v. France*, Application. No. 11800/85, 26 April 1991, para. 35; *United Macedonian Organization Ilinden and Others v. Bulgaria*, Application No. 34960/04, 18 October 2011, para. 59.

²⁵ ECtHR, *Martin Balluch v. Austria*, Application No. 4471/06, 25 September 2012, para. 24.

²⁶ ECtHR, *Kasparov and Others v. Russia*, Application No. 21613/07, 3 October 2013, para. 84.

²⁷ ECtHR, *Ezelin v. France*, op cit, para. 39; similar approach to be found in *Mkrtchyan v. Armenia*, Application No. 6562/03, 11 January 2007, para. 37; *Galstyan v. Armenia*, Application No. 26986/03, 15 November 2007, para. 100; *Osmani and others v. FYROM*, Application No. 50841/99.

ECHR include *Baczowski and others v. Poland*, where the participants in an assembly had not received an authorization from the authority for holding an event, even where this decision was later quashed by an appeal court. In that case, this Court observed that “the refusals to give an authorization could have had a chilling effect on the applicants and other participants in the assemblies”.²⁸ In *Djavit An v. Turkey*, the prohibition for a participant of a meeting to move freely to the place where the meeting was held amounted to a restriction on the right to freedom of peaceful assembly.²⁹

These findings are re-enforced by the comments of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, who has raised concern over practices of several jurisdictions in which States have exerted extensive scrutiny over associations over the argument of transparency and accountability as a way of harassment and intimidation. In particular, the Special Rapporteur has warned about “frequent, onerous and bureaucratic reporting requirements, which can eventually unduly obstruct the legitimate work carried out by associations”.³⁰

Restrictions on the right to seek, receive and utilize resources

This Court has specifically recognized that restrictions on funding of NGOs may adversely and impermissibly interfere with the exercise of freedom of association by the NGO and its members. Thus, in *Ramazanov and Others v. Azerbaijan* the Court acknowledged that “...even assuming that theoretically the association had a right to exist, the domestic law effectively restricted the association's ability to function properly. It could not, *inter alia*, receive any ‘grants’ or financial donations which constituted one of the main sources of financing of non-governmental organizations in Azerbaijan. Without proper financing, the association was not able to engage in charitable activities which constituted the main purpose of its existence”.³¹ Similarly, in *Parti Nationaliste Basque-Organization Regionale D'Iparralde v. France*, a prohibition on a political party receiving foreign funding was characterized as an interference with freedom of association, “having regard to the impact of the circumstances in issue on the applicant party's financial capacity to carry on its political activities”.³²

The importance of safeguarding the capacity of NGOs to engage in fundraising activities has also been stressed by the Human Rights Council, in its Resolution 22/6, where it called upon states not to criminalize or delegitimize activities in defence of human rights on account of the origin of funding.³³ The Special Rapporteur on the right to freedom of peaceful assembly and of association has also emphasized, with reference to the jurisprudence of the Human Rights Committee,³⁴ that “fundraising activities are protected under article 22 of the Covenant, and funding restrictions that impeded the ability of associations to pursue their statutory activities constitute and interference with article 22”.³⁵

The stigmatizing effect of labelling NGOs as ‘foreign agents’

The Office for Democratic Institutions and Human Rights of the OSCE has expressed deep concern at the State practice of “stigmatizing or delegitimizing the work of foreign-funded associations by requiring them to be labelled in a pejorative manner; initiating audit or inspection campaigns to harass such associations; and imposing criminal penalties on associations for failure to comply with any above-mentioned constraints on funding”.³⁶

The Council of Europe's Venice Commission has similarly affirmed, in regard to the NGO

²⁸ ECtHR, *Baczowski and others v. Poland*, Application No. 1543/06, 3 May 2007, para. 67.

²⁹ ECtHR, *Djavit An v. Turkey*, Application No. 20652/92, 20 February 2003, para. 57.

³⁰ Report of the Special Rapporteur on the right to freedom of peaceful assembly and of association, 24 April 2013, UN Doc. A/HRC/23/39, para. 38.

³¹ ECtHR, *Ramazanov and Others v. Azerbaijan*, Application No. 44363/02, 1 February 2007, para. 59.

³² ECtHR, *Parti Nationaliste Basque-Organization Regionale D'Iparralde v. France*, Application No. 71251/01, 7 June 2007, para. 38.

³³ Human Rights Council Resolution, 22/6, Protecting human rights defenders, UN Doc. A/HRC/Res/22/6, para. 9.b.

³⁴ Human Rights Committee, *Viktor Korneenko et al v. Belarus*, Communication No. 1274/2004, U.N. Doc. CCPR/C/88/D/1274/2004, 10 November 2006, para 7.2.

³⁵ Report of the Special Rapporteur on the right to freedom of peaceful assembly and of association, A/HRC/23/39, 24 April 2013, para.16.

³⁶ OSCE office for democratic institutions and human rights (OSCE/ODIHR), Guidelines on Freedom of Association, 1 January 2015, paras. 220-222.

law of the Kyrgyz Republic, that an organisation registered as a 'foreign agent' is likely to be subject to misrepresentation and stigma through being labelled a 'foreign agent', which in turn may lead to harassment and impede its effective operation, thus interfering with the right to freedom of association, and in some cases, with its right to freedom of expression.³⁷ In particular, the Venice Commission found that "in light of the negative connotation of the term 'foreign agent', a non-commercial organization labelled as a 'foreign agent' would most probably encounter an atmosphere of mistrust, fear, hostility, which would make it difficult for it to operate. Other people, and, in particular, representatives of state institutions will be likely to be reluctant to co-operate with them, in particular in discussions on possible changes to legislation or public policy. The labelling of a non-commercial organization as a foreign agent and the obligation for it to include a reference to the 'foreign agent origin' in any materials published or distributed by such an organization therefore, together with the additional obligations which ensue from this labelling, undoubtedly represent an interference with the exercise of the right to freedom of association and of freedom of expression without discrimination".³⁸

Likewise, the Special Rapporteur on the rights to freedom of peaceful assembly and of association has expressed concern over increased restrictions on organisations to access foreign funding based on arguments of the protection of state sovereignty or State's traditional values, including by stigmatizing such organisations. The Special Rapporteur has noted that "foreign funding to civil society has been deliberately depicted as a new form of imperialism or neocolonialism and recipients have been subject to defamation, stigmatization and acts of harassment. This tendency has a serious impact on the work of civil society actors [and] is particularly alarming for associations promoting human rights and democratic reforms who have been accused of 'treason' or of 'promoting regime change'".³⁹

The interveners therefore submit that measures imposing onerous registration or administrative obligations on NGOs, including measures that restrict their ability to seek, receive and utilize financial resources, and measures that stigmatise organisations by labelling them as 'foreign agents', interfere with the right to freedom of association under Article 11 of the Convention. Because such restrictions will almost inevitably affect the capacity of the NGO and its representatives to engage in public debate, they also interfere with the right to freedom of expression under Article 10 of the ECHR. The chilling effect which such measures have on the exercise of the rights to freedom of association and expression of all NGOs and their members further undermines Articles 10 and 11. Such measures call for particular scrutiny given the important role of NGOs in ensuring the participation and debate essential to a healthy civil society.

III. The principle of legality in the application of laws regulating the registration or operation of NGOs

Under the Convention, as affirmed by the jurisprudence of this Court, measures directed at NGOs which serve to restrict rights under Articles 10 or 11 of the ECHR must be adequately prescribed by law, in accordance with the principle of legality. This means that such measures must be established in terms that are sufficiently precise to allow their consequences to be reasonably foreseeable to those affected by them.⁴⁰

This Court has previously found a violation of Article 11 of the ECHR due to the vagueness of legislative provisions regulating NGOs. In *Tebieti Mühafize Cemiyeti and Israfilov v.*

³⁷ European Commission for Democracy through law (Venice Commission) and OSCE office for democratic institutions and human rights (OSCE/ODIHR), joint interim opinion On the Draft Law Amending the Law on Non-commercial organizations and other legislative acts of the Kyrgyz Republic, 1-12 October 2013, para 47

³⁸ European Commission for Democracy through law (Venice Commission) and OSCE office for democratic institutions and human rights (OSCE/ODIHR), joint interim opinion On the Draft Law Amending the Law on Non-commercial organizations and other legislative acts of the Kyrgyz Republic, 1-12 October 2013, para 47.

³⁹ Report of the Special Rapporteur on the right to freedom of peaceful assembly and of association, 24 April 2013, UN Doc. A/HRC/23/39, para. 27.

⁴⁰ ECtHR, *Koretskiy v. Ukraine*, Application No. 40269/02, 3 April 2008, para. 47. See also Human Rights Committee, General Comment No. 34: Article 19 (Freedom of Opinion and Expression), 12 September 2011, UN Doc. CCPR/C/GC/34, para. 25.

Azerbaijan, the Court found that the provisions of the NGO Act did not meet the “quality of law requirement,” since the wide discretion afforded to the authorities to intervene, engendered by insufficiently precise provisions, did not satisfy the standard of foreseeability. In making this finding, the Court noted in particular that “the Government have not submitted any examples of domestic judicial cases which would provide a specific interpretation of these provisions”.⁴¹

In *Koretskyy v. Ukraine*, the Court similarly found that “the provisions [...] regulating the registration of associations were too vague to be sufficiently ‘foreseeable’ for the persons concerned and grant an excessively wide margin of discretion to the authorities in deciding whether a particular association may be registered. In such a situation, the judicial review procedure available to the applicants could not prevent arbitrary refusals of registration.”⁴²

This Court had an opportunity to analyse the application of the vague and overly broad term of ‘political activity’ in the case *Zhechev v. Bulgaria*. There it observed that “bearing in mind that this term is inherently vague and could be subject to largely diverse interpretations, it is quite conceivable that [...] courts could label any goals which are in some way related to the normal functioning of a democratic society as ‘political’ and accordingly direct the founders of legal entities wishing to pursue such goals to register them as political parties instead of ‘ordinary’ associations”.⁴³ The Court further stressed that “a classification based on this criterion is therefore liable to produce incoherent results and engender considerable uncertainty among those wishing to apply for registration of such entities”.⁴⁴

The interveners submit that laws regulating the registration or operation of NGOs which define their scope by reference to inherently vague and imprecise terms such as ‘political activity’, ‘foreign funding’ or ‘forming public opinion’, afford authorities overly broad discretion to intervene in matters affecting rights under Articles 10 and 11 of the ECHR. Without further clear guidance in the adopted law itself, as well as regulations or jurisprudence, such laws leave NGOs unable to predict with any certainty how they should regulate their conduct in order to comply with the law and to avoid penalties. As such, they fall short of the Convention requirement of foreseeability, and lead to interferences with Articles 10 and 11 that are not adequately prescribed by law.

IV. Legitimate aim, necessity and proportionality of measures regulating the conduct of NGOs

Legitimate aim

The interveners recall that, in order for an interference with rights under Articles 10 or 11 to be considered as pursuing a legitimate aim, such an aim must be clearly articulated by the authorities, and must be genuinely intended to serve one of the legitimate aims specified in those articles of the Convention. Different UN Special Rapporteurs, in assessing the Hungarian law regulating NGOs, have noted that “while fighting money laundering and terrorism funding are indeed legitimate and important State interests, it is unclear how forcing NGOs to register as ‘foreign-supported organizations’ furthers those State interests”.⁴⁵

The interveners emphasize that, without clear explanation from the State, it cannot be assumed that measures restricting the registration or operation of NGOs meet the criterion that they must be intended to serve a legitimate aim.

Necessity and proportionality

Even if it is accepted that a measure regulating NGOs pursues a legitimate aim, Articles 10 and 11 of the ECHR requires these to be necessary in a democratic society, therefore

⁴¹ ECtHR, *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, Application No. 37083/03, 8 October 2009, para. 62.

⁴² ECtHR, *Koretskyy v. Ukraine*, op cit, para 48.

⁴³ ECtHR, *Zhechev v. Bulgaria*, Application No. 57045/00, 21 June 2007, para. 55.

⁴⁴ ECtHR, *Zhechev v. Bulgaria*, op cit, para. 55.

⁴⁵ Letter of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, and the Special Rapporteur on the situation of human rights defenders addressed to the Government of Hungary of 9 May 2017 concerning the Bill T/14967 on the Transparency of Organizations Financed from Abroad, available at: <http://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL-HUN-2-2017.pdf>.

... serving a pressing social need, and be proportionate in pursuit of this aim.⁴⁶ This Court has consistently shown particular reluctance to accept as necessary restrictions on participation in debate concerning matters of public interest. Thus, in *Arslan v. Turkey*, the Court recalled that “there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest. Furthermore, the limits of permissible criticism are wider with regard to the government than in relation to private citizens or even politicians. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion”.⁴⁷ In *Gorzelik and Others v. Poland*, where an NGO that represented the interests of an ethnic minority group was refused registration, the Grand Chamber affirmed “the direct relationship between democracy, pluralism and the freedom of association and ... the principle that only convincing and compelling reasons can justify restrictions on that freedom”.⁴⁸

The requirement that restrictions on rights serve a pressing social need echoes the similar requirement set forth by the UN Human Rights Committee in *Lee v. Republic of Korea*, that, in respect of the necessity of the restriction in a democratic society, States must “demonstrate that the [restrictions] are in fact necessary to avert a real, and not only hypothetical danger” to the legitimate aim advanced by the State.⁴⁹

This Court found in *Koretskyy v. Ukraine*, for example, that the refusal to register an NGO on the grounds of the inconsistency of their articles of association with the law, in particular the prohibition on NGOs distributing propaganda and lobbying for their ideas and aims, involving volunteers as members or carrying out publishing activities, with no “explanation for, or even an indication of the necessity of the existing restrictions”, did not pursue “a pressing social need”.⁵⁰ In *Zhechev v. Bulgaria*, the Court observed that since NGOs could not take part in any level of elections there was “therefore no ‘pressing social need’ to require every association deemed by the courts to pursue ‘political’ goals to register as a political party”.⁵¹

This Court has held that “in determining whether a necessity within the meaning of Article 11 § 2 exists, the States have only a limited margin of appreciation”.⁵² In order to meet the requirement of proportionality, measures restricting or imposing administrative burdens on NGOs must be the least intrusive possible, with due regard to the significance of the interests at stake. In *Republican Party of Russia v. Russia*, this Court reasserted that “while States are entitled to require organizations seeking official registration to comply with reasonable legal formalities, that is always subject to the condition of proportionality”.⁵³ As the Court noted in *Stankov and United Macedonian Organization Ilinden v. Bulgaria*, “sweeping measures of a preventive nature to suppress freedom of assembly and expression [...] do a disservice to democracy and often even endanger it”.⁵⁴

Specifically in respect of restrictions on receipt of foreign funding, in *Parti Nationaliste Basque-Organization Regionale D'Iparralde v. France*, the Court said it “could not see exactly how” in situations when a political party receives financing from a foreign political party, “that would undermine state sovereignty by this factor alone”.⁵⁵ In this case, the Court reasoned that the State enjoyed a margin of appreciation in regulating the financing of political parties. As political parties could rely on alternative sources of financing, the prohibition was not found to violate the right to freedom of association and the Court found this measure to be proportionate. However, such a wide margin of appreciation has not generally been afforded by this Court to States where the measures in issue restrict the conduct of NGOs. The Human Rights Committee has similarly affirmed that restrictions on the right to freedom of expression must not be overbroad. The Committee has

⁴⁶ A similar standard obtains under the ICCPR: Human Rights Committee, General Comment 34, op cit, para. 35.

⁴⁷ ECtHR, *Arslan v. Turkey*, Application No. 23462/94, 8 July 1999, para. 46.

⁴⁸ ECtHR, *Gorzelik and others v. Poland*, op cit, paras. 88-89.

⁴⁹ Human Rights Committee, *Lee v. Republic of Korea*, Communication No. 1119/2002, UN Doc. CCPR/C/84/D/1119/2002, 29 July 2005, para. 7.2.

⁵⁰ ECtHR, *Koretskyy v. Ukraine*, op cit, paras. 52-54.

⁵² ECtHR, *United Macedonian Organization Ilinden and Others v. Bulgaria*, op cit, para. 61.

⁵³ ECtHR, *Republican Party of Russia v. Russia*, Application No. 12976/07, 12 April 2011, para. 87.

⁵⁴ ECtHR, *Stankov and United Macedonian Organization Ilinden v. Bulgaria*, op cit, para. 97.

⁵⁵ ECtHR, *Parti Nationaliste Basque-Organization Regionale D'Iparralde v. France*, op cit, para. 47.

explained that “the principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law”,⁵⁶ and has indicated that certain laws are incompatible with permissible restrictions under Article 19 of the ICCPR, including those which “suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute [...] human rights defenders for having disseminated such information”.⁵⁷

The temporary nature of measures that prevent or restrict the operation of NGOs does not in itself establish their proportionality. In *Christian Democratic People’s Party v. Moldova*, this Court underlined the disproportionality of the measure in that case and concluded that “the temporary nature of the ban is not of decisive importance in considering the proportionality of the measure, since even a temporary ban could reasonably be said to have a ‘chilling effect’ on the party’s right to exercise its freedom of expression and to pursue its political goals”.⁵⁸

The interveners submit that sweeping measures which impose restrictions on the ability of NGOs to seek, receive and utilize financial support or burdensome administrative obligations on a wide range of NGOs, with a consequent chilling effect on NGO activity, are likely to disproportionately interfere with rights under Articles 11 and 10 of the ECHR. Such unduly broad measures will also fall short of the requirement that they meet a pressing social need.

Furthermore, the severity of the chilling effect on Articles 10 and 11 of measures that stigmatise NGOs through labels such as ‘foreign agent’ should be taken into account in any assessment of proportionality.

Finally, where punitive measures are imposed for failure to comply with NGO laws, including fines, imprisonment, dissolution of NGOs or suspension of their activities, the law must establish specific criteria to ensure that the severity of sanctions imposed corresponds to the specific threat to the protected interests.⁵⁹ In the regulation of NGOs, harsh punitive measures will rarely constitute the least intrusive measures available to achieve the protection of the interests at stake and therefore will generally be disproportionate.

V. The scope of permissible restrictions under Article 18, in relation to Articles 10 and 11 of the Convention.

Article 18 of the ECHR gives protection against misuse of powers to restrict the rights and freedoms guaranteed in the Convention for improper purposes, other than the limitations that have been prescribed therein. As has been sustained by this Court throughout its jurisprudence on Article 18, this provision can only be applied in conjunction with other articles of the Convention as it does not have an autonomous role.⁶⁰

In *Rasul Jafarov v. Azerbaijan*, this Court stressed that, “depending on the circumstances of the case, improper reasons cannot always be proven by pointing to a particularly inculpatory piece of evidence”⁶¹ and established that for determining a violation to Article 18, the Court could also take into account the general context of increasing harsh and restrictive regulation of NGOs activity and their funding, as well as statements by high-ranking officials and other published commentary in the media that consistently accused human rights defenders of being spies, traitors or foreign agents.⁶²

In this regard, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has raised concern over the many instances in which domestic laws impose restrictions on the right to association, and particularly on the right to seek,

⁵⁶ Human Rights Committee, General Comment No. 34: Article 19 (Freedoms of Opinion and Expression), 12 September 2011, UN Doc. CCPR/C/GC/34, para 34.

⁵⁷ Human Rights Committee, General Comment No. 34, op cit, para 30.

⁵⁸ ECtHR, *Christian Democratic People’s Party v. Moldova*, Application No. 28793/02, 14 February 2006, para. 77.

⁵⁹ ECtHR, *Christian Democratic People’s Party v. Moldova*, op cit, para. 47.

⁶⁰ ECtHR, *Gusinski v. Russia*, Application No. 70276/01, 19 May 2004, para. 73; ECtHR, *Ilgar Mamadov v. Azerbaijan*, Application No. 15172/13, 22 May 2014, para. 137.

⁶¹ ECtHR, *Rasul Jafarov v. Azerbaijan*, Application No. 69981/14, 17 March 2016, para. 158.

⁶² ECtHR, *Rasul Jafarov v. Azerbaijan*, op cit, paras. 159-160.

receive and utilize funding, on grounds other than those prescribed in international human rights law, including for the protection of State sovereignty and traditional values, and transparency and accountability, among others.⁶³

In particular, while the UN Special Rapporteur has recognized that independent bodies have a legitimate reason to examine the associations' records to ensure transparency and accountability, States must ensure that this procedure is not arbitrary and that is respectful of the rights to non-discrimination and privacy, as it would otherwise put the independence of associations and the safety of their members at risk.⁶⁴ Similarly, the Steering Committee of Human Rights of the Council of Europe has stressed that reporting requirements should not inhibit the autonomy of associations and should not impose discriminatory restrictions on potential sources of funding.⁶⁵

The interveners consider that, given the potential for abuse on political grounds, the purpose of measures restricting the rights of NGOs and their representatives under Articles 10 and 11 of the ECHR should be closely scrutinized under Article 18 of the ECHR, in light of the systemic challenges facing civil society in the country concerned, and more broadly in the region, and the statements and behaviours of relevant government officials towards NGOs and civil society in general.

VI. Conclusions

The interveners consider that measures imposing administrative and reporting burdens on NGOs related to the receipt of foreign funding, and stigmatizing the receipt of such funding, interfere with rights under Articles 10 and 11 of the ECHR in that they have a significant impact on the ability of NGOs and their representatives to engage in public debate and to participate in civil society. Where the scope of application of such laws is dependent on vague terms such as "political activity" and "foreign funding", without further clear statutory precision, as well as regulatory or jurisprudential guidance, their impact is not sufficiently foreseeable to meet the requirement of prescription by law. Furthermore, such laws must be clearly articulated as serving a specific legitimate aim, and must meet the stringent requirement of necessity and proportionality, in order to avoid the potential for arbitrary application of its provisions. Such measures should be closely scrutinized for improper purpose under Article 18 of the ECHR, in light of the systemic position of civil society in the country and the statements and behaviour of relevant government officials towards NGOs and civil society.

⁶³ Report of the Special Rapporteur on the right to freedom of peaceful assembly and of association, 24 April 2013, UN Doc. A/HRC/23/39 Report of the Special Rapporteur on the right to freedom of peaceful assembly and of association, 21 May 2012, UN Doc. A/HRC/20/27, para. 20.

⁶⁴ Report of the Special Rapporteur on the right to freedom of peaceful assembly and of association, 21 May 2012, UN Doc. A/HRC/20/27, para. 65.

⁶⁵ Council of Europe. Steering Committee for Human Rights (CDDH). Analysis on the impact of current national legislation, policies and practices on the activities of civil society organizations, Human Rights defenders and national institutions for the promotion and protection of Human Rights. Adopted by the CDDH at its 87th meeting, 6-9 June 2017, para. 100.