



The Judicial Dimension of the NGO Crackdown

*Application of the Foreign Agents Act by Russian
Courts*

June 2014



International Partnership for Human Rights (IPHR) works with civil society groups from numerous countries to raise human rights concerns at the international level and promote respect for the rights of vulnerable communities, such as human rights defenders; political prisoners; victims of torture and unfair trials; ethnic, religious and other minorities; women and children from marginalized communities and independent journalists and others who are at risk because they challenge government policies. We seek to assist these groups in delivering their message to international actors and to call attention to human rights issues that otherwise may not reach the agenda of international organizations and institutions.

The **Civic Solidarity Platform (CSP)** was created to bring together nongovernment organizations in Europe, Eurasia and North America committed to improving the human rights situation in Eastern Europe and Central Asia. It provides a common space for these groups to share their experience in conducting research, advocacy and public organizing. It fosters new channels of communication and improves methods for working cooperatively. The Platform serves as a conduit through which civic activists can build alliances, strengthen mutual support and solidarity and improve their influence on national and international human rights policy.

Written by: Maria Suchkova¹ and Simon Pauashvili²

Cover photo was taken by: Yulia Klimova, HRC "Memorial"

International Partnership for Human Rights would like to express special gratitude to Open Society Foundations for its support to the Russia trial monitoring project under which this publication was made possible.

IPHR would like to thank Natalya Taubina, director of the Public Verdict Foundation, and Yuri Dzhiblادze, president of the Centre for the Development of Democracy and Human Rights, for their contribution to the section "Recommendations and Conclusions"

Contact details: International Partnership for Human Rights

Contact: International Partnership for Human Rights (IPHR)

Avenue des Arts 3-4-5, 8th Floor

1210 Brussels, Belgium

Tel. +32 2 227 6145 (landline) +32 475 39 21 21 (mobile)

Email: iphronline.org

¹ ¹Partner at *Threefold Legal Advisors LLC*, LL.M in International Human Rights Law (University of Essex).

² ² Advocacy Officer at IPHR

Table of Contents

Executive Summary	3
A. Background.....	5
B. Scope of the report	6
C. Compatibility with Article 6 of the Convention	7
1. General principles established in the Court's case-law.....	8
2. Fairness of proceedings in the case of <i>ADC Memorial</i>	9
D. Compatibility with Articles 10 and 11 of the Convention	10
1. General principles established in the Court's case-law.....	11
2. Compatibility of the Foreign Agents legislation and the proceedings in the cases under review with the aforementioned principles.....	12
a. Obligation to register as "an organization performing functions of a foreign agent" in the light of the right to hold opinions.....	12
b. Vagueness and broadness of the term "political activity"	13
Excessive regulation of NGO activities	18
i. Audit and reporting.....	19
ii. Inspections	19
iii. Obligation to mark publications as produced by an "organization performing the functions of a foreign agent".....	20
Severity of sanctions for non-compliance with the Foreign Agents Act	20
E. Compatibility with Article 14 of the convention	22
F. Recommendations to the russian government	23

Judicial Dimension of the Crackdown – Application of the Foreign Agents Act by Russian Courts

EXECUTIVE SUMMARY

This report offers a synthesis of a ten month trial observation conducted by the experts from the Civic Solidarity Platform (CSP), who followed over 30 court hearings affecting some of Russia's leading human rights organizations. All trials were related to the application of the notorious Federal Law No 121 FZ (hereinafter referred to as Foreign Agents Act) introduced in November 2012. The report focuses on the proceedings brought against or initiated by seven Russian NGOs, which were followed by CSP trial monitors.

The report concludes that the Foreign Agents Act introduces excessive and unnecessary requirements for NGOs and provides for overly harsh penalties for non-compliance. The Act in question is couched in terms that are vague and liable to an overly broad interpretation. The result, as shown in the report, is inconsistent application of the law by the Russian courts. Moreover, the report adduces that requiring NGOs to register as "organizations performing the functions of a foreign agent", as it was done in some of the cases followed by CSP observers, is an infringement on their fundamental right to hold opinions.

According to the trial monitoring reports and the case-files, no issues as regards the independence and impartiality of the tribunals were raised in any of the cases. The proceedings were generally open to the public wishing to attend and the equality of arms and the principles of adversarial proceedings were generally respected. The length of proceedings was not questioned by the parties in any of the cases.

Nevertheless, in none of the cases monitored by CSP observers, have the courts examined if and to what extent the restrictions imposed by this law were substantiated and proportionate to the legitimate aim pursued, or whether the prosecutors' justifications were relevant and sufficient. Thereby, the courts failed to fulfill their function of providing scrutiny to guarantee the unhindered exercise of the right to freedom of association, choosing instead to rubber-stamp the prosecutor's charges.

The right to a reasoned decision was an issue in some of the proceedings. For example, in the civil proceedings against *ADC Memorial* the courts failed to properly examine the evidence adduced by the defense and provide explicit replies to their key arguments. Bearing in mind the inherent vagueness of the term "political activities" it is concluded that the domestic courts have failed to engage in a proper examination of the case of *ADC Memorial* and to expressly reply to the crucial arguments of the defense. Consequently, the judgments in that case may be regarded as being in breach of the right to a fair hearing and to a reasoned decision guaranteed by Article § 1 of the European Convention on Human Rights and Fundamental Freedoms.

In the cases under review, the domestic courts' findings that the activities of *ADC Memorial*, *Kostroma Civic Initiatives Support Centre*, *Transparency International – R* and *Women of the Don* amounted to those of "organizations performing functions of foreign agents" interfered with their right to hold opinion. The same is true in respect of the court's judgment in the case of *HRC Memorial* whereby the NGO's complaint against the prosecutorial order to register as an "organization performing functions of a foreign agent" was dismissed.

Furthermore, the report discloses conflicting judicial practice of Russian courts while applying the Foreign Agents Law. The same types of activities (for example, publication of reports online, producing recommendations for state authorities, holding discussion events open to the public) were deemed to be "political activity" by some courts while others recognized them as normal functioning of civil society organizations. Therefore, the judicial practice with regard to the Foreign Agents Act not only failed to dissipate the interpretational doubts as regards the notion of "political activity", but only confirmed the inherent vagueness and legal uncertainty of this legislative provision.

In the case of the *Women of the Don* the court has opted for an even wider definition of "political actions". It stated that "any form of intellectual influence on the public with respective aims [i.e. formation, support and change of political institutions] may be regarded as political actions". The court held that publishing critical articles and comments on official documents aiming to highlight problems and/or holding roundtables that may influence the opinion of their participants, amount to "political actions". The court concluded *inter alia* that publishing the report on the NGO's activities along with critical articles on the organizations' web-site amounted to "political activity".

The Foreign Agents Act, both prior and following the judgment of the Constitutional Court may be regarded as creating a basis for unwarranted interferences with the freedom of expression and freedom of association, in breach of the relevant ECHR provisions.

In view of the stated aims, it is hard to see any reasonable and objective justification for stricter governmental control over some types of lawful activities and not over others, as well as over those NGOs in receipt of foreign funding and not over those funded domestically. In view of the above, the Foreign Agents Act (as applied) may be regarded as being in breach of the non-discrimination provisions of the ECHR.

The foremost recommendation to the Russian government is to repeal the provisions of the Foreign Agents Act as contradicting the Russian Constitution and the international human rights norms enshrined in a number of international treaties to which Russia is a party. Alternatively, as a minimum, the term "foreign agent" must be substituted by a less misleading term "organization receiving foreign funding" and the definition of "political activity" must be clearly defined and strictly applied to activities that have political nature.

While infamous law remains in force, the Russian courts bear important responsibility to ensure that proceedings in relation to the application of the Foreign Agents Act are conducted in compliance with the requirements of the Article 6 of the ECHR. The test of "proportionality and necessity in a

democratic society" should routinely be applied in line with the well-established case law of the European Court of Human Rights.

A. BACKGROUND

The human rights situation in Russia has deteriorated to an unprecedented level since Vladimir Putin took office as President for the third time. Numerous laws which seriously restrict civil and political rights and limit the functioning of civil society organizations were passed in a relatively short period of time in the wake of Putin's inauguration. These laws are a great challenge to the fundamental human rights, including those of freedom of expression, assembly and association, Russia has committed itself to respecting and protecting by ratifying various international human rights treaties and conventions.

This report concerns the application of the Foreign Agents Act by the courts of the Russian Federation. The law in question entered into force in November 2012, and requires any NGO which receives foreign funding and engages in ill-defined "political activities" to register as a "foreign agent" - a synonym for "spy" in Russian. If found guilty of violating this law NGOs face large fines, suspension of their operations and even prison terms of up to two years for their leaders. However, as a result of a universal boycott by Russian groups no single organization has registered in the special registry.

In March 2013, one month after the deadline for registration as a 'foreign agent' had expired, the Russian government launched an intimidating nationwide inspection campaign in which it tried to identify NGOs which fell under the remit of the law and force them to register. These checks were conducted by representatives of the Prosecutors' Offices, the Ministry of Justice and other government agencies.

As a result, nine administrative cases against the NGOs, and five administrative cases against NGO leaders, were launched by the Prosecutors' Offices. NGOs and their leaders were accused of violating the law by failing to register as 'foreign agents'. Many of the organizations subject to checks also received notices of violations and were given time to 'correct the problem'.

In June 2013, several Russian organizations which are members of the Civic Solidarity Platform proposed to launch a project which would monitor the court trials initiated under the Foreign Agents Act. IPHR accepted the proposal to coordinate the implementation of this project, the objective of which was defined as: to provide independent assessment of the legal proceedings and court hearings against non-governmental organizations which take place in the Russian Federation through targeted trial monitoring, documentation and reporting, complemented by national and international advocacy and targeted media outreach, to support the unhindered functioning of independent human rights organizations.

Over 30 court hearings in Moscow, St. Petersburg, Novosibirsk, Novocherkassk and Kostroma were monitored by experienced trial monitors in the period 15 July 2013 – 23 May 2014. Trial monitors focused on the fairness of the proceedings in the light of applicable international standards and the overall application of the Foreign Agents Act by the Russian courts and its impact on those organizations affected by this law.

Decision, on which trials to monitor were made in consultation with Russian organizations, based on the necessity of monitoring and the importance of the presence of international observers. Particular attention was given to civil proceedings against the Anti-Discrimination Centre (ADC) Memorial and Women of the Don and hearings of the Constitutional Court of the Russian Federation. This report is largely based on trial monitoring reports and an analysis of the case materials from those cases which have been monitored.

B. SCOPE OF THE REPORT

The aim of the present Report is to assess the compatibility of a number of legal proceedings taken pursuant to, or in connection with, the 2012 amendments to the Russian legislation governing non-governmental organizations (hereinafter – "NGOs") as regards their status of "organizations performing functions of foreign agents"³ with the guarantees of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – "**the Convention**") and relevant case-law of the European Court of Human Rights (hereinafter – "**the Court**").

The report focuses on the proceedings brought against or by seven Russian NGOs which were followed by the CSP trial monitors, namely:

- Civil proceedings brought by the Prosecutor's Office against the *Anti-Discrimination Centre "Memorial"* (St. Petersburg) which resulted in an order for the NGO to register as "an organization performing functions of a foreign agent"(upheld on appeal);
- Civil proceedings brought by the Prosecutor's Office against the *Women of the Don Union* (Novocherkassk, Rostov Region) which resulted in an order for the NGO to register as "an organization performing functions of a foreign agent" (appeal proceedings pending);
- Civil proceedings challenging the Prosecutor's Office's caution against breach of law brought by the *Golos Siberia Foundation* (Novosibirsk) which resulted in the declaration of the caution to be unlawful (upheld on appeal);

³ Federal Law No. 121-FZ "On the introduction of amendments to certain legislative acts of the Russian Federation regarding the regulation of the activity of non-commercial organizations performing the function of a foreign agent", adopted on 20 July 2012, in force on 21 November 2012. Federal Law No.192-FZ "On the introduction of amendments to the Code of the Russian Federation on Administrative Offences", adopted on 12 November 2012, in force on 25 November 2012.

- Administrative proceedings against the *Kostroma Civic Initiatives Support Centre*(Kostroma) which resulted in the imposition of a fine of RUB 300,000 for failure to register as an "organization performing functions of a foreign agent" (upheld on appeal);
- Civil proceedings challenging the Prosecutor's Office's caution against breach of law brought by the *Centre for Anti-Corruption Research and Initiatives "Transparency International – R"* (Moscow) which resulted in the dismissal of the NGO's complaint (upheld on appeal);
- Civil proceedings brought by the *Human Rights Centre "Memorial"*(Moscow) challenging the Prosecutor's Office's order to rectify breaches of law resulting in the dismissal of the NGOs complaint (appeal proceedings pending);
- Civil proceedings brought by the *Public Verdict Foundation* (Moscow) challenging the Prosecutor's Office's decision to carry out an inspection, and its actions in the course of the inspection, and further challenging the Prosecutor's Office's order to rectify breaches of law (pending before the court of the first instance),

(hereinafter – "**cases under review**").

The Report also, as relevant, draws upon the cases of other NGOs brought in connection with the Foreign Agents Act. In addition, it covers proceedings brought before the Constitutional Court of the Russian Federation (hereinafter – "**the Constitutional Court**") which challenged the Foreign Agents legislation.

The Report is based on the prosecutorial and judicial decisions and parties' submissions in the cases under review, the judgment of the Constitutional Court, the IPHR trial monitoring reports, relevant press articles, judicial decisions and expert opinions publicly available.

C. COMPATIBILITY WITH ARTICLE 6 OF THE CONVENTION

This section of the Report focuses on irregularities of due process which occurred in the course of the judicial proceedings in the cases under review. It draws upon the guarantees of Article 6 of the Convention (right to a fair trial), which in the relevant part are:

"Article 6

1. In the determination of his civil rights and obligations [...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...] the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. [...]"

Article 6 § 1 of the Convention, in its civil limb, applies if there is a dispute over a right that can be said, at least on arguable grounds, to be recognized under domestic law. Such dispute may relate not only to the actual existence of a right but also to its scope and the manner of its exercise (see, for instance, *Frydlender v. France* [GC], no. 30979/96, § 27, ECHR 2000-VII).

Due to the unique nature of the Foreign Agents Act, the Court has never been asked to deal with questions of the applicability of Article 6 to cases in which an existing NGO is required to assume a particular status prescribed by law. In the context of NGO-related cases however, the Court has held that disputes in which associations seek the protection of rights to which they have a claim as legal persons do fall within the ambit of Article 6 § 1 of the Convention (*Collectif national d'information et d'opposition à l'usine Melox – Collectif Stop Melox et Mox v. France*, (dec.), no. 75218/01, 28 March 2006). Furthermore, this provision was found to be applicable to proceedings concerning the legal existence of an association even if domestic legislation characterized freedom of association as a matter of public law (*Apeh Üldözötteinek Szövetsége and Others v. Hungary*, no. 32367/96, § 30-36, ECHR 2000-X).

In view of the above, the present section proceeds on the assumption that the civil proceedings taken in connection with to the provisions of the Foreign Agents Law fell within the ambit of Article 6 § 1 of the Convention.

Turning to the cases under review, according to the trial monitoring reports and the case files no issues regarding the independence and impartiality of the tribunals were raised in any of the cases. The proceedings were generally open to the public wishing to attend.⁴ The equality of the parties and the principles of adversarial proceedings were generally respected. The length of proceedings was not questioned by the parties.

At the same time, the overall fairness of some of the civil proceedings in cases brought under the provisions of the Foreign Agents Law may be questioned from the perspective of the right to a reasoned decision. For instance, in the civil proceedings against *ADC Memorial* the courts failed to properly examine the evidence adduced by the defense or give explicit replies to their key arguments.

1. GENERAL PRINCIPLES ESTABLISHED IN THE COURT'S CASE-LAW

According to the Court's case-law, for the proceedings to be fair, as required by Article 6 § 1 of the Convention, domestic courts must 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 (*Van Kück v. Germany*, no. 35968/97, §§ 47, 48, ECHR 2003-VII; *Kraska v. Switzerland*, judgment of 19 April 1993, Series A no. 254-B, § 30).

⁴ The trial monitoring report in the case of *ADC Memorial* indicates that while the proceedings were not closed to the public, during one of the hearings in that case, held on 14 October 2013, the courtroom was not large enough to fit all members of the public who wished to be present. The hearing in question did not involve examination of evidence or substantive pleading by the parties. In any event, considering the proceedings as a whole, this shortcoming appears to have been rectified during the subsequent hearings (see, *mutatis mutandis*, *Axen v. Germany*, 8 December 1983, § 28, Series A no. 72).

In that connection, Article 6 § 1 of the Convention requires the courts to give reasons for their judgments. While the right to a reasoned judgment cannot be understood as requiring a court to give a detailed answer to every argument, the Court has held that where an applicant clearly and precisely raises an argument which could have been decisive for the outcome of the case, such an argument requires a specific and explicit response from the court. In the absence of such a reply, it is impossible to ascertain whether the court simply neglected to deal with the applicant's submission or whether it intended to dismiss it and, if that were its intention, what its reasons were for so deciding (*Krasulya v. Russia*, no. 12365/03, § 52, 22 February 2007).

2. FAIRNESS OF PROCEEDINGS IN THE CASE OF *ADC MEMORIAL*

As in other cases under review, the judicial proceedings brought by the Prosecutor's Office against *ADC Memorial* which sought to compel it to register as an "organization performing functions of a foreign agent", centered around the issue of whether the NGO was engaged in "political activity" as stipulated in the Foreign Agents Act. Both parties presented the court with the conclusions of experts ("specialists" under Russian law) on this issue. The report submitted by the defense was authored by experts in political science and socio-humanitarian studies, and concluded that *ADC Memorial* was not engaged in "political activities". The prosecutor adduced a brief opinion by two legal scholars to the effect that the activities of the NGO were political. The specialists invited by the parties also gave testimony in court.⁵ Furthermore, the NGO's representatives petitioned the court to order a comprehensive psychological, linguistic, political and sociological expert examination of the case to make a final determination as to the nature of the NGO's activities.⁶ The court, however, declined this petition.

In its judgment, the first instance court dismissed all the specialists' reports and testimonies as irrelevant without making any detailed analysis of their content. It also indicated that the reports were obtained outside the judicial proceedings, failing however to explain the reasons for their refusal to commission a court-appointed expert examination. The court concluded that, in any event, the issue of whether the NGO's operations entailed "political activities" was a purely legal one and, thus, did not require expert evaluation to assist the court.⁷

The NGO's representatives appealed against the judgment and clearly articulated the aforementioned concerns in their brief. They insisted that the first instance court had dismissed a key piece of their

⁵IPHR Trial Monitoring Report of the proceedings in the case of *ADC Memorial*, p. 3.

⁶ Appeal brief of *ADC Memorial* against the judgment of the Leninsky District Court of Saint-Petersburg dated 12 December 2013, p. 14.

⁷Judgment of the Leninsky District Court of Saint-Petersburg dated 12 December 2013, p.p. 8-9. It is worth noting that the approach to interpreting "political activity" as a purely legal notion not needing special assessment from an expert is not uniform. For instance, in the *Women of the Don* case the court appointed experts in linguistics, psychology, political and social sciences to assess whether the NGO engaged in political activity. The court relied heavily on the experts' conclusions in its judgment. See Judgment of the Novochoerkassk City Court of the Rostov Region dated 14 May 2014, p.p. 10-12.

evidence, which was in connection with the issue central to the case at hand, and had at the same time refused to commission an expert examination, thereby failing to examine the case properly.⁸

The appeal court, however, did not give a specific and explicit response to the defense's arguments. In dealing with the question of whether specialist knowledge was required to determine the scope of the notion of "political activity", the appeal court simply stated that the first instance court was correct in qualifying this notion as a legal one and refusing to appoint an expert.⁹ As to the specialist testimony heard by the first instance court, the appeal court held that this evidence did not cast doubt on the well-roundedness of the first instance court's judgment¹⁰, without, however, giving any reasons for drawing this conclusion.

In view of the above, and bearing in mind the inherent vagueness of the term "political activities" (see below), it is concluded that the domestic courts have failed to engage in a proper examination of the case of *ADC Memorial* and to expressly respond to the crucial arguments of the defense. Consequently, the judgments in that case may be regarded as being in breach of the right to a fair hearing and a reasoned decision guaranteed by Article § 1 of the Convention.

D. COMPATIBILITY WITH ARTICLES 10 AND 11 OF THE CONVENTION

This section focuses on the compatibility of the Foreign Agents legislation, as applied in the cases under review and as interpreted by the Constitutional Court, with Articles 10 and 11 of the Convention, the relevant parts of which state:

"Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. [...]
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

"Article 11

- “1. Everyone has the right to [...] freedom of association with others [...]

⁸ Appeal brief of *ADC Memorial* against the judgment of the Leninsky District Court of Saint-Petersburg dated 12 December 2013, p.p. 12-14.

⁹ Judgment of the Saint-Petersburg City Court dated 8 April 2014, p. 8.

¹⁰ *Ibid.* p. 6.

2. No restrictions shall be placed on the exercise of [this right] other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. [...]"

1. GENERAL PRINCIPLES ESTABLISHED IN THE COURT'S CASE-LAW

It is the Court's longstanding position that "freedom of expression guaranteed by Article 10 of the Convention constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfillment" (see, among many other authorities, *Hertel v. Switzerland*, 25 August 1998, § 46, *Reports of Judgments and Decisions* 1998-VI). The Court has repeatedly recognized civil society's important contribution to the discussion of public affairs, and held that non-governmental organizations, including those working in the field of human rights, should be regarded as social "watchdogs" and be afforded special Convention protection similar to that extended to the press (*Vides Aizsardzības Klubs v. Latvia*, no. 57829/00, § 42, 27 May 2004, *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, § 27, ECHR 2009-...).

Similarly, in the context of Article 11 of the Convention, the Court has underlined 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" (see *Zhechev v. Bulgaria*, no. 57045/00, § 35, 21 June 2007 with further references).

In NGO-related cases the Court has highlighted the intrinsic connection between the guarantees of Articles 10 and 11 of the Convention - "[g]iven that the implementation of the principle of pluralism is impossible without an association being able to express freely its ideas and opinions, the Court has also recognized that the protection of opinions and the freedom of expression within the meaning of Article 10 of the Convention is one of the objectives of the freedom of association" (*Zhechev v. Bulgaria*, cited above, §36 with further references).

The Court has on numerous occasions stated that the exceptions to freedom of expression and freedom of association are to be construed strictly, and only "convincing and compelling reasons" can justify such restrictions. Any interference with these freedoms must be carried out "in accordance with law", pursue a legitimate aim and correspond to a "pressing social need". In particular, the Court determines whether the interference was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". Finally, the Court has long held that in determining whether a necessity within the meaning of Articles 10 § 2 and 11 § 2 exists, States have only a limited margin of appreciation (see, for instance, *The United Macedonian Organization Ilinden and Others v. Bulgaria*, no. 59491/00, § 62, 19 January 2006).

2. COMPATIBILITY OF THE FOREIGN AGENTS LEGISLATION AND THE PROCEEDINGS IN THE CASES UNDER REVIEW WITH THE AFOREMENTIONED PRINCIPLES

In the cases under review, the enactment of the Foreign Agents Act, and the ensuing proceedings, undoubtedly interfered with the organizations' rights under Article 10 and 11 by obliging them to accept the status of "organizations performing the functions of a foreign agent" and/or subjecting them to penalties.

In this section it is concluded that the application of the Foreign Agents Act (including in the proceedings under review) may raise serious issues as to its compliance with Articles 10 and 11 of the Convention in view of the following:

- Requiring NGOs to register as "organizations performing the functions of a foreign agent" may be regarded as an infringement on their fundamental right to hold opinions;
- The Foreign Agents Act (as applied in the cases under review) is couched in terms which are vague and liable to an overly broad interpretation;
- The Foreign Agents Act introduces excessive and unnecessary requirements for NGOs and provides for overly harsh penalties for non-compliance.

a. Obligation to register as "an organization performing functions of a foreign agent" in the light of the right to hold opinions

The freedom to hold opinions, as set forth in Article 10 of the Convention, is "a prior condition to all other freedoms guaranteed by [this provision] and it almost enjoys an absolute protection in the sense that the possible restrictions set forth in paragraph 2 are inapplicable".¹¹

Under the Foreign Agents Act NGOs in receipt of foreign funding, and engaged "*including* in the interest of foreign sources, in political activities" in Russia shall declare themselves to be "organizations performing functions of a foreign agent"¹² (emphasis added). Accordingly, the law stipulates that for the purposes of establishing whether an organizations "performing the functions of a foreign agent" it is immaterial whether it acts in the interest of foreign donors in the course of its activities or pursues another agenda, including its own.

In the cases under review, the domestic courts' findings that the activities of *ADC Memorial*,¹³ *Kostroma Civic Initiatives Support Centre*,¹⁴ *Transparency International – R*¹⁵ and *Women of the Don*¹⁶ amounted to those of "organizations performing the functions of foreign agents" interfered with their right to hold opinions. The same is true of the court's judgment that *HRC*

¹¹ M. Macovei, *Freedom of Expression. A guide to the implementation of Article 10 of the European Convention on Human Rights*, 2nd edition. Human Rights Files no. 2 (2004).p. 8.

¹² Article 1-1 and 2-2 of the Foreign Agents Act No. 121-FZ.

¹³ Judgment of the Leninsky District Court of Saint Petersburg dated 12 December 2013, p.p. 6-7; Judgment of the Saint-Petersburg City Court dated 8 April 2014, p.p. 5-6.

¹⁴ Judgment of the Magistrate's Court of the 1st District of Kostroma dated 29 May 2013, p. 10.

¹⁵ Judgment of the Zamoskvoretskiy District Court of Moscow dated 9 August 2013, p. 3.

¹⁶ Judgment of the Novocherkassk City Court of the Rostov Region dated 14 May 2014, p. 13.

Memorial's subsequent complaint against the prosecutorial order to register as an "organization performing the functions of a foreign agent" should be dismissed.¹⁷

In the Russian language the word "agent" commonly means someone pursuing other persons' interests.¹⁸ In other words, NGOs falling within the ambit of the Foreign Agents Act are forced (under threat of penalties)¹⁹ to publicly declare – irrespective whether it is actually the case – that in the course of their work they convey and pursue the agenda of foreign donors, and not that of their members, management or beneficiary groups.

Therefore, in cases where an NGO is funded by foreign donors but does not act in their interest, a court-ordered obligation to register as "an organization performing the functions of a foreign agent", or a judicial finding that it engages in activities characteristic of a foreign agent, may be regarded as denying it the fundamental right to hold opinions.

b. Vagueness and broadness of the term "political activity"

Articles 10 and 11 of the Convention require that any interference with freedom of expression and freedom of assembly shall be carried out "in accordance with law". The aforementioned requirement implies *inter alia* that any law serving as a basis for the interference should be formulated with sufficient precision. The law should afford a measure of legal protection against arbitrary interference with the Convention rights by public authorities by indicating with sufficient clarity the scope of any discretion granted to the authorities and the manner of its exercise. At the same time, the Court has accepted that it is not possible to attain absolute rigidity in the framing of laws, and many of them are inevitably couched in terms which, to a greater or lesser extent, are vague (*Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, no.37083/03, § 56-58, ECHR 2009).

The Court has previously found a violation on account of the general wording of legislation regulating NGO activities. In *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan* the Court held that the legislative basis for the authorities' interference with the NGO's rights was formulated in such a general manner as to "encompass an unlimited range of issues related to an association's existence and activity", which made it difficult for associations to foresee which specific actions on their part could lead to an interference of the authorities. (*Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, cited above, §§ 61-62).

In *Zhechev v. Bulgaria*, a case concerning the refusal to register an NGO as an association and the requiring of it to register as a political party on account of the "political" nature of its stated aims, the Court took into account the uncertainty surrounding the term "political" as used in the Constitution and as interpreted by domestic courts in finding that the interference was not "necessary in a

¹⁷Judgment of the Zamoskvoretskiy District Court of Moscow dated 23 May 2014. As of the date of the present report, the full text of the judgment remains unavailable.

¹⁸ Expert Linguistics Report of the Institute of Russian Language of the Russian Academy of Science dated 13 November 2013. Available at: <http://www.memo.ru/uploads/files/996.pdf>.

¹⁹ Article 3 of the Foreign Agents Act No. 121-FZ and the Foreign Agents Act No. 192-FZ.

democratic society".²⁰ The Court noted that the domestic "courts could label any goals which are in some way related to the normal functioning of a democratic society as "political"...A classification based on this criterion is therefore liable to produce incoherent results and engender considerable uncertainty" (*Zhechev v. Bulgaria*, cited above, §55).

Below it is demonstrated that the Foreign Agents Act is couched in terms so vague, and so liable to an overly broad interpretation, that its application in cases under review may be regarded as inconsistent with the Convention.

i. Cases decided prior to the judgment of the Constitutional Court

The legal norms concerning the status of "an organization performing the functions of a foreign agent", as they stood²¹ at the time of the judgments in four of the cases under review, stipulated that the obligations and sanctions provided for in the Foreign Agents legislation applied to organizations engaged in "political activity". The latter is defined as follows:

"participation in organizing and holding political actions aimed at influencing the decision-making by state bodies intended for the change of state policy pursued by them, as well as in shaping public opinion for the aforementioned purposes".²²

The terms used to define "political activity", namely "political actions", "state policy" and "shaping public opinion", are not themselves defined in the Foreign Agents Act or elsewhere in Russian legislation.

Judicial practice prior to the judgment of the Constitutional Court did not seem to dissipate these interpretational concerns. In a number of cases a broad interpretation of "political activity" was adopted:

- In the case of *ADC Memorial* the courts held that the publication on the organization's website of a report²³ containing a negative appraisal of the work of Russian law enforcement bodies and recommendations for State authorities aimed at the elimination of the abuses described in the report constituted "political activity". The courts further held that any organization which aims to influence public opinion on any issues of public life, and which disseminates its own or others' opinions on such issues to the general public or State authorities, shall be deemed to be engaged in "political activity".²⁴

²⁰ However, in *Zhechev v Bulgaria* the Court did find a violation of the "quality of law" requirement with regard to the alleged vagueness of the term "political". The Court put special emphasis on the type of instrument in which the term was contained (the national Constitution) and the role of the courts in dissipating the interpretational doubts (cited above, § 40).

²¹ The applicable law was later clarified by the Constitutional Court (see below).

²² Article 2-2 of the Foreign Agents Act No. 121-FZ.

²³ While it is not stated in the judicial decisions relating to the case, it is worth noting that the impugned Report "Roma, Migrants, Activists: Victims of Police Abuse" was prepared in order to be submitted to the UN Committee Against Torture, within the framework of the review of the 5th periodic report by the Russian Federation, at the Committees' 49th session.

²⁴ Judgment of the Leninsky District Court of Saint Petersburg dated 12 December 2013, p.p. 6-7; Judgment of the Saint Petersburg City Court dated 8 April 2014, p.p. 5-6.

- In the case of the *Kostroma Civic Initiatives Support Centre* the court considered²⁵ that the Centre was engaged in "political activity" because it had held a round-table discussion on Russian-American relations which was open for the public to attend²⁶ and organized election monitoring.²⁷
- In the case of *Transparency International – R* the courts established that this NGO organized events focusing on tackling corruption, the activities of the Ministry of Internal Affairs bodies and state support of non-commercial organizations and produced an anti-corruption review of the then draft Foreign Agents Act. This, according to the courts, amounted to "political activity". The courts further held that the goals of the NGO as stated in its founding documents (*inter alia* carrying out and supporting anti-corruption projects and promoting transparency in the public sector) also amounted to "political activity".²⁸

In other cases the courts opted for a narrow interpretation of "political activity":

- In the case of the *Golos Siberia Foundation* the court defined "political activity" generally as "public activity in connection with gaining, retaining or entrenching political power".²⁹ The court held that the Foundation's activities (including, for instance, holding roundtables on electoral issues) did not amount to "political activity". The court also implicitly dismissed the prosecutor's allegations that the NGO's statutory activities as stated in its founding documents (including, for instance, producing recommendations in the sphere of electoral rights and carrying out independent monitoring of human rights compliance in the course of elections and referendums)³⁰in and of themselves amounted to "political activity". This judgment was upheld on appeal.³¹
- In the notable case of the *Perm Regional Human Rights Centre* (not a case under review) the court held that the NGO's work aimed at advancing human rights (in particular, in this case, the right to information) is not in general intended to change state policy, and cannot be regarded as "political activity" because state policy itself was to ensure human rights protection. The court further held that criticism of the authorities' actions did not in and of itself amount to "political activity".³²

²⁵ Judgment of the Magistrate's Court of the 1st District of Kostroma dated 29 May 2013, p. 10.

²⁶ The defense, however, insisted that it did not organize the impugned roundtable. It stated that the roundtable was organized by the administration of the Kostroma Region and the NGO's Board Chair only moderated the discussions. Additional Appeal Brief of the *Kostroma Civic Initiatives Support Center* against the judgment of the Magistrate's Court of the 1st District of Kostroma dated 29 May 2013, p. 4.

²⁷ The defense stated that it was only the NGO's Board Chair (and not the NGO itself) who took part in election monitoring as a representative of another civil society organization. Ibid.

²⁸ Judgment of the Zamoskvoretskiy District Court of Moscow dated 9 August 2013, p. 3. The Constitutional Court refused to examine the complaint filed by *Transparency International-R* in which it complained *inter alia* about the vagueness of the legislation in question. The Constitutional Court stated that all the issues raised by the NGO had previously been examined and discussed in the Judgment of the Constitutional Court No. 10-P dated 8 April 2014. See Decision of the Constitutional Court No. 917-O dated 13 May 2014.

²⁹ Judgment of the Central District Court of Novosibirsk dated 29 October 2013, p. 6.

³⁰ Ibid. p. 4

³¹ Judgment of the Novosibirsk Regional Court dated 23 January 2014.

³² Judgment of the Magistrate's Court of the 21st District of the Leninskiy District of Perm dated 22 July 2013, p. 6. Upheld on appeal on 4 September 2014. Information available at: <http://www.pgpalata.ru/news/050913>.

- In the case of the *Centre for Civil Analysis and Independent Research* (not a case under review) the court held that producing a report on the issue of activism and publishing it on the organizations' website; holding discussions and other events, including with the participation of state officials on the issues of civic activism; submitting the organization's opinion on the required amendments to regional legislation concerning socially-oriented NGOs to the regional legislature and the participation of the NGO's director, at the invitation of the regional governor, in a working group on issues concerning the regional policy on the support of socially-oriented NGOs did not amount to "political activity".³³

As seen from the above, the Foreign Agents Law has generated conflicting judicial practice. The same types of activities (for example, publication of reports online, producing recommendations for state authorities, holding discussion events open to the public) were deemed to be "political activity" by some courts, whereas others recognized them as normal functions for civil society organizations. Therefore, judicial practice with regard to the Foreign Agents Act (at least prior to the judgment of the Constitutional Court – see below) not only failed to dissipate the interpretational doubts regarding the notion of "political activity" but confirmed the inherent vagueness and legal uncertainty of this legislative provision. The unforeseeable application of the legislation in question may in itself be regarded as being in violation of the Convention.

ii. Interpretation of "political activity" given by the Constitutional Court

The Constitutional Court in its Judgment no. 10-P explained what the terms "political activity" and "political actions" entailed:

"Proof of the intent to engage in political activity in the territory of the Russian Federation may include the constituent, policy and other official documents of the non-profit organization, public statements of its leaders (officers) containing appeals for the adoption, change or abrogation of particular government decisions, or notifications about the holding of assemblies, rallies, demonstrations, marches or picketing addressed by that non-profit organization to a body of executive power of the subject of the Russian Federation or of local government; the preparation and nomination of legislative initiatives; and other manifestations of social activity that objectively indicate its intention to participate in the organization and carrying out of political actions in order to influence the decision-making by state bodies intended for the change of state policy pursued by them."³⁴

"[...] in addition to meetings, rallies, demonstrations, marches and pickets, political actions include canvassing in connection with elections and referendums; public appeals to government bodies; dissemination, including with the use of modern information technologies, of their assessments of the decisions made and policy pursued by state bodies; as well as other activities, which it would be impossible for legislation to list comprehensively. In listing these or other activities organized and carried out with the participation of non-profit organizations with

³³ Judgment of the Magistrate's Court of the 21st District of the Leninskiy District of Perm dated 17 July 2013, p.p. 4-5.

³⁴ Judgment of the Constitutional Court no. 10-P dated 8 April 2014, p. 33.

political actions subject to aforementioned statutes, their goal of influencing – directly or through the shaping of public opinion – decision-making by state bodies and the policy pursued by them and attracting the attention of the government and/or civil society should be of fundamental importance."³⁵

This definition was criticized by the civil society as being overly broad.³⁶ Indeed, the Constitutional Court included within the ambit of the Foreign Agents Act almost any type of activity generally carried out by civil society organizations (see, *mutatis mutandis*, *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, cited above, §61). Notably, the Court has already found "questionable" and "unwarranted" the approach whereby "the holding of meetings, demonstrations, assemblies and other forms of public campaigning" by a minority rights association was deemed to amount to political activities (*The United Macedonian Organization Ilinden and Others*, cited above, §§ 17, 19, 21 and 73; see also *Zhechev v. Bulgaria*, cited above, §56).

iii. Cases heard after the Judgment of the Constitutional Court

The extreme broadness of the discussed legislative provisions is further confirmed by cases decided following the Judgment of the Constitutional Court and with reference to it.

In the case of the *Women of the Don Union*³⁷ the court opted for an even wider definition of "political actions". It stated that "any form of intellectual influence on the public with respective aims [i.e. the formation, support and change of political institutions] may be regarded as political actions".³⁸ The court held that publishing critical articles and comments on official documents aiming to highlight problems and holding round tables to influence the opinion of their participants amounted to "political actions".³⁹ The court concluded *inter alia* that publishing a report on the NGO's activities and critical articles on its website amounted to "political activity".⁴⁰

In the case of *HRC Memorial*⁴¹ the court dismissed the NGO's complaint against the prosecutorial order to register as an "organization performing the functions of a foreign agent". The prosecutors alleged that the NGO's work in the field of politically-motivated persecution, including its cooperation with a web-based information project focusing on politically-motivated arrests, amounted to "political activity". It was also alleged that the fact that one of the NGO's projects is directed by a member of an opposition movement confirms the "political" nature of the organization's activities.⁴²

³⁵Ibid. P. 38.

³⁶IPHR Statement, *New blow to NGOs in Russia: Two controversial court rulings in one day* dated 8 April 2014.

³⁷Note: the organization intends to appeal against the judgment. See HRW, *Russia: Rights Group Labeled "Foreign Agent"*. Available at: <http://www.hrw.org/news/2014/05/15/russia-rights-group-labeled-foreign-agent>.

³⁸Judgment of the Novocheerkassk City Court of the Rostov Region dated 14 May 2014, p. 13.

³⁹Ibid.

⁴⁰Ibid. P. 14.

⁴¹Judgment of the Zamoskvoretskiy District Court of Moscow dated 23 May 2014. As of the date of the present report, the full text of the judgment remains unavailable. The organization intends to appeal against the judgment. See HRC Memorial, *Memorial to Appeal against the Court Judgment on the Lawfulness of the Prosecutorial Order*. Available at: <http://memo.ru/d/198405.html>.

⁴²Order of the Prosecutor's Office of Moscow dated 29 April 2013.

In the case of the *Public Verdict Foundation*, currently pending before the court of the first instance, the prosecutors allege that the organization's work in the field of law enforcement bodies' reform, combating torture by law enforcement officers and the provision of legal assistance to members of the protest movement against unfair elections in Russia constituted "political activity".⁴³

In view of the above, the Foreign Agents Law both prior and following the judgment of the Constitutional Court may be regarded as creating the basis for unwarranted interferences with freedom of expression and freedom of association which are in breach of the relevant Convention provisions.

EXCESSIVE REGULATION OF NGO ACTIVITIES

As noted above, Articles 10 and 11 of the Convention require that any interference with freedom of expression and freedom of association must be only what is "necessary in a democratic society". Any interference must correspond to a "pressing social need" (see *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 95, 17 February 2004 with further references). The exceptions set out in Articles 10 and 11 are to be construed strictly; only convincing and compelling reasons can justify restrictions on freedom of association (*Zhechev v. Bulgaria*, cited above, §43).

For example, in *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan* the Court adopted a restrictive approach to assessing the authorities' powers to interfere with NGOs' internal activities, and held that while certain "minimum requirements" may be introduced by law, "the authorities should not intervene in the internal organizational functioning of associations to such a far-reaching extent as to ensure observance by an association of every single formality provided by its own charter" (*Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, cited above, §78).

The Foreign Agents Act introduces an array of requirements for NGOs registered as "performing the functions of a foreign agent". These requirements include carrying out an annual audit of financial activities; annual revision of the activities of the NGO by competent authorities; bi-annual reporting on the activities of the NGO and its management to the competent authorities; quarterly reporting on the expenses of the NGO and the requirement to keep a separate account of expenditures funded by foreign donors.⁴⁴ The Foreign Agents Act further expands the grounds which would justify conducting unscheduled inspections of an organization, which now include, for instance, complaints from citizens and organizations, and information received from State authorities, concerning potential violations of law in its sphere of activities.⁴⁵ The Act further stipulates that any publications by an organization (including online publications and press articles) should be marked as being "published and/or disseminated by a non-profit organization performing the functions of a foreign agent".⁴⁶

⁴³Order of the Moscow Prosecutor's Office dated 8 May 2013.

⁴⁴Foreign Agents Act No. 121-FZ, Article 2-5.

⁴⁵Ibid.

⁴⁶Ibid. Article 2-4.

This section of the report aims to highlight that the aforementioned requirements (if applied) may be subject to criticism as not corresponding to any "pressing social need", and being, therefore, a disproportionate interference with freedom of association in violation of the Convention. However, any definitive conclusions as regards violations of the Convention can only be drawn on a case-by-case basis following an assessment of all of the relevant circumstances.

i. Audit and reporting

The reporting and audit obligations now imposed may be regarded as not being strictly necessary for meeting the stated aim of the Foreign Agents Acts, namely the aim of ensuring transparency cited by the Constitutional Court.⁴⁷ Prior to the enactment of the Foreign Agents Act all NGOs already had a number of reporting obligations (including reporting to the tax authorities and to the Ministry of Justice on the use of foreign funds).⁴⁸ The reporting already done by NGOs is more than sufficient to keep the relevant authorities informed of the foreign funding received by civil society organizations and the activities on which it has been spent.

At the same time, the additional reporting and audit obligations represent a significant burden for any given organization due to the costs involved⁴⁹ and the time needing to be invested in producing respective reports and financial documents. Even for larger NGOs it may become difficult to solicit the funding necessary to comply with the newly established obligations, while for the smaller ones registration as an "organization performing the functions of a foreign agent" with the ensuing obligations may prove to be prohibitive of their operation as a whole.

ii. Inspections

The extension of the grounds on which to conduct unscheduled inspections may be criticized from the standpoint of the Convention as being an undue interference with freedom of association based on legislation which is not entirely clear as to the scope of the authorities' discretion.

The Foreign Agents Act authorizes unscheduled inspections *inter alia* on the basis of "information from state or municipal authorities concerning the violation by a non-profit organization, performing the functions of a foreign agent, of legislation of the Russian Federation in the sphere of its activities".⁵⁰

As in *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, this ground for inspection is formulated in "general terms" and, consequently, affords the authorities "wide discretion to intervene in any matter related to [an NGO's] existence". It is further notable that the Foreign Agents Act does not appear to contain any "detailed rules governing the scope and extent of the [authorities'] power to intervene in the internal management and activities of [NGOs], or minimum safeguards", which

⁴⁷ Judgment of the Constitutional Court no. 10-Pdated 8 April 2014, p.p. 28-29.

⁴⁸ Federal Law No. 7-FZ "On non-profit organizations", adopted on 12 January 1996 as amended, Article 32.

⁴⁹ For the assessment of the costs involved see: Expert Opinion by P. Gamolskiy, the Head of the Club of Auditors and Accountants of Non-Profit Organizations. Available at: <http://www.memo.ru/d/146913.html>.

⁵⁰ Foreign Agents Act No. 121-FZ, Article 2-5.

would sufficiently protect NGOs from the risk of arbitrary interference (*Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, cited above, §§62-64).

iii. Obligation to mark publications as produced by an "organization performing the functions of a foreign agent"

As discussed above, the obligation to declare oneself an "organization performing the functions of a foreign agent" may amount to an infringement of the core guarantee of Article 10 of the Convention, namely, the right to hold opinion.

On a practical level, the aforementioned requirement does not seem to correspond to any "pressing social need". Indeed, pursuant to the usual requirements of donors, virtually all publications produced by Russian NGOs with the support of a donor contain a special note to that end, thereby informing the public of the source of funding. The requirement to mark publications as produced by an "organization performing the functions of a foreign agent" does not carry any added value from the perspective of the legislation's stated aim, but only creates a basis for instilling distrust in such NGOs among a large proportion of the general public.⁵¹

SEVERITY OF SANCTIONS FOR NON-COMPLIANCE WITH THE FOREIGN AGENTS ACT

In examining whether an interference with Articles 10 and 11 of the Convention has been proportionate to the aims pursued, the Court, as appropriate, takes into account the severity of the sanction imposed (*Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, cited above, §82).

The Foreign Agents Act sets out a number of sanctions which may be applied against NGOs and their executive officers in cases of non-compliance with the newly established obligations. Namely, the activities of an NGO failing to register as an "organization performing the functions of a foreign agent" may be suspended for up to six months⁵² and/or it may be fined from RUB 300,000 to RUB 500,000 as an administrative penalty.⁵³ The same administrative fine may be imposed on an "organization performing the functions of a foreign agent" for failure to mark its publications as prescribed by law.⁵⁴ Failure to comply with the reporting obligations, or provision of incomplete or incorrect information to the competent authorities, is punishable by a fine ranging from RUB 100,000 to RUB 300,000.⁵⁵ The newly adopted legislation further establishes the principle of the individual responsibility of those organizing or participating in the activities of an "organization performing the functions of a foreign agent" when the activities of the organization have been suspended: organizers may be subjected to a fine of up to RUB 50,000, and participants up to RUB 5,000.⁵⁶ Finally, an NGOs' executive officers may be held criminally liable for maliciously avoiding registering their NGO as an

⁵¹Expert Linguistics Report of the Institute of Russian Language of the Russian Academy of Science dated 13 November 2013. Available at:<http://www.memo.ru/uploads/files/996.pdf>.

⁵² Foreign Agents Act No. 121-FZ, Article 2-5.

⁵³ Foreign Agents Act No. 192-FZ, Section 4.

⁵⁴Ibid.

⁵⁵ Foreign Agents Act No. 192-FZ, Section 3.

⁵⁶ Foreign Agents Act No. 192-FZ, Section 5.

"organization performing the functions of a foreign agent". The latter offence may be punishable by an array of sanctions, the most severe being two years imprisonment.⁵⁷

The severity of these administrative sanctions (fines) has been criticized by the Constitutional Court. It has held that the legislation which establishes the minimum penalty for failure to register as an "organization performing the functions of a foreign agent" at RUB 300,000 could lead to excessive restriction of NGOs' property rights and prevent the courts from taking an individual approach to every case.⁵⁸ The Constitutional Court further stated:

"These shortcomings would not be fraught with the risk of constitutional problems if the establishment of high minimums of fines were accompanied by softer alternative administrative penalties, the possibility to impose an administrative fine below the lower limit provided for by the sanction for the relevant offense, release from administrative responsibility or penalty in case of the offender's active repentance or voluntary removal of the committed violations and their consequences, as well as other legislative acts, which provide bodies and officers of administrative jurisdiction with effective means of fair and proportionate response. At present, however, the Code of the Russian Federation on Administrative Offenses does not provide for such possibilities [...]."⁵⁹

It is concluded that the legislature should make necessary amendments with due regard to the above finding.⁶⁰ At the same time however, the Constitutional Court held that the maximum penalty provided for in the same provision (RUB 300,000) was not excessive.⁶¹

Of the NGOs under review, only the *Kostroma Civic Initiatives Support Centre* was subjected to a fine of RUB 300,000 for failure to register as an "organization performing the functions of a foreign agent". The Centre has declared its intention to appeal against the judgment ordering the fine in view of the Constitutional Court's findings.⁶²

The criminal penalties stipulated by the Foreign Agents Act and, in particular, the possibility to order the imprisonment of managing staff for avoiding registering the NGO as "an organization performing the functions of a foreign agent" appear to be grossly disproportionate to the stated aims of the Act, in view of the lack of any objectifiable harmful consequences for society which such an offence may cause (see, *mutatis mutandis*, *Ceylan v. Turkey [GC]*, no.23556/94, § 37, ECHR 1999-IV).

⁵⁷ Foreign Agents Act No. 121-FZ, Article 3-2.

⁵⁸ Judgment of the Constitutional Court no. 10-Pdated 8 April 2014, pp. 44-45.

⁵⁹ Ibid, P. 49.

⁶⁰ Ibid. P. 50.

⁶¹ Ibid. P. 44.

⁶² Information available at: <http://logos44.ru/newsstories/656.aspx>.

E. COMPATIBILITY WITH ARTICLE 14 OF THE CONVENTION

This section looks at the Foreign Agents Act from the standpoint of the non-discrimination provision contained in Article 14 of the Convention, which provides:

"Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

According to the Court's case-law "a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, for instance, *Belgian Linguistic case*, Series A, no. 6, 23 July 1968, *Inze v. Austria*, 28 October 1987, § 41, Series A no. 126, and *Genovese v. Malta*, no. 53124/09, §§ 43-44, 11 October 2011).

The Foreign Agents Act provides for differential treatment of NGOs on the basis of two criteria. Firstly, as underlined by Judge Yaroslavtsev in his Dissenting Opinion to the Judgment of the Constitutional Court, the legislation in question creates inequality between those NGOs which receive foreign funding and those who do not.⁶³ Secondly, the Foreign Agents Act contains an exemption for NGOs engaged in activities in the spheres of science, culture, art, healthcare, disease prevention and treatment, social support and protection, the protection of motherhood and children, social support for disabled persons, promotion of a healthy way of life, physical culture and sport, protection of flora and fauna, charitable work and activities for the support of charitable work and volunteering, which represents preferential treatment as compared to those NGOs falling within the ambit of the Act.

The Foreign Agents Act itself, and its preparatory notes, are silent as to the reasons for such differential treatment and only state that the Act aims at upholding the transparency of NGOs' work and their accountability before the general public. In view of the stated aims, it is hard to see any reasonable and objective justification for stricter governmental control over some types of lawful activities and not others, and over those NGOs in receipt of foreign funding and not those funded domestically. In view of the above, the Foreign Agents Act (as applied) may be regarded as being in breach of the non-discrimination provisions of the Convention.

⁶³Judgment of the Constitutional Court no. 10-P dated 8 April 2014, Dissenting Opinion by Judge Yaroslavtsev, p. 63

F. RECOMMENDATIONS TO THE RUSSIAN GOVERNMENT

Bearing in mind that the requirements regarding public accountability and reporting of NGOs laid down by Russian legislation existing before November 2012 were sufficient to ensure transparency of the activities and sources of funding of civil society organizations, and taking into account the destructive impact that the Foreign Agents Act and its implementation have had on independent advocacy civil society groups in the Russian Federation, including human rights, environmental, social research and other organizations, the Russian government:

- Must repeal the provisions of the Foreign Agents Act as contradicting the Russian Constitution and international human rights treaties, including the International Covenant on Civil and Political Rights and the European Convention on Protection of Fundamental Rights and Freedoms. Revoking the law would be the only effective guarantee of the implementation of Russia's international obligations on freedom of association and other fundamental rights and would facilitate the creation of an enabling environment for the functioning of independent civil society organizations in the country.

As a temporary measure, before a decision to repeal the Foreign Agents Act finds sufficient support in the Russian parliament and government, the following amendments to the legislation in question must be made as soon as possible:

- Substitute the term "foreign agent" by the less misleading and non-derogatory term of "an organization receiving foreign funding" in order to avoid ambiguity with respect to how it is perceived;
- Clearly and narrowly define the notion of "political activity" in the law as activities that have a strictly political nature and aim at influencing the process of competing for and assuming political power, such as by providing support to political parties or individual candidates in elections;
- Interpret the legislation restrictively in practice so as to exclude basic, core activities of civil society organizations from the ambit of the Law, including public policy and advocacy work aimed at influencing decisions of public authorities, public education and awareness raising work aimed at influencing public opinion, interaction with international and inter-governmental organizations, and the exercise of the fundamental rights of freedom of expression, peaceful assembly and association;
- Include a provision into the law whereby a government body that seeks to include an organization in the list of "foreign agents" or to compel an organization to declare itself a "foreign agent" must prove beyond reasonable doubt that the organization has acted upon the orders, on behalf and in the interest of a foreign principal;
- Abolish criminal sanctions for the leaders of organizations found to violate the provisions of the Foreign Agents Act;
- Ensure that any government body inspections of NGOs are conducted in a manner respectful of the staff of the targeted organizations and do not interfere with or paralyze their regular work;
- Amend legislation regulating government body inspections of NGOs so as to ensure that inspections may not be conducted on arbitrary grounds; unscheduled inspections, including inspections by prosecutors may only be conducted on the basis of grounds clearly spelled out by law; a concrete and exhaustive list of documents that may be required during an inspection is specified in the law; documents submitted by NGOs to other agencies cannot be

required during an inspection; and a time limit for the duration of an inspection is established;

- Abandon the ambiguous and arbitrary practice of bringing civil actions against NGOs under the Foreign Agents Law on behalf of "unidentified groups of persons".

Recommendations to Russian Courts:

Taking into account the ambiguous nature of key concepts of the Foreign Agents Law, Russian courts bear a high level of responsibility for interpreting law in a manner which corresponds to Russia's international obligations. To this end, while applying the law, Russian courts should:

- Apply the test of "proportionality and necessity in a democratic society" in line with the well-established case law of the European Court of Human Rights, including in the application of administrative sanctions such as fines, and the suspension of the work and dissolution of an organization;
- Ensure that proceedings related to the application of the Foreign Agents Act are conducted in compliance with the requirements of Article 6 of the European Convention on Human Rights and Fundamental Freedoms as interpreted by the European Court of Human Rights. For this purpose, Russian courts should ensure that:
 - i. proceedings are conducted in a public and transparent manner. Whenever the proceedings are fully or partly closed to the public, proper justification should be provided;
 - ii. the organizations concerned and their representatives are given adequate time and opportunity to formulate their position in relation to the case under consideration;
 - iii. the parties in the case compete on equal footing and have a chance to ask questions and receive relevant answers;
 - iv. arguments and motions of the defense, as well as independent expert assessment requested by the defense are properly taken into account and the burden of proof rests strictly on the prosecution side, including the responsibility to prove beyond reasonable doubt and using compelling and concrete evidence that the organization was engaged in "political activity" and was acting on orders and in the interests of a foreign principal;
 - v. decisions and/or judgments offer clear and comprehensive argumentation and all substantial questions and motions of the defense are properly reflected in the argumentation.