

IN THE EUROPEAN COURT OF HUMAN RIGHTS

BETWEEN:

LEVADA CENTRE

Applicant

-v-

THE RUSSIAN FEDERATION

Respondent

MEDIA LEGAL DEFENCE INITIATIVE

Third Party Intervener

WRITTEN COMMENTS OF THE THIRD PARTY INTERVENER

Introduction

1. The Third Party Intervener (“the Intervener”) submits these written comments pursuant to leave granted by the President of the Third Section under Rule 44 §3 of the Rules of the Court.¹
2. This case concerns the requirement for Russian non-governmental organisations (‘NGOs’) that receive foreign funding and engage in ‘political activities’ to register as ‘foreign agents’ under the Foreign Agents Law.² It raises issues of considerable public importance with respect to the degree to which government is allowed to lawfully intrude on the day to day functioning of NGOs. The case is brought against the backdrop of increasing hostility towards NGOs from governments, both within the Council of Europe and elsewhere, who have adopted legislation seeking to regulate the ways in which NGOs operate.³ Many of these laws contain provisions imposing constraints on NGOs and other human rights defenders seeking to access foreign funding, requiring them to identify themselves to the public as ‘foreign agents’, and imposing criminal sanctions in the event of non-compliance. The outcome of this case is therefore likely to have an impact on a large number of NGOs, online activists,

¹ As provided in the letter dated 28 September 2018 from the Section Registrar, J.S. Phillips.

² *Federal Law No 121-FZ On Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-Commercial Organisations Performing the Functions of Foreign Agents*, available at <http://kremlin.ru/acts/bank/35748>.

³ These laws will be referred to as ‘foreign agent’ type laws’ throughout this intervention.

citizen journalists and others involved in defending human rights throughout the member states of the Council of Europe.

3. These written comments will focus on the following issues, with reference to relevant international and comparative law and commentary:
 - (i) The proliferation of ‘foreign agent’ type laws in other jurisdictions both within and outside the Council of Europe and their impact on NGOs and other human rights defenders;
 - (ii) ‘Foreign agent’ type laws will invariably have a chilling effect on NGOs;
 - (iii) ‘Foreign agent’ type laws impacting on the right to freedom of expression of NGOs and other human rights defenders must be subject to the strictest scrutiny;
 - (iv) Factors to be considered in assessing whether ‘foreign agent’ type laws are used for improper purposes to restrict Convention rights.

The proliferation of ‘foreign agent’ type laws in other jurisdictions and their impact on NGOs and other human rights defenders

4. NGOs play an essential role in the development and realisation of democracy and human rights, in particular through the promotion of public awareness, participation in public life and securing the transparency and accountability of public authorities.⁴ The Council of Europe’s Committee of Ministers has recognised the “essential contribution made by NGOs to the development and realisation of democracy”.⁵ According to the Vienna Declaration and Program of Action, “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”.⁶
5. Member states have a positive obligation to protect human rights defenders and to create an environment that allows them to carry out their activities without undue interference. The Council of Europe Committee of Ministers has called on Council of Europe member states to “create an environment conducive to the work of human rights defenders, enabling individuals, groups and associations to freely carry out activities, (...) to promote and strive for the protection of human rights and fundamental freedoms”.⁷

⁴ United Nations Development Programme, *Global Inventory of UNDP Engagement with Civil Society* (1 May 2009), available at http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/civic_engagement/global-inventory-of-undp-engagement-with-civil-society-2009.html; World Economic Forum, *The Future Role of Civil Society* (January 2013), available at http://www3.weforum.org/docs/WEF_FutureRoleCivilSociety_Report_2013.pdf.

⁵ Council of Europe Committee of Ministers, *Legal Status of Non-governmental Organisations in Europe*, CM/Rec14 (10 October 2007), available at <https://rm.coe.int/16807096b7>.

⁶ World Conference on Human Rights, *Vienna Declaration and Program of Action* (25 June 1993) para. 38.

⁷ Council of Europe Committee of Ministers, *Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities* (6 February

6. The recent proliferation of ‘foreign agent’ type laws suggests states are failing to comply with these obligations. For instance, in relation to the Russian Foreign Agent Law, the Council of Europe Commissioner for Human Rights has observed that a requirement to register as an organisation “performing the function of a foreign agent” and to identify as a “foreign agent” in all publications, amounts to an interference with the free exercise of the rights to freedom of association and freedom of expression”. He expressed particular concern at the requirement for NGOs to self-label using the term “foreign agent”, the broad and vague character of the term “political activity”, which increased the likelihood of the law’s arbitrary interpretation and application, and the disproportionate sanctions, including the possibility of applying criminal charges for “malicious” non-compliance.⁸
7. Further concerns have been raised about the ability of NGOs to raise funds free from unwarranted interference. The importance of this key principle was recognised by this Court in the case of *Ramanazova v Azerbaijan* where it noted that a domestic law that restricted an NGO’s ability to receive financial donations meant it “was not able to engage in charitable activities which constituted the main purpose of its existence.”⁹ It has also been recognised by a range of international bodies. The Committee of Ministers of the Council of Europe in its Recommendation on the legal status of non-governmental organisations in Europe stated that, “NGOs should be free to solicit and receive funding [...] not only from public bodies in their own state but also from institutional or individual donors, another state or multilateral agencies, subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties.”¹⁰
8. According to the United Nations Human Rights Council, “no law should criminalise or delegitimise activities in defence of human rights on account of the origin of funding”.¹¹ The Special Rapporteur on the right to freedom of peaceful assembly and of association, referring to the case law of the Human Rights Committee, affirmed 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 an interference with article 22”.¹²

2008), available at <https://www.ohchr.org/Documents/Issues/Defenders/DeclarationHRDCoECommitteeMinisters.pdf> para. 2(i).

⁸ Council of Europe Commissioner for Human Rights, *Opinion of the Commissioner for Human Rights on the Legislation of the Russian Federation on Non-Commercial Organisations in Light of Council of Europe Standards* (15 July 2013), available at <https://rm.coe.int/16806da5b2>; Council of Europe Commissioner for Human Rights, *Opinion of the Commissioner for Human Rights on the Legislation of the Russian Federation on Non-Commercial Organisations in Light of Council of Europe Standards*: (9 July 2015), available at <https://rm.coe.int/16806da5b2>. The Court will also note that Russia has introduced a law allowing the state apply similar restrictions to the press: available at <https://www.bbc.com/news/world-europe-42234582>.

⁹ *Ramazanov and Others v. Azerbaijan*, no. 44363/02, § 59, 1 February 2007

¹⁰ Council of Europe Committee of Ministers, *Legal Status of Non-governmental Organisations in Europe*, CM/Rec14 (10 October 2007), available at <https://rm.coe.int/16807096b7>.

¹¹ Human Rights Council, *Protecting Human Rights Defenders*, HRC Res. 22/6, UN Doc. A/HRC/22/L.13 (21 March 2013), para. 9.

¹² Human Rights Council, *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.

9. Notwithstanding this clear guidance, based on fundamental democratic principles, in addition to Russia there is an emerging trend of states adopting laws restricting NGO activity, not least through restrictions on how they fund their activities. Azerbaijan has, over the years, introduced a series of legislative measures impacting on the ability of NGOs to operate.¹³ Among the more restrictive provisions that have been imposed at various stages are the requirements that (i) donations to NGOs can only be made by Azerbaijani citizens or registered foreign legal persons; (ii) all NGOs must be registered with the Ministry of Justice, no more than one branch of a foreign NGO can be established, and all changes to the NGO's structure, body and funding must be reported; and (iii) NGOs are banned from engaging in political activities. These laws have been heavily criticised not only because of the excessive burdens placed on NGOs but also because of the vague and imprecise language of the legislative provisions.¹⁴
10. In Hungary, the Transparency of Organisations Receiving Foreign Funds Law came into force in June 2017. It is, in many aspects, similar to the Russian Foreign Agents' law. According to the Parliamentary Assembly of the Council of Europe the Hungarian law was "inspired by the corresponding Russian law".¹⁵ For example, the Hungarian law requires NGOs to register and label themselves in all their publications, websites and press material as "organisations supported from abroad".¹⁶ According to the Council of Europe Commissioner for Human Rights it was introduced against the backdrop of "continued antagonistic rhetoric from certain members of the ruling coalition, who publicly labelled some NGOs as "foreign agents" based on the source of their funding and questioned their legitimacy".¹⁷ The UN Special Rapporteur on the situation of human rights defenders indicated, in a statement issued after his visit to Hungary, that "human rights defenders who criticize the Government or raise human rights concerns are quickly intimidated and portrayed as 'political' or 'foreign agents'. They face enormous pressure through public criticism, stigmatization in the media, unwarranted inspections and reduction of state funding".¹⁸

¹³ The following three laws have recently been introduced - *Law of the Republic of Azerbaijan "On Non-Governmental Organisations (Public Associations and Funds)"* ("the NGO Law") adopted 13 June 2000 (amendments on it were adopted on 15 February 2013, 17 December 2013 and 17 October 2014); *The Law of the Republic of Azerbaijan "On State Registration and State Register of Legal Entities"* ("the Registration Law") adopted 12 December 2003; *The Law of the Republic of Azerbaijan "On Grants"* ("the Law on Grants") adopted 17 April 1998 and amended 17 October 2014.

¹⁴ Council of Europe and Venice Commission, *Opinion on the Law on Non-Governmental Organisations (Public Associations and Funds)* (12-13 December 2014), available at <https://rm.coe.int/1680306ff8>

¹⁵ Council of Europe, *Resolution 2162 (2017) Alarming developments in Hungary: draft NGO law restricting civil society and possible closure of the European Central University* (27 April 2017), available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23715&lang=en>

¹⁶ European Commission (Press Release), *Hungary: commission launches infringement procedure for law on foreign-funded NGOs* (13 July 2017), available at http://europa.eu/rapid/press-release_IP-17-1982_en.htm.

¹⁷ Human Right Council, *Letter to the Speaker of the National Assembly of Hungary* (26 April 2017).

¹⁸ Human Right Council, *End of mission statement by Special Rapporteur on the situation of human rights defenders, Visit to Hungary* (8 - 16 February 2016), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?ewsID=17048&LangID=E#sthash.ayjYEDjx.dpuf>.

11. Following its introduction, the Hungarian law was criticised by a range of international bodies. The Council of Europe Parliamentary Assembly expressed concern at (i) the lack of public consultation in the lead up to the adoption of the laws by parliament; (ii) the requirement that NGOs confirm receipt of foreign funding on material they publish and disseminate; (iii) the discriminatory nature of the legislation, which applied to some associations but not others.¹⁹ The Venice Commission noted that the requirement for NGOs in certain circumstances to identify as an “organisation receiving support from abroad” would, having regard to the prevailing political situation in Hungary, result in their stigmatisation, “adversely affecting their legitimate activities and having a chilling effect on freedom of expression and association”.²⁰ In a letter to the Organisation for the Security and Cooperation in Europe (OSCE) over 200 NGOs in Hungary have expressed concern that, “the newly adopted law will not be the endpoint of the several years long governmental campaign to denounce Hungarian civil society organisations. On the contrary, this is a new step in a long process that aims at fully discrediting civil society organisations”.²¹
12. In Poland, the ruling party recently set up the ‘National Freedom Institute - Centre for the Development of Civil Society’. NGO funding will now be entirely centralised through this institution.²² Concerns have been expressed that this institution will only distribute funding to NGOs sharing the government’s political outlook.²³ Following this development, the UN Human Rights Regional Office for Europe expressed concern over the shrinking space for civil society organizations in Poland and the potential for NGO funding to be discriminatorily cut.²⁴
13. Outside of the Council of Europe, in Belarus, a 2011 law regulating the activities of NGOs imposes restrictions that are similar to those found under the Russian and Hungarian laws.²⁵ The law requires ‘mandatory’ registration of funding, imposes criminal liability on NGOs violating rules on receiving foreign funding, and provides that only registered NGOs can legally accept foreign grants and technical aid and only for a limited set of approved activities.

¹⁹ Council of Europe, *Resolution 2162 (2017) Alarming developments in Hungary: draft NGO law restricting civil society and possible closure of the European Central University* (27 April 2017), available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23715&lang=en>.

²⁰ Council of Europe European Commission for Democracy through Law, *Hungary: Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad* (20 June 2017), para. 65, available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)015-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)015-e).

²¹ OSCE, *Independent Civil Society Under Attack in Hungary Statement by Hungarian NGOs* (22 September 2017), available at <https://www.osce.org/odihr/339316?download=true>.

²² Deutsche Welle, *Poland: Bringing NGOs into the government fold?* (1 October 2017), available at <https://www.dw.com/en/poland-bringing-ngos-into-the-government-fold/a-40768051>.

²³ Politico, *Warsaw grabs purse strings of Polish NGOs* (12 August 2017), available at <https://www.politico.eu/article/pis-polish-ngos-fear-the-governments-embrace/>.

²⁴ OHCHR, *Poland: UN Human Rights Office troubled by shrinking civic space, growing extremist rhetoric* (7 March 2018), available at <https://europe.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=134&LangID=E>.

²⁵ *Law of the Republic of Belarus on Public Associations*, No.3252-XII (4 October 1994) [as amended at 4 November 2013]; see also, O. Oleinikova, *Foreign Funded NGOs in Russia, Belarus and Ukraine: Recent Restrictions and Implications* (2017) Vol. 9 No. 3, *Cosmopolitan Civil Societies: an Interdisciplinary Journal* available at <https://epress.lib.uts.edu.au/journals/index.php/mcs/article/view/5637/6188>.

14. As with the content of the legislation, the political background is also strikingly familiar. The Government continues to deny registration to NGOs and political parties, which the Belarusian President frequently labels as “the fifth column,” on a variety of pretexts, including “technical” problems with applications. Authorities frequently harass and intimidate individuals who identify themselves as founding members of organisations in an effort to induce them to abandon their membership and thus deprive groups of the number of petitioners necessary for registration.²⁶ The US Department of State has noted that following the 2010 crackdown, the authorities sought to close any legal loopholes considered beneficial to NGOs and severely limited foreign funding.²⁷ The OSCE has referred to these laws as “symbolic of the unrelenting crackdown on independent human rights NGOs and activists in Belarus.”²⁸
15. Since the Russian Foreign Agents Law came into force, a number of other countries have adopted laws containing provisions that have had a deleterious impact on the ability of NGOs to operate without undue interference. For example, in Israel recent legislation imposed a requirement on NGOs receiving support from a ‘Foreign State Entity’ to disclose that fact on all publications or campaigns it undertakes.²⁹ In Kazakhstan, elements of the ‘foreign agents’ regime have also been introduced.³⁰

‘Foreign agent’ type laws will invariably have a chilling effect

16. These written comments are made against the background of states’ increasing hostility towards NGOs engaged in the defence of human rights. The Parliamentary Assembly of the Council of Europe has “repeatedly denounced the dramatic deterioration of the situation of civil society in certain Council of Europe member States, in particular following the adoption of restrictive laws and regulations regarding registration, operating and financing”.³¹ As noted below, in such circumstances this Court should apply the most careful scrutiny to measures designed to, or having the effect of, stigmatising NGOs and preventing or severely impacting their ability to carry out their functions unhindered by undue interference.
17. Where ‘foreign agent’ type laws allow for the application of criminal sanctions, including imprisonment, such as in the case of the Russian Foreign Agent law, this is bound to have a chilling effect on NGOs. The Council of Europe Commissioner for Human Rights has noted in the Russian context that the severe penalties applied to the offence of deliberate non-registration hardly qualify as being ‘necessary in a

²⁶ US Department of State, *Belarus 2016 Human Rights Report* (2016), available at <https://www.state.gov/documents/organization/265610.pdf>.

²⁷ *Ibid.*

²⁸ OSCE, *Working sessions 8 and 9, specifically selected topic: Freedom of association and assembly* (27 September 2013), available at <https://www.osce.org/odihr/105996?download=true>.

²⁹ *Obligation to Disclose Support by a Foreign Political Entity Act (Amendment Increasing transparency for supported entities whose primary financing comes from support by foreign political entities)*, 5776-2016 (11 July 2016) (unofficial translation of the bill).

³⁰ *Tax Code of the Republic of Kazakhstan*, Article 14 para. 1-2 (as amended by the Law of 26 July 2016 No.12-VI).

³¹ Council of Europe, *Resolution 2162 (2017) Alarming developments in Hungary: draft NGO law restricting civil society and possible closure of the European Central University* (27 April 2017), available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23715&lang=en>.

democratic society' and proportionate.³² Further, vague and broad legislation can give rise to uncertainty over imposition of sanctions, resulting in “a chilling effect on freedom of expression and self-censorship”.³³ This chilling effect represents an interference not only with the right to freedom of expression of the NGO, but also with the right of the NGOs' potential clients and partners to freely receive information that would normally be disseminated in the course of their work.

Regulation of NGOs must be subject to the strictest scrutiny under Article 10

18. Article 10 of the Convention, and its equivalent provision at Article 19 of the ICCPR, provide that the right to freedom of expression includes the right to seek, receive and impart all kinds of information, including political discourse,³⁴ commentary on public affairs,³⁵ journalism,³⁶ cultural and artistic expression,³⁷ teaching,³⁸ and religious commentary.³⁹ In particular, this Court has stated on many occasions 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.⁴⁰ A further, and related, crucial function of Article 10 is to protect the dissemination and exchange of information relating to human rights matters. The Declaration on Human Rights Defenders specifically recognises the importance of this right for NGOs, providing that everyone has a right to know, seek, obtain, receive and hold information about all human rights.⁴¹
19. While the focus of this Court has often been on the press when emphasising the existence of “certain increased protections under Article 10 of the Convention”,⁴² it has also recognised the fundamental role NGOs play in informing the public on matters of public interest.⁴³ In particular, it has recognised that “the function of creating various platforms for public debate is not limited to the press but may also be exercised by, among others, non-governmental organisations, whose activities are an essential element of informed public debate. The Court has accepted that when an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press and may be characterised as a social

³² Council of Europe Commissioner for Human Rights, *Opinion of the Commissioner for Human Rights on the Legislation of the Russian Federation on Non-Commercial Organisations in Light of Council of Europe Standards* (15 July 2013), available at <https://rm.coe.int/16806da5b2>; Council of Europe Commissioner for Human Rights, *Opinion of the Commissioner for Human Rights on the Legislation of the Russian Federation on Non-Commercial Organisations in Light of Council of Europe Standards: An Update* (9 July 2015), available at <https://rm.coe.int/16806da5b2>.

³³ As noted by this court in a different context in, *Vajnai v. Hungary*, no. 33629/06, § 54, ECHR 2008

³⁴ *Lingens v. Austria*, 8 July 1986, § 42, Series A no. 103.

³⁵ *Sürek and Özdemir v. Turkey* [GC], nos. 23927/94 and 24277/94, § 58, 8 July 1999; *Axel Springer AG v. Germany* [GC], no. 39954/08, § 79–80, 7 February 2012.

³⁶ *Axel Springer AG v. Germany* [GC], no. 39954/08, § 81, 7 February 2012; *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298.

³⁷ *Müller v. Austria*, no. 12555/03, 5 October 2006.

³⁸ *Sorguç v. Turkey*, no. 17089/03, § 35, 23 June 2009.

³⁹ *Otto-Preminger-Institut v. Austria*, 20 September 1994, § 47, Series A no. 295-A; *İ.A. v. Turkey*, no. 42571/98, § 28, ECHR 2005-VIII.

⁴⁰ *Wingrove v. the United Kingdom*, 25 November 1996, § 58, *Reports of Judgments and Decisions* 1996-V,

⁴¹ UN General Assembly, *Article 6 Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

⁴² See Committee of Ministers of the Council of Europe, *Declaration of the Committee of Ministers on the protection of journalism and safety of journalists and other media actors*, (30 April 2014), para. 6.

⁴³ *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 103, ECHR 2013.

“watchdog” warranting similar protection under the Convention as that afforded to the press. It has recognised that civil society makes an important contribution to the discussion of public affairs.”⁴⁴

20. This Court has held that measures capable of discouraging participation by the press in public debate on matters of public concern must be subject to “careful scrutiny” under Article 10.⁴⁵ NGOs require the same protection. Legislation that hinders the ability of NGOs to assume their “public watchdog” role effectively and that hampers or removes their ability to provide accurate and reliable information to the public should be scrutinised carefully.⁴⁶ In particular, in its analysis of whether there has been a violation of Article 10, as a consequence of the introduction of such measures, this Court should attach particular weight to evidence demonstrating hostility from the authorities and state run media towards NGOs.
21. In its application of this ‘strict scrutiny’ test, it is submitted that the Court should satisfy itself as to the following: (i) that measures restricting the Article 10 rights of an NGO comply with the ‘provided by law’ requirement of Article 10; (ii) that there are relevant and sufficient reasons demonstrating the necessity of introducing these measures in order to achieve a legitimate aim; and (iii) whether, and if so to what extent, the authorities took into account the ‘public watchdog’ role of NGOs when introducing such measures.
22. As to the first consideration, this Court has stated that this requirement will be fulfilled only where the law is accessible and “formulated with sufficient precision to enable the citizen to regulate his conduct”.⁴⁷ This Court should consider whether any of the laws that regulate the conduct and functioning of NGOs do so through vague and overbroad provisions, for example by relying on undefined and imprecise terms such as ‘foreign agent’⁴⁸, ‘foreign funding’ and ‘political activity’, as is the case with the Russian Foreign Agents law. The use of these imprecise provisions affords the state broad scope to arbitrarily interfere with the functioning of NGOs in a way that would affect a range of rights under the Convention, including Article 10. The vagueness of the laws would affect the ability of NGOs to predict with reasonable certainty how they will be applied, thereby falling foul of the requirement of foreseeability as they would prevent NGOs from regulating their activities and their behaviour to comply with the law and avoid sanction.⁴⁹

⁴⁴ *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, §166, 8 November 2016.

⁴⁵ *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, § 26, 14 April 2009.

⁴⁶ *Ibid.*

⁴⁷ *The Sunday Times v. United Kingdom*, no. 13166/87, §49, 26 April 1979.

⁴⁸ According to the Council of Europe Commissioner for Human Rights the term ‘foreign agent’ brings with it strong negative connotations in Russia, suggesting that a person described in this way is a traitor or foreign spy.

⁴⁹ See for example *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, no. 37083/03, §62-65, ECHR 2009, where this court stated as follows, “The Court agrees with the applicants that the above provisions are worded in rather general terms and may give rise to extensive interpretation. The Government have not submitted any examples of domestic judicial cases which would provide a specific interpretation of these provisions. In such circumstances, the NGO Act appears to have afforded the Ministry of Justice a rather wide discretion to intervene in any matter related to an association’s existence. This situation could render it difficult for associations to foresee which specific actions on their part could be qualified by the Ministry as “incompatible with the objectives” of the NGO Act.”

23. Second, the Court should have regard to whether the measures adopted are ‘relevant’ to the achievement of a legitimate aim under Article 10(2) of the Convention. This provides an important safeguard against measures, such as suspension, fines or criminal sanction, being imposed arbitrarily against NGOs.⁵⁰ Measures imposing onerous conditions on NGOs are usually justified by the state with reference to national security and the prospect of the commission of criminal offences such as money laundering. However it has been observed, in relation to Hungary’s 2017 law regulating NGOs, that, “while fighting money laundering and terrorism funding (which are stated as concerns in the preamble) are indeed legitimate and important State interests, it is unclear how forcing NGOs to register as ‘foreign-supported organizations’ furthers those State interests.”⁵¹ Absent a clear and unambiguous explanation from the state, it should not be assumed that measures interfering with the Article 10 rights of NGOs serve a legitimate aim.
24. Third, this Court should have regard to whether the domestic authorities and courts took into account the “public watchdog” role performed by NGOs when determining whether measures imposed against them are necessary and proportionate in a democratic society. In order to meet the proportionality requirement measures that restrict the activities of NGOs must be the least intrusive possible, with due regard to the significance of the interests at stake. This Court has stated that, “sweeping measures of a preventive nature to suppress freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles [...] do a disservice to democracy and often even endanger it”.⁵² The absence of any proper assessment of the ‘public watchdog’ role by the state should be a factor in this Court’s determination of whether such measures are necessary and proportionate.

Factors to be considered in assessing whether ‘foreign agent’ laws are used for improper purposes to restrict Convention rights.

25. Article 18 requires states to act in good faith. While there is a presumption that they will do so, that presumption can be rebutted where it is shown that “the real aim of the authorities was not the same as that proclaimed (or as can be reasonably inferred from the context)”.⁵³
26. In order to decide whether there is improper intent, this Court has applied a test that considers whether “it can be established to a sufficient degree that proof of improper reasons follows the combination of relevant case-specific facts.”⁵⁴ More recently, in *Jafarov v. Azerbaijan* this Court applied a three-part test in its consideration of whether or not the State had failed to act in good faith. First, this Court examined “the general

⁵⁰ See for example *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, §27, 14 April 2009

⁵¹ UN 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 (9 May 2017), available at <https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL-HUN-2-2017.pdf>

⁵² *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, § 97, ECHR 2001-IX.

⁵³ *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 899, 25 July 2013. See also *Lutsenko v. Ukraine*, no. 30663/04, § 106, 18 December 2008.

⁵⁴ *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, § 158, 22 May 2014.

context of the increasingly harsh and restrictive legislative regulation” concerning the right alleged to have been violated. Second, it looked at statements of high-ranking state officials together with relevant articles published in the pro-government media. Third, it examined whether a pattern has developed where individuals or organisations holding the same political views or engaged in the same or similar activities as the applicant have been targeted in the same or similar terms to the applicant.⁵⁵

27. It is not difficult to see how vague and imprecise laws interfering with NGOs’ Article 10 rights by restricting their ability to engage in public debate and participate in civil society might be abused for political purposes in states where the government is openly hostile to such organisations. In the context of discussions around the introduction of the Hungarian ‘Foreign Agent’ type law in 2017 the Parliamentary Assembly of the Council of Europe raised precisely this concern when it noted the “overall accusatory and labelling rhetoric by Hungarian public officials surrounding the drawing up and discussion of the draft law, which raises doubts about the real aims of the proposed legislation”.⁵⁶
28. In the Russian context, applying the *Jafarov* three-part test, the Foreign Agent law can be considered (i) through an examination of how vague and overbroad provisions of the law have been implemented in practice; (ii) by examining commentary relevant to how the law is being implemented from high ranking state officials and the state controlled media, with articles and other commentary by high-ranking state officials and others in positions of power being examined in order to assist the Court in drawing reasonable inferences as to the state’s aims in such circumstances; and (iii) through an assessment of whether there is an emerging or on-going pattern of restrictions on human rights, taking into account the general situation in the state including judicial independence and impartiality, the treatment of NGOs critical of the state, and the reports of prominent human rights monitoring mechanisms and NGOs concerning the state.⁵⁷ Where an examination of all of the circumstances of the case “indicates that the actual purpose of the impugned measures was to silence and punish the applicant(s) for (their) activities”, then it can be concluded that Article 18 has been violated.⁵⁸

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⁵⁵ *Jafarov v. Azerbaijan*, no. 69981/14, §159-161, 17 March 2016.

⁵⁶ Council of Europe, *Resolution 2162 (2017) Alarming developments in Hungary: draft NGO law restricting civil society and possible closure of the European Central University* (27 April 2017), available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23715&lang=en>.

⁵⁷ See Human Rights Watch, *Russia: ‘Year of Ecology’ a Sham: 5 Years of ‘Foreign Agents’ Law Devastates Environmental Groups* (21 November 2017), available at <https://www.hrw.org/news/2017/11/21/russia-year-ecology-sham> and *Russia: Government vs. Rights Groups: The Battle Chronicle* (18 June 2018), available at <https://www.hrw.org/russia-government-against-rights-groups-battle-chronicle>.

⁵⁸ *Jafarov v. Azerbaijan*, no. 69981/14, §159-161, 17 March 2016.