

**WRITTEN COMMENTS**  
**BY THE INSTITUTE FOR LAW AND PUBLIC POLICY**  
**Application no. 9988/13 – *Ecodefence and Others v. Russia***  
**and 48 other applications**

**I. Introduction**

1. These written comments are submitted to the European Court of Human Rights (“the Court”) by the Institute for Law and Public Policy (“ILPP”) under Article 36 § 2 of the European Convention on Human Rights (“the Convention”) and Rule 44 § 3 of the Rules of Court, pursuant to leave granted on 31 May 2017 by the President of the Third Section.<sup>1</sup> ILPP is a Russian independent non-profit think tank with experience in legal and policy research, human rights-centered legal education, academic publishing in the fields of constitutional and international law, and strategic human rights litigation.
2. Application no. 9988/13 – *Ecodefence and Others v. Russia* – and 48 other applications currently before the Court concern the enforcement of the so-called “Foreign Agents Act”<sup>2</sup> *vis-à-vis* Russian non-governmental organisations (NGOs)<sup>3</sup> which receive funds and other property from “foreign sources”. These applications raise important issues of principle relating to the extent of permissible government intrusion into the functioning of civil society organisations, not only in Russia but also across the Member States of the Council of Europe and beyond. In 2014, when the constitutionality of the Foreign Agents Act was challenged before the Constitutional Court of Russia, ILPP intervened in the proceedings as *amicus curiae*.<sup>4</sup> Drawing upon and developing its earlier analysis of the legislative framework introduced by the Foreign Agents Act, ILPP addresses the following issues in these written comments:

*a) NGOs’ Right of Access to Funding under International Law:* Is access to funding protected by international law as part of the right to freedom of association? Does regulation introduced by the Foreign Agents Act interfere with the right to access funding?

*b) Foreign Funding Restrictions: A Comparative Analysis:* What kinds of restrictions on foreign funding for NGOs are recognised in the Council of Europe and other relevant national jurisdictions? Are there any examples of restrictions analogous to those introduced by the Foreign Agents Act, and are such restrictions permissible under international law?

**II. NGOs’ Right of Access to Funding under International Law**

3. **Summary: International law guarantees access to resources for NGOs as an inherent part of their right to freedom of association, as confirmed by relevant universal and regional authorities. The Foreign Agents Act affects NGOs’ right to access funding to the extent it**

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<sup>1</sup> These written comments have been prepared by ILPP lawyers Dimitriy Mednikov, Irina Osmankina, Olga Podoplelova, Nataliya Sekretareva, and Grigory Vaypan. All sources and authorities referred to in the footnotes are current as of 17 July 2017.

<sup>2</sup> Federal Law of 20 July 2012 No. 121-FZ “On Making Amendments to Certain Legislative Acts of the Russian Federation Regarding Regulation of Activities of Non-Commercial Organisations Performing Functions of a Foreign Agent”.

<sup>3</sup> Russian law uses the term “non-commercial organisation”. In these written comments the terms “non-governmental organisation”, “non-commercial organisation”, and “non-profit organisation” are treated as synonyms.

<sup>4</sup> Full text of the *amicus curiae* brief is available at ILPP website. URL: [http://ilpp.ru/netcat\\_files/userfiles/Litigation\\_Treining/Amicus/2\\_NKO%20Inostr%20agency\\_Amicus%20Curiae%20Brief.pdf](http://ilpp.ru/netcat_files/userfiles/Litigation_Treining/Amicus/2_NKO%20Inostr%20agency_Amicus%20Curiae%20Brief.pdf) (in Russian).

**discourages reliance on foreign funding, puts additional financial and administrative burdens on those NGOs which receive and use foreign funding, and imposes special penalties for failure to comply with these restrictions.**

*1) United Nations Framework*

4. Article 22 § 1 of the International Covenant on Civil and Political Rights (“ICCPR”, “Covenant”) provides that “everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.” The Human Rights Committee has observed that Article 22 of the ICCPR encompasses not only the right to form an association but also “the right of such an association freely to carry out its statutory activities.”<sup>5</sup> Building on these provisions the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association concluded in his 2013 Report that “fundraising activities are protected under [A]rticle 22 of the Covenant.”<sup>6</sup>
5. In addition to the ICCPR, a number of United Nations instruments and institutions recognise that the right to freedom of association includes the right to have access to resources (such as funding) for the purpose of establishing and running an association. In particular, Article 6(f) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief explicitly refers to the freedom “[t]o solicit and receive voluntary financial and other contributions from individuals and institutions.”<sup>7</sup> Article 13 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (“Declaration on Human Rights Defenders”) similarly proclaims: “Everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means.”<sup>8</sup> The Special Rapporteur on the situation of human rights defenders has noted that “[t]he right to access funding is an inherent element of the right to freedom of association, which is contained in major human rights instruments.”<sup>9</sup>
6. Finally, other international human rights treaty bodies such as the Committee on the Elimination of All Forms of Discrimination Against Women,<sup>10</sup> the Committee on the Rights of the Child,<sup>11</sup> and the Committee on the Elimination of Racial Discrimination<sup>12</sup> have highlighted the importance of eliminating restrictions on civil society organisations’ access to funding.

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<sup>5</sup> HRC, *Viktor Korneenko et al. v. Belarus*, Communication No. 1274/2004, UN Doc. CCPR/C/88/D/1274/2004 (2006), para. 7.2.

<sup>6</sup> Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai, UN Doc. A/HRC/23/39 (2013), para. 16 (“Report of the Special Rapporteur, Maina Kiai (2013)”).

<sup>7</sup> UN GA Res. 36/55, UN Doc. A/RES/36/55 (1981).

<sup>8</sup> UN GA Res. 53/144, UN Doc. A/RES/53/144 (1999).

<sup>9</sup> Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekagya, UN Doc. A/66/203 (2011), para. 68.

<sup>10</sup> CEDAW, Concluding Observations: Algeria, UN Doc. CEDAW/C/DZA/CO/3-4 (2012), para. 20; CEDAW, Report of the Committee on the Elimination of All Forms of Discrimination Against Women on its Twenty Second Session, UN Doc. A/55/38 (2000), p. 65, paras. 154–155.

<sup>11</sup> CRC, Concluding Observations of the Committee on the Rights of the Child: Nepal, UN Doc. CRC/C/15/Add.261 (2005), paras 33–34; CRC, Concluding Observations of the Committee on the Rights of the Child: Central African Republic, UN Doc. CRC/C/15/Add.138 (2000), paras. 22–23.

<sup>12</sup> CERD, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Ireland, UN Doc. CERD/C/IRL/CO/2 (2005), para. 12.

7. International law does not draw any distinction between funding received from foreign, domestic or international donors.<sup>13</sup> The United Nations Human Rights Council has specifically called upon states to ensure that “no law should criminalize or delegitimize activities in defence of human rights on account of the origin of funding thereto”<sup>14</sup> and to ensure that states “do not discriminatorily impose restrictions on potential sources of funding aimed at supporting the work of human rights defenders”.<sup>15</sup> The United Nations Special Representative of the Secretary-General on human rights defenders has noted that “[g]overnments must allow access by NGOs to foreign funding as a part of international cooperation, to which civil society is entitled to the same extent as [g]overnments.”<sup>16</sup> The Human Rights Committee has condemned foreign funding restrictions for NGOs when considering states’ periodic reports under Article 40 of the ICCPR.<sup>17</sup>

## 2) Regional Human Rights Systems

### *Council of Europe*

8. In 2007 the Committee of Ministers of the Council of Europe adopted a Recommendation on the legal status of non-governmental organisations in Europe in which it affirmed that “NGOs should be free to solicit and receive funding – cash or in-kind donations – 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.”<sup>18</sup> Guidelines on Legislation Pertaining to the Right to Freedom of Association, adopted jointly by the Venice Commission and the Organisation for Security and Cooperation in Europe (“OSCE”) provide that “associations shall have the freedom to seek, receive and use financial, material and human resources, whether domestic, foreign or international, for the pursuit of their activities. In particular, states shall not restrict or block the access of associations to resources on the grounds of the nationality or the country of origin of their source, nor stigmatize those who receive such resources.”<sup>19</sup> Furthermore, the Conference of International Non-Governmental Organisations of the Council of Europe has repeatedly denounced restrictions on funding of non-governmental organisations.<sup>20</sup>

### *Inter-American Human Rights System*

9. Article 16 of the American Convention on Human Rights guarantees “[e]veryone ... the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.” The Inter-American Court of Human Rights has emphasised that the right to

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<sup>13</sup> Report of the Special Rapporteur, Maina Kiai (2013), para. 17.

<sup>14</sup> Human Rights Council, Protecting Human Rights Defenders, HRC Res. 22/6, UN Doc. A/HRC/22/L.13 (2013), para. 9.

<sup>15</sup> *Id.*

<sup>16</sup> Report of the Special Representative of the Secretary-General on human rights defenders, Hina Jilani, UN Doc. A/59/401 (2004), para 82(1).

<sup>17</sup> HRC, Concluding Observations of the Human Rights Committee: Egypt, UN Doc. CCPR/CO/76/EGY (2002) para. 21; HRC, Concluding Observations of the Human Rights Committee: Ethiopia, UN Doc. CCPR/C/ETH/CO/1 (2011), para. 25.

<sup>18</sup> CoE Committee of Ministers, Recommendation of the Council of Europe Committee of Ministers to Member States on the Legal Status of Non-governmental Organisations in Europe, CM/Rec(2007)14, para. 50.

<sup>19</sup> Venice Commission-OSCE Joint Guidelines on Freedom of Association, Guidelines on Legislation Pertaining to the Right to Freedom of Association, Principle 7. URL: <http://www.osce.org/odihr/132371?download=true>.

<sup>20</sup> Conference of INGOs of the Council of Europe, Resolution Concerning Civil Society in Belarus, CONF/PLE(2012)RES1 (2012); The Opinion of the Expert Council on NGO Law on "The law introducing amendments to certain legislative acts of the Russian Federation regarding the regulation of activities of non-commercial organisations performing the functions of foreign agents", CONF/PLE(2013)REC5 (2013).

freedom of association encompasses the right to “set up and participate freely in non-governmental organisations, associations or groups involved in human rights monitoring, reporting and promotion.”<sup>21</sup> Similarly, the Inter-American Commission on Human Rights (“IACHR”) has observed that “the right to receive international funds in the context of international cooperation for the defense and promotion of human rights is protected by freedom of association,”<sup>22</sup> and “[o]ne of the State's duties stemming from freedom of association is to refrain from restricting the means of financing of human rights organizations.”<sup>23</sup> The IACHR has also condemned restrictions on foreign funding of human rights defenders advocating for political rights and freedoms as contrary to international law.<sup>24</sup>

### *African Human Rights System*

10. Article 10 § 1 of the African Charter on Human and People’s Rights protects the freedom of association by proclaiming that “[e]very individual shall have the right to free association provided that he abides by the law.” Although the African Commission on Human and People’s Rights has not yet extensively dealt with the issue of limitations on funding received by civil society organisations, it has denounced restrictions on foreign funding for NGOs in Ethiopia,<sup>25</sup> Kenya,<sup>26</sup> and Egypt.<sup>27</sup>

### *3) Foreign Agents Act: Interference with the Right of Access to Funding*

11. Turning to the Foreign Agents Act, it has been common for Russian officials to claim that the new regulation does not affect in any way the right of Russian NGOs to receive and use funds and other property from abroad.<sup>28</sup> Yet, although there is no outright prohibition, it is clear that the regulatory regime introduced into the Federal Law of 12 January 1996 No. 7-FZ on “On Non-Commercial Organisations” (“Law on NGOs”) and other laws by the Foreign Agents Act restricts NGOs’ right to have access to funding.
12. *First*, it discourages reliance of NGOs on foreign financial support. This is achieved through the use of the pejorative term “foreign agent” *vis-à-vis* NGOs which receive foreign funding and work in the fields of human rights, rule of law, and other areas considered to be “political” under the Foreign Agents Act (Article 2 § 6 of the Law on NGOs); by providing for mandatory registration of such NGOs with the Ministry of Justice in a special register (Article 32 § 7 of the

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<sup>21</sup> IACtHR, *Case of Kawas-Fernandez v. Honduras*, Merits, Reparations and Costs, (ser. C.) No. 196 (2009), para 146.

<sup>22</sup> IACHR, *Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II. Doc. 54 (2009), para. 585; IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II. Doc. 66 (2011), para. 186.

<sup>23</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II. Doc. 66 (2011), para. 179.

<sup>24</sup> *Id.*, para. 185.

<sup>25</sup> ACommHPR, *Resolution on the Human Rights Situation in the Democratic Republic of Ethiopia*, 51/218 (2012). URL: <http://www.achpr.org/sessions/51st/resolutions/218/>.

<sup>26</sup> ACommHPR, *Press Release on the NGO and Media Bills in Kenya* (2014). URL: <http://www.achpr.org/press/2014/04/d198/>.

<sup>27</sup> ACommHPR, *Resolution on Human Rights Abuses in Egypt*, 16/287 (2014). URL: <http://www.achpr.org/sessions/16th-eo/resolutions/287/>.

<sup>28</sup> E.g.: Annual Town Hall Meeting with Vladimir Putin, 25 April 2013: “If this is activity which seeks to be part of international political process and is funded from abroad, that’s not bad, but then we need to know about this, let’s make them say – what’s wrong about this? Indeed, such activity is not prohibited”. URL: <http://kremlin.ru/events/president/news/17976> (in Russian).

Law on NGOs); and by requiring such NGOs to label accordingly all materials they issue and/or distribute (Article 24 of the Law on NGOs).

13. *Second*, it puts additional financial and administrative burdens on those NGOs which receive and use foreign funding. These include an obligation for such NGOs to submit extra financial and activity reports (once every three months and six months respectively) and independent audit statements (once a year) to the Ministry of Justice (Article 32 §§ 3, 3.2 of the Law on NGOs), as well as routine inspections of such NGOs once a year as opposed to the ordinary regime of one routine inspection per three years (Article 32 § 4.5 of the Law on NGOs). It is estimated that “foreign agent” NGOs are forced to spend annually the average amount of 273 000 Roubles (4 009 Euro) more than other NGOs.<sup>29</sup>
14. *Third*, it provides for separate offences with higher penalties under the Code of Administrative Offences of the Russian Federation (Articles 19.7.5-2, 19.34) for failure to comply with the above rules, and even provides for a separate crime of “malicious non-compliance” under the Criminal Code of the Russian Federation (Article 330.1).
15. Therefore, by virtue of the Foreign Agents Act and subsequent amendments Russian NGOs are forced either to avoid foreign funding or to endure the above restrictions. Given the international legal framework governing access of NGOs to resources, this regulatory regime interferes with their right to receive and use funding and is thus unlawful unless it falls into any of the permissible limitations of the freedom of association under international law.

### III. Foreign Funding Restrictions: A Comparative Analysis

16. Under Article 11 of the Convention restrictions of the right to freedom of association are allowed only insofar as they “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”. The Court has earlier held that “the exceptions set out in Article 11 are to be construed strictly”, “only convincing and compelling reasons can justify restrictions on freedom of association”, and “the States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision.”<sup>30</sup> Analysis in this section focuses on legitimate aims of foreign funding restrictions recognised in the Council of Europe and other relevant national jurisdictions.
17. **Summary: *First*, traditional restrictions related to national security or public safety (enforcement of laws on customs, foreign exchange, prevention of terrorism financing and money laundering, and those on the funding of elections and political parties) have not been relied upon by the Russian authorities as justification for the Foreign Agents Act and are in any event inapplicable in this case. *Second*, disclosure and reporting requirements for lobbyists controlled by foreign principals, provided for by the United States Foreign Agents Registration Act, are fundamentally different from the restrictions introduced by the Foreign Agents Act in Russia. *Third*, protection of sovereignty and prevention of “foreign interference” are not legitimate aims with respect to foreign funding restrictions on civil society.**

#### *1) Traditional Restrictions Related to National Security or Public Safety*

18. Recommendation CM/Rec(2007)14 of the Council of Europe Committee of Ministers to Member States on the legal status of non-governmental organisations in Europe provides that the freedom

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<sup>29</sup> Social Information Agency, “What Is the Price of “Foreign Agent” Status? Lawyers Counted the Costs”. URL: <https://www.asi.org.ru/news/2015/11/26/107822/> (in Russian).

<sup>30</sup> ECtHR, *United Macedonian Organisation Ilinden and Others v. Bulgaria*, app. no. 59491/00 (2006), para. 61.

of NGOs to solicit and receive funding, including from non-domestic sources, is “subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties.”<sup>31</sup>

19. Yet, pursuit of these interests, although related to the protection of national security or public safety, requires a strictly proportionate approach to any restrictions on freedom of association. By way of an example, the Financial Action Task Force (FATF), an intergovernmental body addressing the issue of money-laundering and terrorist financing, acknowledges that measures taken to prevent the risk of terrorist financing abuse in the non-profit sector, such as risk-based supervision, monitoring, and information gathering, should not disrupt or discourage legitimate activities of NGOs and should not unduly restrict their ability to access financial resources.<sup>32</sup> Restrictive measures must be the least intrusive and must not target all civil society associations disregarding their risk to be misused for terrorist financing on the basis of analysis of their purpose, activities, size, and location of operation. FATF directly states that “detailed registration procedures for [NGOs], additional reporting requirements, <...> and an external audit of the organization, may not be appropriate for <...> those [NGOs] facing little to no [terrorist financing] risk.”<sup>33</sup> FATF recommendations do not contain any indications that heightened scrutiny in the absence of evidence of any illegal activity would serve any legitimate purpose. The practice of the Council of Europe Member States makes it clear that the mere fact that income is obtained from abroad does not automatically lead to an additional reporting burden on an NGO in the context of anti-terrorism legislation. Usually, legislation on combating terrorism demonstrates that additional reporting requirements are imposed depending on the area of activities of a legal entity, the amount of money involved in a particular transaction<sup>34</sup> or in case a transaction qualifies as “suspicious” or “unusual”.<sup>35</sup> Even if legal provisions specifically target NGOs as a “reporting person” under anti-terrorism legislation, as it is established in Armenia,<sup>36</sup> Bosnia and Herzegovina,<sup>37</sup> or Estonia,<sup>38</sup> there are no differences between obligations of NGOs and other legal entities under such regulation.
20. The Russian authorities have never relied on the legitimate aims listed above as justification for the Foreign Agents Act. In any event, the “foreign agents” regime is unrelated to the advancement of any of those aims, and any reference to them can hardly be regarded as genuine. As has been noted by three United Nations Special Rapporteurs with respect to a similar law passed in Hungary in June 2017 (on this law, see also below), “[w]hile fighting money laundering and

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<sup>31</sup> CoE Committee of Ministers, Recommendation of the Council of Europe Committee of Ministers to Member States on the Legal Status of Non-governmental Organisations in Europe, CM/Rec(2007)14, para. 50.

<sup>32</sup> FATF, International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation (2012), updated June 2017, at 11, 53 § 4(e). URL: <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>.

<sup>33</sup> FATF, Report on Best Practices on Combating the Abuse of Non-profit Organizations (Recommendation 8), adopted in June 2015, §15, §23. URL: <http://www.fatf-gafi.org/media/fatf/documents/reports/BPP-combating-abuse-non-profit-organisations.pdf>.

<sup>34</sup> E.g., Kingdom of Denmark, Act on Measures to Prevent Money Laundering and Financing of Terrorism, No. 1022, 13 August 2013, Art. 16(3). URL: <http://www.legislationline.org/topics/topic/5/country/34>.

<sup>35</sup> E.g., Republic of Latvia, Law “On the Prevention of Laundering the Proceeds from Criminal Activity and Terrorism Financing”, 17 July 2008, Art. 3(4). URL: <https://likumi.lv/doc.php?id=178987>.

<sup>36</sup> Republic of Armenia, Law “On Combating Money Laundering and Terrorism Financing”, 26 May 2008, Art. 26. URL: <https://www.anti-moneylaundering.org/Document/Default.aspx?DocumentUid=DA880436-E0D0-4CAF-A8A2-400740847774>.

<sup>37</sup> Bosnia and Herzegovina, Law “On the Prevention of Money Laundering”, Art. 3 (14) (a). URL: <http://www.legislationline.org/topics/topic/5/country/40>.

<sup>38</sup> Republic of Estonia, Act “On Money Laundering and Terrorist Financing Prevention”, 19 December 2007, Art. 3, 21 § 3. URL: <https://www.riigiteataja.ee/en/eli/523122013005/consolide>.

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.”<sup>39</sup>

2) *Disclosure and Reporting Requirements for Lobbyists Controlled by Foreign Principals (U.S. Foreign Agents Registration Act)*

21. Various Russian officials as well as drafters of the Foreign Agents Act have repeatedly asserted that it is modelled on the United States Foreign Agents Registration Act of 1938 (22 U.S.C. § 611-621) (“FARA”).<sup>40</sup> However, these two laws are fundamentally different from each other. The most important differences relate to the requirement of a principal-agent relationship under FARA and the scope of activities covered by FARA.

*Requirement of Principal-Agent Relationship under FARA*

22. FARA, unlike the Foreign Agents Act in Russia, requires evidence of a principal-agent relationship between the “foreign agent” and its “foreign principal”, meaning high level of dependence and control between the domestic association or individual and its foreign donor.
23. Under Article 2 § 6 of the Law on NGOs the mere fact that a Russian NGOs participating in “political activity” receives funding from abroad is sufficient to be considered a “foreign agent”. It is not necessary to prove that the NGOs is acting “in the interest of” any foreign entity. In contrast, according to the current version of § 611(c) of FARA, in order to consider a person a “foreign agent”, the government must prove in each specific instance that the person (a) is acting “at the order, request, or under the direction or control of a foreign principal,” and (b) “in the interests of such a foreign principal.” These two conditions are cumulative. Moreover, since 1966, § 613(d)(2) of FARA has explicitly provided that activities not undertaken primarily in a foreign interest do not require registration.
24. These legislative criteria have been reflected in the case law of the United States courts. In *Attorney General of the United States v. Irish Northern Aid Committee*, the United States District Court for the Southern District of New York declared the Irish Northern Aid Committee (“Committee”) a “foreign agent” according to FARA and declared the Provisional Irish Republican Army (“IRA”) its “foreign principal”. The court found that the Committee was established by the IRA and, acting upon the direct order of the IRA, collected funds in the United States for the humanitarian and military needs of the Irish republican movement.<sup>41</sup> On the contrary, in *Attorney General of the United States v. Irish People, Inc.*, the United States Court of Appeals for the District of Columbia Circuit refused to declare *The Irish People*, a local newspaper, an agent of the Committee and, thus, a “foreign agent” of the IRA according to FARA.<sup>42</sup> The court held that, while (a) the Committee was providing financial support to the newspaper; (b) there were similarities in the political views of the Committee’s leadership and that of the newspaper; and (c) some positions on the newspaper’s editorial staff were filled by individuals from the Committee, in aggregate these facts were nevertheless insufficient to declare that the newspaper was under the control of the Committee. Moreover, the court spoke in favour

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<sup>39</sup> Letter of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, and the Special Rapporteur on the situation of human rights defenders addressed to the Government of Hungary of 9 May 2017 concerning the Bill T/14967 on the Transparency of Organizations Financed from Abroad. URL: <http://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL-HUN-2-2017.pdf>.

<sup>40</sup> E.g., *Interview with Irina Yarovaya, Draft Law on NGOs- ‘Foreign Agents’ is Identical with Contemporary Foreign Legislation – Yarovaya*, 29 June 2012. URL: <http://er.ru/news/87096/> (in Russian); Annual Town Hall Meeting with Vladimir Putin, 25 April 2013. URL: <http://kremlin.ru/events/president/news/17976> (in Russian).

<sup>41</sup> *Attorney General of the United States v. Irish Northern Aid Committee*, 530 F.Supp. 241 (1981).

<sup>42</sup> *Attorney General of the United States v. Irish People, Inc.*, 796 F.2d 520 (1986).

of a limited understanding of the term “foreign agent”, stating, “Congress was particularly concerned that registration would not be imposed to stifle internal debate on political issues by citizens sympathetic to the views of foreigners but free from foreign direction or control.”<sup>43</sup>

25. The current FARA register of “foreign agents” consists almost exclusively of commercial and other representatives of foreign states and international organisations, as well as advertising and lobbying agencies that openly admit to promoting the interests of their “foreign principals” as their main purpose. If the United States Department of Justice considers an organisation as a “foreign agent” which evades registration, then the Department must overcome a high burden of proof. Over the past twenty years there have only been two instances of successful prosecutions for violations of FARA registration requirement. In *United States v. Siljander*, it was proven that Global Strategies, Inc., a consultancy, was paid to lobby the interests of the Islamic American Relief Agency before U.S. government agencies.<sup>44</sup> *United States v. Fai* dealt with the systemic financing of the Kashmiri American Council (“KAC”), an American NGO, by certain organs of the government of Pakistan in order to influence U.S. officials regarding self-rule in Kashmir.<sup>45</sup>

*FARA Focuses on Lobbying, Consulting, and Publicity Services – Not Civil Society*

26. The definition of “political activity” in § 611(o) FARA, read together with four specific types of activity that constitute the status of a “foreign agent” § 611(c) of FARA, is generally understood to refer to lobbying, meaning direct verbal or written interaction with United States officials on behalf of a client about making changes to legislation or bylaws, implementing state programs, or confirming an individual for government positions.<sup>46</sup> When the term “political activity” was introduced into FARA in 1966, the only examples of “political activity” discussed during the drafting process were instances of economic lobbying, namely related to taxation and foreign capital investments.<sup>47</sup> Moreover, in the interest of eliminating the possibility of overbroad interpretation of this term, lawmakers specifically inserted a safeguard clause into § 613(d) of FARA saying that any activity “not serving predominantly a foreign interest” is not subject to registration. Commentators note that by introducing the term “political activity” Congress tried to narrow and sharpen the scope of FARA, and not broaden or erode it.<sup>48</sup>
27. The current FARA register is dominated by organisations that provide paid services aimed at influencing the decision-making process of United States government agencies,<sup>49</sup> collection of information and political consultancy services,<sup>50</sup> and publicity services.<sup>51</sup>

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<sup>43</sup> *Id.*, at 524.

<sup>44</sup> *United States v. Mark Deli Siljander*, Criminal Action No. 07-CR-00087-07-W-NKL, Plea Agreement. URL: [www.fara.gov/docs/DE%20539\\_Siljander%20Plea.pdf](http://www.fara.gov/docs/DE%20539_Siljander%20Plea.pdf).

<sup>45</sup> *United States v. Syed Ghulam Nabi Fai*, Criminal Case No. 1:11-CR-00561-LO, Plea Agreement. URL: [www.investigativeproject.org/documents/case\\_docs/1849.pdf](http://www.investigativeproject.org/documents/case_docs/1849.pdf).

<sup>46</sup> This definition can be found in the Lobbying Disclosure Act, 2 U.S.C. § 1602.

<sup>47</sup> See Francis O’Hara, *The Foreign Agents Registration Act: The Spotlight of Pitiless Publicity*, 10 VILL. L.R. 435, 451-53 (1965).

<sup>48</sup> See Gerald McLaughlin, *Foreign Agents Registration Act: Proposed Amendments*, 40 N.Y.U. L. REV. 311, 316-17.

<sup>49</sup> E.g., BGB Group lobbies to the Committee on Foreign Investment in the United States on behalf of China, Greece, Haiti, Italy, Japan, Saudi Arabia, and South Korea. URL: <http://www.fara.gov/docs/6206-Registration-Statement-20140121-1.pdf>.

<sup>50</sup> E.g., McBee Strategic Consulting, LLC, consults the Embassy of Nigeria in the United States. URL: <http://www.fara.gov/docs/6176-Registration-Statement-20130801-1.pdf>.

<sup>51</sup> E.g., Coyne Public Relations, LLC, provides advertising services for official tourist representatives of Hong Kong and South Africa in the United States. URL: <http://www.fara.gov/docs/6177-Registration-Statement-20130807-1.pdf>.

28. Civil society organisations which work in the fields of human rights, democracy, the rule of law, and social assistance in the United States and receive foreign funding are not subject to registration as “foreign agents”. Those few NGOs that are included in the registry of “foreign agents” openly admit that their actions fall under one of the four criteria in § 611(c) of FARA. For example, the United States office of the National Coalition of Syrian Revolution and Opposition Forces represents the interests of the Syrian opposition—a “foreign principal”—in dealing with United States government agencies,<sup>52</sup> and the All Pakistan Muslim League collects donations for a Pakistan political party.<sup>53</sup>
29. Summing up, regulation established by FARA does not target civil society and does not apply to NGOs’ activities in the fields of human rights, democracy, the rule of law, and social assistance. NGOs currently included in the register of “foreign agents” in Russia would not be covered by FARA. To the extent the Russian authorities refer to FARA as a model for the Foreign Agents Act, such references are erroneous and misleading.

### *3) Protection of Sovereignty and Prevention of “Foreign Interference”*

30. As follows from the Explanatory Note to the Foreign Agents Act, it was enacted with the aim of “ensuring the needed openness and transparency” of foreign funding received by Russian NGOs.<sup>54</sup> However, it transpires from public statements by various Russian officials that the underlying reason behind the move towards greater transparency of NGOs was the need to expose and limit “foreign influence” on (or “foreign interference” into) the Russian society.<sup>55</sup> The Explanatory Note reinforces this interpretation, arguing that “the draft law seeks to provide the Russian society with proper elements of control over activities of non-commercial organisations funded by foreign sources and pursuing political goals”.<sup>56</sup> The aim of the Foreign Agents Act is, in other words, to protect national sovereignty.
31. Considerations of this kind may not be used as a lawful ground for foreign funding restrictions on civil society. It is important to note that “transparency” is hardly a legitimate aim *per se*. Rather, it is a means towards the fulfilment of other aims (as, for example, disclosure of financial information by NGOs might contribute to the prevention of money laundering and terrorism financing, thus protecting national security and public safety). However, beyond the narrow contexts of lobbying and funding of elections and political parties, transparency as a means to reinforce national sovereignty to the detriment of the civil society is not a permissible reason for restrictive funding legislation.
32. The United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association considers “protection of State’s sovereignty or of the State’s traditional values against external interference”<sup>57</sup> to be an impermissible ground for foreign funding restrictions for NGOs. He also dismisses attempts to justify such restrictions by references to established categories such as “national security”: “Affirming that national security is threatened when an association receives funding from foreign sources is not only spurious and distorted, but also in contradiction

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<sup>52</sup> <http://www.fara.gov/docs/6164-Registration-Statement-20130408-2.pdf>.

<sup>53</sup> <http://www.fara.gov/docs/6019-Registration-Statement-20110215-1.pdf>.

<sup>54</sup> Explanatory Note to the Draft Federal Law No. 102766-6 (“Explanatory Note to the Foreign Agents Act”), at 3. URL: [http://asozd2.duma.gov.ru/main.nsf/\(ViewDoc\)?OpenAgent&arhiv/a\\_dz\\_6.nsf/ByID&0C05ED49C136DEEF43257A2C00596CAF](http://asozd2.duma.gov.ru/main.nsf/(ViewDoc)?OpenAgent&arhiv/a_dz_6.nsf/ByID&0C05ED49C136DEEF43257A2C00596CAF).

<sup>55</sup> E.g., *Law Does Not Prohibit But Requires Disclosure. Registration of ‘Foreign Agents’ – a Logical Step for Every Sovereign Country*, comment by Dmitry Vyatkin, 21 November 2012. URL: <http://er.ru/news/93621/> (in Russian); *Russia NGO Law and Its American ‘Counterpart’*, comment by Valentina Matvienko, 27 July 2012. URL: [http://rapsinews.ru/international\\_publication/20120727/263951867.html](http://rapsinews.ru/international_publication/20120727/263951867.html) (in Russian).

<sup>56</sup> Explanatory Note to the Foreign Agents Act, at 3.

<sup>57</sup> Report of the Special Rapporteur, Maina Kiai (2013), paras. 27-34.

with international human rights law.”<sup>58</sup> Similarly, OSCE Guidelines on the Protection of Human Rights Defenders stipulate that “[p]articipating States should abolish all undue restrictions on foreign sources of funding imposed under the pretext of combating ‘foreign interference’ and defending ‘national interests’, and should respect the right of NGOs to promote and protect all human rights”.<sup>59</sup>

33. Recent years have seen a dangerous proliferation of national laws similar to the Russian Foreign Agents Act which seek to justify restrictions of the right of NGOs to receive foreign funding by appeals to national sovereignty. One of the latest examples is Hungary, having passed the Law on the Transparency of Organisations Receiving Support from Abroad in June 2017, which is closely modelled on the Russian “foreign agents” legislation.<sup>60</sup> Elements of “foreign agents” regime have been introduced in Israel (2016)<sup>61</sup> and Kazakhstan (2016).<sup>62</sup> Initiatives proposing registration and reporting requirements, special printed material labelling and sanctions for non-compliance have been discussed or voiced at least in Kyrgyzstan (2013-2016),<sup>63</sup> Ukraine (2014),<sup>64</sup> Armenia (2015),<sup>65</sup> and Slovakia (2016-2017).<sup>66</sup>
34. In the present case, by finding that restrictions introduced by the Russian Foreign Agents Act do not serve a legitimate aim, the Court has a chance to halt this alarming tendency and uphold the right to freedom of association for civil society organisations in the Council of Europe and beyond.

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**Olga Sidorovich**

Director

Institute for Law and Public Policy

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<sup>58</sup> *Id.*, para. 30.

<sup>59</sup> OSCE Guidelines on the Protection of Human Rights Defenders, Section B: Explanatory Report, para. 212. URL: <http://www.osce.org/odihr/guidelines-on-the-protection-of-human-rights-defenders?download=true>.

<sup>60</sup> Law on the Transparency of Organisations Receiving Support From Abroad of 13 June 2017. URL: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2017\)031-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2017)031-e).

<sup>61</sup> 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 (unofficial translation of the bill). URL: [http://www.hamoked.org/files/2016/112432\\_eng.pdf](http://www.hamoked.org/files/2016/112432_eng.pdf).

<sup>62</sup> Tax Code of the Republic of Kazakhstan, Art. 14 §1-2 (as amended by the Law of 26 July 2016 No.12-VI). URL: [https://online.zakon.kz/Document/?doc\\_id=30366217#pos=1454;-199](https://online.zakon.kz/Document/?doc_id=30366217#pos=1454;-199) (in Russian).

<sup>63</sup> Draft law “On Making Additions and Amendments to Certain Legislative Acts of the Kyrgyz Republic” (2013). Legislation was rejected by the Kyrgyz Parliament in 2016.

<sup>64</sup> Draft law “On Making Amendments to the Law of Ukraine ‘On the Judicial System and Status of Judges’ and procedural laws on additional measures of protection of citizens’ safety.” (in Ukrainian). URL: <http://zakon2.rada.gov.ua/laws/show/721-18?test=4/UMfPEGznhh0cf.ZiotmoLLHI4Cos80msh8Ie6>. Legislation was passed in January 2014 and was never enacted.

<sup>65</sup> <https://www.euractiv.com/section/armenia/opinion/armenia-s-anti-ngo-laws-inspired-by-moscow/>.

<sup>66</sup> National Council of the Slovak Republic, Proposal to Amend Law No. 213/1997. URL: <http://www.nrsr.sk/web/Default.aspx?sid=zakony/zakon&MasterID=6083>.