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Russia's Suppression of the Media Violates Its International Law Obligations

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As Russia continues to wage its unlawful war against Ukraine, in recent weeks Russia has severely restricted free expression within its borders. While journalists in Russia have long had to navigate a host of draconian laws designed to stifle free expression and limit media coverage critical of the government,[1] these new measures amount to a drastic escalation. Through both administrative and legislative measures, Russia has totally restricted several media outlets from operating in Russia. Among other things, Russia is threatening harsh criminal and monetary penalties against those who report on the conflict as a war or an invasion.

The catalyst for the new restrictions is Russia's desire to control the public narrative associated with the war. Russia's media agency, *Roskomnadzor*, has blocked access to media platforms (including social media) and news outlets on a variety of alleged bases, including that certain outlets and platforms were allegedly spreading misinformation about Russia's actions in Ukraine and restricting access to government-backed media.[2]

Concurrently, Russia adopted amendments to the Criminal Code that introduces prison terms of up to 15 years for persons convicted of disseminating "knowingly false information" about military operations.[3] The same law introduces a maximum penalty of five years imprisonment for "discrediting" and "calling for obstruction" of the use of the Russian armed forces.[4] In practice, these new measures grant Russia broad authority to impose harsh penalties for any criticism of Russia's conduct against Ukraine. Under the serious threat of criminal prosecution, major foreign news outlets as well as prominent independent Russian news outlets, have been forced to take significant measures. Some have suspended operations in Russia,[5] removed content regarding Russia's attacks on Ukraine,[6] or shut down entirely.[7]

In addressing recent legislative amendments, three Special Rapporteurs of the United Nations' Human Rights Council have observed that "[w]hile the government claims that the purpose of the new legislation is to protect the 'truth' about what it euphemistically calls a 'special military operation' in Ukraine, in reality the law places Russia under a total information blackout on the war and in so doing gives an official seal of approval to disinformation and misinformation."[8] The Special Rapporteurs explain that "[b]y restricting reporting and blocking access to information online the authorities are not only choking the last vestiges of independent, pluralistic media in Russia, but they are also depriving the population of their right to access diverse news and views at this critical time when millions of Russians legitimately want to know more about the situation in Ukraine."[9]

Russia's restrictions on the media violate its international human rights obligations. In addition, Russia's actions may also breach obligations it owes foreign investors under investment treaties to which it is party. Below, we set out options that may be available to affected media companies and journalists seeking to challenge Russia's actions.

Claims Before Human Rights Bodies

Related People

Rahim Moloo

Charline O. Yim

Marryum Kahloon

Nadia Alhadi

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At this time and until September 16, 2022, Russia is a party to the European Convention on Human Rights (the "European Convention"). While Russia was removed from the Council of Europe on March 16,[10] the Committee of Ministers (the Council of Europe's statutory decision-making body)[11] and the European Court of Human Rights ("ECHR")[12] have confirmed that Russia will remain a party to the European Convention until September 16. Accordingly, the ECHR "remains competent to deal with applications directed against the Russian Federation in relation to acts or omissions capable of constituting a violation of the Convention provided that they occurred until 16 September 2022."[13]

Pursuant to the European Convention, Russia must guarantee physical and legal persons in its jurisdiction basic human rights, including the right to free expression.[14] Russia's actions to suppress the media are clear violations of its obligations under the European Convention, and any effort by Russia to enforce its new censorship laws may amount to further violations. Thus, media companies and journalists who have been impacted by Russia's recent measures may be able to seek remedies for these violations before the ECHR.[15]

To successfully bring an application before the ECHR, applicants must: (*i*) satisfy the jurisdictional and admissibility criteria required by the European Convention; and (*ii*) demonstrate a violation of the European Convention.

To have standing before the ECHR, a person (either physical or legal) must be able to show that a party to the European Convention committed a violation of the European Convention against them within its jurisdiction,[16] and was "directly affected" by the violation.[17] In addition, an applicant should seek to exhaust remedies in the jurisdiction whose actions are being challenged and bring a claim within four months of a final decision.[18] This requirement, however, is not a hard and fast rule, and "must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants."[19] In this case, an applicant could argue there is an "administrative practice" of censoring journalists in Russia that renders exhaustion of local remedies futile or ineffective.[20] In this context, any application should be brought within four months of the applicant receiving notice of the act that is the subject of the application or any prejudicial effect arising from the act.[21]

On the merits, Russia's measures appear to be clear violations of its obligations under the European Convention. The European Convention states that "[e]veryone 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."[22] Legislation that causes potential authors to adopt a form of self-censorship, as is the case in Russia, can amount to an interference with the right to freedom of expression.[23] Free expression can only be limited if the restriction is: (*i*) provided for by law, (*ii*) in pursuit of a legitimate aim, and (*iii*) necessary and proportionate to achieve that aim.[24]

With respect to (*i*), the ECHR has held that domestic laws that restrict freedom of expression must be formulated "with sufficient precision to enable the person concerned to regulate his or her conduct: he or she needed to be able – if need be with appropriate advice – to foresee, to a degree that was reasonable in the circumstances, the consequences that a given action could entail."[25] The ECHR has further emphasized that "indiscriminate blocking measure[s] which interfere[] with lawful content . . . as a collateral effect of a measure aimed at illegal content . . . amounts to arbitrary interference" with the right to free expression.[26] Here, Russia has, for example, criminalized "discrediting" and "calling for obstruction" of the use of the Russian military. These vague terms could arguably extend to any form of criticism of the Russian military.

With respect to (*ii*), while Russia contends that the restrictions are necessary for national

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security, it is widely acknowledged that the purpose of these restrictions is to suppress criticism and dissent of Russia's unlawful war. As the Special Rapporteurs note, these new restrictions are "yet another drastic step in a long string of measures over the years, restricting freedom of expression and media freedom and further shrinking the civic space in the Russian Federation."[27] Indeed, in recent cases against Russia, the ECHR has concluded that Russia has acted with an "ulterior purpose" to "suppress political pluralism."[28] In any event, the ECHR has concluded that where opinions do not incite violence, a state cannot rely on the defense of national security to restrict the public's right to be informed by using criminal law to influence the media.[29]

With respect to (*iii*), there is no basis for Russia to contend that these laws are necessary and proportionate. As Professor Marko Milanovic of the University of Nottingham School of Law has explained, these laws "are almost entirely divorced from addressing specific harms caused by speech, and they are so overbroad that they generate a veritable storm of chilling effects on speech in the public interest (indeed, that's their whole point)."[30] In cases involving the suspension of media publication and distribution, the ECHR has held that "[t]he practice of banning the future publication of entire periodicals . . . went beyond any notion of 'necessary' restraint in a democratic society and, instead, amounted to censorship."[31]

A successful applicant will receive relief in the form of a declaration that the State's laws or actions are in violation of the European Convention, as well as just satisfaction, *i.e.*, monetary compensation, for damages incurred.[32]

In addition to the ECHR, other human rights mechanisms may be available to hold Russia accountable for its violations of human rights. For example, Russia is also currently a State Party to the International Covenant on Civil and Political Rights ("ICCPR") as well as the First Optional Protocol to the ICCPR.[33] Similar to its obligations under the European Convention, Russia is also obligated under the ICCPR to guarantee persons in its jurisdiction basic human rights, including the right to free expression.[34] Individuals who have been impacted by Russia's recent measures may therefore also be able to seek remedies for violations of the ICCPR before the Human Rights Committee at the United Nations. Unlike the ECHR, only physical persons can submit complaints to the Human Rights Committee.[35] In addition, if the same matter has been submitted to another treaty body or regional human rights mechanism (like the ECHR), the Human Rights Committee cannot examine the complaint.[36]

Claims Under Bilateral Investment Treaties

As will be addressed in a forthcoming alert regarding potential international arbitration remedies arising from Russia's recent conduct, Russia is a party to multiple bilateral investment treaties ("BITs") pursuant to which it owes certain obligations to qualifying foreign investors from states with which it has BITs and their investments. These obligations include, among others, the obligation to treat investors and their investments fairly and equitably and not to expropriate investments without the payment of adequate compensation. To the extent media entities (or other companies and individuals) qualify as investors with investments under one of these treaties and have suffered breaches of a BIT due to Russia's actions, these investors may be able to submit such claims in international arbitration directly against the Russian state.

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[1] *See, e.g.*, *Russia: New assault on independent media, NGOs and activists through suffocating fines*, Amnesty International (Oct. 29, 2018), https://www.amnesty.org/en/latest/news/2018/10/russia-new-assault-onindependent-media-ngos-and-activists-through-suffocating-fines/; *Russia: New bills criminalising insults to the State and spread of 'fake news' threaten freedom of expression*, Article 19 (Jan. 25, 2019), https://www.article19.org/resources/russia-new-bills-criminalising-online-insults-of-state-and-the-spread-of-fake-news-threaten-freedom-of-expression/; *Russia advances legislation on 'fake news' and*

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'disrespecting authorities', Committee To Protect Journalists (Mar. 7, 2019), https://cpj.org/2019/03/russia-advances-legislation-on-fake-news-and-disre/; Letter from Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to the Government of Russia (May 1, 2019), here; *Russian Federation: "Fake News" Bill Prompted By COVID-19 Threatens Freedom Of Expression*, Amnesty International (Apr. 3, 2020), https://www.amnesty.org/download/Documents/EUR4620932020ENGLISH.pdf.

[2] *See, e.g.*, Elizabeth Culliford, *Russia blocks Facebook, accusing it of restricting access to Russian media*, Reuters (Mar. 4, 2022, 7:16 PM), https://www.reuters.com/business/media-telecom/russia-blocks-facebook-accusing-it-restricting-access-russian-media-2022-03-04/; Shannon Bond & Bobby Allyn, *Russia is restricting social media. Here's what we know*, NPR (Mar. 11, 2022, 1:57 PM), https://www.npr.org/2022/03/07/1085025672/russia-social-media-ban; *Russia blocks Ekho Moskvy and Dozhd TV, restricts social media access*, Committee to Protect Journalists (Mar. 1, 2022, 5:48 PM), https://cpj.org/2022/03/russia-blocks-echo-of-moscow-and-dozhd-tv-restricts-social-media-access/. *See also ?? ??????????? ??????? ? ?????????? ???? Instagram (About restricting access to the social network Instagram)*, Roskomnadzor (Mar. 11, 2022), https://rkn.gov.ru/news/rsoc/news74180.htm; *??????? ???? ?? ?????? ?????????? ???* (*Measures taken to protect Russian media)*, Roskomnadzor (Feb. 25, 2022), https://rkn.gov.ru/news/rsoc/news74108.htm; *??????? ???????? ???? ?? ??????????? ??????? ? ?????????? ??? (Response measures taken to restrict access to Russia media)*, Roskomnadzor (Mar. 4, 2022), https://rkn.gov.ru/news/rsoc/news74156.htm.

[3] *See UN rights experts raise alarm over Russia's 'choking' media clampdown at home*, UN News (Mar. 11, 2022), https://news.un.org/en/story/2022/03/1113762.

[4] *See UN rights experts raise alarm over Russia's 'choking' media clampdown at home*, UN News (Mar. 11, 2022), https://news.un.org/en/story/2022/03/1113762.

[5] *See, e.g.*, Michael M. Grynbaum, *The New York Times Pulls Its News Staff From Russia*, N.Y. Times (Mar. 8, 2022), https://www.nytimes.com/2022/03/08/business/media/new-york-times-russia-press-freedom.html; Oliver Darcy, *CNN, BBC, and others suspend broadcasting from Russia after Putin signs law limiting press*, CNN (Mar. 4, 2022, 10:05 PM), https://www.cnn.com/2022/03/04/media/bbc-cnn-russia-putin-media-law/index.html; *Ukraine war: BBC News journalists resume English-language broadcasts from Russia*, BBC News (Mar. 8, 2022), https://www.bbc.com/news/entertainment-arts-60667770.

[6] *See, e.g.*, *Russia's Novaya Gazeta cuts Ukraine war reporting under censorship*, Reuters, (Mar. 4, 2022, 11:55 AM), https://www.reuters.com/world/russias-novaya-gazeta-cuts-ukraine-war-reporting-under-censorship-2022-03-04/.

[7] *See, e.g.*, Anton Troianovski, *Russia Takes Censorship to New Extremes, Stifling War Coverage*, N.Y. Times (Mar. 4, 2022), https://www.nytimes.com/2022/03/04/world/europe/russia-censorship-media-crackdown.html; Anton Troianovski, *Last Vestiges of Russia's Free Press Fall Under Kremlin Pressure*, N.Y. Times (Mar. 3, 2022), https://www.nytimes.com/2022/03/03/world/europe/russia-ukraine-propaganda-censorship.html.

[8] *UN rights experts raise alarm over Russia's 'choking' media clampdown at home*, UN News (Mar. 11, 2022), https://news.un.org/en/story/2022/03/1113762.

[9] *UN rights experts raise alarm over Russia's 'choking' media clampdown at home*, UN News (Mar. 11, 2022), https://news.un.org/en/story/2022/03/1113762.

[10] Council of Europe, Ministers' Deputies Decision CM/Del/Dec(2022)1428ter/2.3, *Consequences of the aggression of the Russian Federation against Ukraine* (Mar. 16, 2022), https://search.coe.int/cm/?pages/result_details.?aspx?objectid=?0900001680a5d7d9.

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See also Committee of Ministers, *The Russian Federation is excluded from the Council of Europe*, Council of Europe (Mar. 16, 2022), https://www.coe.int/en/web/cm/news/-/asset_publisher/?hww?luK1RCEJo?/content/the-russian-federation-is-excluded-from-the-council-of-europe/16695; European Convention, Art. 58(3) ("Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.").

[11] Council of Europe, Ministers' Deputies Resolution CM/Res(2022)3, *On legal and financial consequences of the cessation of membership of the Russian Federation in the Council of Europe* (Mar. 23, 2022), https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a5ee2f. *See also* Committee of Ministers, *Russia ceases to be a Party to the European Convention on Human Rights on 16 September 2022*, Council of Europe (Mar. 23, 2022), https://www.coe.int/en/web/portal/-/russia-ceases-to-be-a-party-to-the-european-convention-of-human-rights-on-16-september-2022.

[12] European Court of Human Rights, Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights (Mar. 23, 2022), here.

[13] European Court of Human Rights, Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights (Mar. 23, 2022), here.

[14] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, *available at* https://www.echr.coe.int/documents/convention_eng.pdf (hereinafter "European Convention").

[15] The ECHR may receive applications from any "person, non-governmental organisation or group of individuals." European Convention, Art. 34. This includes companies that do not exercise governmental or other powers beyond those conferred by ordinary private law. *See Slovenia v. Croatia*, App. No. 54155/16, Grand Chamber Decision, Nov. 18, 2020, §§ 61-63, https://hudoc.echr.coe.int/eng?i=001-206897.

[16] *See* European Convention, Art. 1.

[17]*Roman Zakharov v. Russia*, App. No. 47143/06, Judgment, Dec. 4, 2015, § 164, https://hudoc.echr.coe.int/eng?i=001-159324.

[18] *See* European Convention, Art. 35(1).

[19] *Akdivar and Others v. Turkey*, App. No. 21893/93, Judgment, Sept. 16, 1996, § 69, https://hudoc.echr.coe.int/eng?i=001-58062.

[20] *See Ukraine v. Russia (re Crimea)*, App. Nos. 20958/14 and 38334/18, Grand Chamber Decision, Dec. 16, 2020, §§ 260-63, 363-68, https://hudoc.echr.coe.int/eng?i=001-207622; *Georgia v. Russia (II)*, App. No. 38263/08, Grand Chamber Judgment, Jan. 21, 2021, §§ 98-99, 220-21, https://hudoc.echr.coe.int/eng?i=001-207757.

[21] *See Dennis and Others v. The United Kingdom*, App No. 76573/01, Decision, July 2, 2002, https://hudoc.echr.coe.int/eng?i=001-22838 ("[T]he object of the [four] month time limit under Article 35 § 1 is to promote legal certainty, by ensuring that cases raising issues under the Convention are dealt with in a reasonable time and that past decisions are not continually open to challenge.").

[22] European Convention, Art. 10.

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[23] *Altu? Ganer Akçam v. Turkey*, App. No. 27520/07, Judgment, Jan. 25, 2012, §§ 67-83, https://hudoc.echr.coe.int/eng?i=001-107206; *Vajnai v. Hungary*, App. No. 33629/06, Judgment, July 8, 2008, § 54, https://hudoc.echr.coe.int/eng?i=001-87404.

[24] *See* European Convention, Art. 10(2).

[25] *Perinçek v. Switzerland*, App. No. 27510/08, Grand Chamber Judgment, Oct. 15, 2015, § 131, https://hudoc.echr.coe.int/eng?i=001-158235.

[26] *OOO Flavus and Others v. Russia*, App. Nos. 12468/15, 23489/15, 19074/16, Judgment, June 23, 2020, § 38, https://hudoc.echr.coe.int/eng?i=001-203178. *See also Vladimir Kharitonov v. Russia*, App. No. 10795/14, Judgment, June 23, 2020, § 46, https://hudoc.echr.coe.int/eng?i=001-203177 ("*The Court reiterates that it is incompatible with the rule of law if the legal framework fails to establish safeguards capable of protecting individuals from excessive and arbitrary effects of blocking measures*").

[27] *UN rights experts raise alarm over Russia's 'choking' media clampdown at home*, UN News (Mar. 11, 2022), https://news.un.org/en/story/2022/03/1113762.

[28] *Navalnyy v. Russia (No. 2)*, App. No. 43734/14, Apr. 9, 2019, §§ 96-98, https://hudoc.echr.coe.int/eng?i=001-192203. *See also* Marko Milanovic, *The Legal Death of Free Speech in Russia*, EJIL:Talk! (March 8, 2022), https://www.ejiltalk.org/the-legal-death-of-free-speech-in-russia/.

[29] *See Gözel et Özer v. Turkey*, App. Nos. 43453/04 and 31098/05, Judgment, July 6, 2010, § 56, https://hudoc.echr.coe.int/eng?i=001-99780.

[30] Marko Milanovic, *The Legal Death of Free Speech in Russia*, EJIL:Talk! (Mar. 8, 2022), https://www.ejiltalk.org/the-legal-death-of-free-speech-in-russia/.

[31] *See Ürper and Others v. Turkey*, App. Nos. 14526/07 et al., Judgment, Oct. 20, 2009, § 44, https://hudoc.echr.coe.int/eng?i=001-95201.

[32] European Convention, Art. 41.

[33] *Ratification Status for Russian Federation*, UN Treaty Body Database, here (last available Mar. 23, 2022).

[34] *See* International Covenant on Civil and Political Rights, Mar. 23, 1976, *available at* https://treaties.un.org/?doc/Treaties/1976/03/19760323%2006-17%20AM/Ch_IV_04.pdf.

[35] *See A Newspaper Publishing Company v. Trinidad and Tobago*, Communication No. 360/1989, U.N. Doc. Supp. No. 40 (44/A/40) (1989).

[36] *See* Optional Protocol to the International Covenant on Civil and Political Rights, Mar. 23, 1976, *available at* https://treaties.un.org/doc/Treaties/1976/03/19760323%2007-37%20AM/Ch_IV_5p.pdf, Art. 5(2)(a). *See also* European Convention, Art. 35(2)(b).

The following Gibson Dunn lawyers prepared this client alert: Rahim Moloo, Charline Yim, Marryum Kahloon, and Nadia Alhadi in New York.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's International Arbitration or Transnational Litigation practice groups, or the following authors:

Rahim Moloo – New York (+1 212-351-2413, rmoloo@gibsondunn.com) Charline Yim –

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New York (+1 212-351-2316, cyim@gibsondunn.com) Marryum Kahloon – New York (+1 212-351-3867, mkahloon@gibsondunn.com)

Please also feel free to contact the following practice group leaders:

International Arbitration Group: Cyrus Benson – London (+44 (0) 20 7071 4239, cbenson@gibsondunn.com) Penny Madden QC – London (+44 (0) 20 7071 4226, pmadden@gibsondunn.com)

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