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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

**ON THE OFFICIAL WARNING
ADDRESSED ON 13 JANUARY 2010
TO THE BELARUSIAN ASSOCIATION OF JOURNALISTS
BY THE MINISTRY OF JUSTICE
OF BELARUS**

by

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Introduction

1. The Venice Commission has been requested by the Parliamentary Assembly to assess the compatibility of an official warning addressed by the Ministry of Justice of Belarus on 13.01.2010 to the Belarusian Association of Journalists with "universal human rights standards". I have been asked to act as rapporteur for the opinion requested by the Parliamentary Assembly of the Council of Europe.

2. The exact terms of the request of the Parliamentary Assembly of the Council of Europe are as set forth in Recommendation 1897 (2010)¹ reproduced hereafter: 14. The Assembly notes with concern the official warning addressed by the justice ministry of Belarus on 13 January 2010 to the Belarusian Association of Journalists, challenging internationally recognised work in the interests of journalists, media and media freedom. Recalling its Resolution 1372 (2004) on the persecution of the press in the Republic of Belarus, the Assembly reaffirms that media freedom is an essential condition for democracy and a requirement for membership with the Council of Europe. The Assembly calls on the authorities in Belarus not to abuse arbitral administrative regulations to restrict unduly the rights to freedom of expression and freedom of association under Articles 19 and 22 of the International Covenant on Civil and Political Rights and Articles 10 and 11 of the European Convention on Human Rights. As Belarus, is an associate member of the Venice Commission, the Assembly furthermore asks the Venice Commission to analyse the compatibility of such warning the justice ministry of Belarus with universal human rights standards.

Background and facts

3. The Order of the Minister of Justice: On 13 January 2010 the Minister of Justice issued an official warning (ORDER) addressed to the Belarusian Association of Journalists (GABAZh, hereinafter).² The official warning was that the administrative body of the GABAZh be placed under obligation to ensure that all membership documents issued previously to members of the GA BAZh are withdrawn and see to it that they cannot be used in the future. The Ministry of Justice maintained that the press cards issued by the GA BAZh were unlawful as they "led to an unjustified assumption by the members of GA BAZh of the powers attributed to a mass media journalist" who has the right according to Article 34 paragraph 2 of the Media Act to exercise professional duties.

4. The Ministry of Justice maintains in the Order that the official GA BAZh press cards illegally contain the words "Press" and "Press Republic of Belarus" as the journalist association is not a mass medium and may not issue "official documents" of the type in question to its members as it is in breach of the requirements of the paragraph 7 of Article 1 and paragraph 4.9 of Article 34 of the Republic of Belarus Mass Media Act, No. 427-Z of 17 July 2009.³

5. Moreover, the Ministry of Justice claimed that the Legal Center for Media Protection attached to GA BAZh is "not envisaged in the statutes of the GA BAZh and acted beyond the statutes of the organization." Pro bono legal work done in support of independent journalists does not comply with GA BAZh's mandate.

6. Besides, the Ministry also complains about information about GA BAZh objectives on the web site of the Association (www.baj.by) not corresponding to the statute.

¹ Assembly debate on 27 January 2010 (6th Sitting). Text adopted by the Assembly on 27 January 2010.

² Signed by the Deputy Minister of Justice, Aliaksandr Simanau.

³ Legal Acts on Mass Media; Law of the Republic of Belarus, No. 427-Z of July 17, 2009

7. The GA BAZh was ordered to take steps with the objective of preventing any future infringements of the requirements of the law and the organization's articles as mentioned in the Order and to submit evidence to the Ministry of Justice that the requirements listed above had been acted upon. They must rewrite the goals on the website and withdraw all the press cards within a month from the issuing of the Order.

8. The GA BAZh has been issuing its press cards for ten years already.⁴ The GA BAZh Legal Center has according to the same source been active since 1999 and "approved by the Ministry of Justice" and the website has been operated since 2003.⁵ The GA BAZh deputy chairperson, Andrei Bastunets, states that there is no such thing as an approved form of an ID of a member of Non Governmental Organisation and it is therefore impossible to violate rules that do not exist.⁶

9. The GA BAZh is a non-governmental, non-partisan and non-profit professional union of media workers, united on the platform of free expression and independent journalism ideas. It works to defend the legitimate rights of journalists and campaigns for promoting the freedom of expression in the country.⁷ Founded in 1995, GABAZh has currently reached around 1100 members, representing a wide range of media outlets from across Belarus. Around 16 per cent of members work with the state-sponsored media organizations.

10. The GA BAZh is an affiliate of Article 19, an esteemed global campaign for free expression in London.⁸ It is an affiliate of the International Federation of Journalists since 1997⁹ and signed an affiliation agreement with Reporters without Borders in 2003. That same year, World Association of Newspapers (WAN) awarded the GA BAZh with the Golden Pen of Freedom Prize.¹⁰ In 2004 the European Parliament awarded the GA BAZh the Sakharov Prize for Freedom of Thought.¹¹ The GA BAZh operates out of the central offices in the capital Minsk and through a network of 24 regional affiliates in all regional and important urban centers across Belarus. (Only 6 of them have official status, as the rest had severe problems with getting legal addresses.)

11. The International Federation of Journalists (IFJ) protested against Ministry of Justice threats of legal action against the Belarus Association of Journalists (GABAZh) for issuing press cards to its members and for engaging in activities beyond the scope of their statutes.¹² The IFJ stated that: "To charge a journalists' association with illegally issuing press cards is a sign that the government of Belarus is so anti independent media that it has lost all sense of proportion and reality. It uses every bureaucratic trick in the trade to squeeze the life out of independent journalism. It opens itself up to ridicule across Europe".

12. The Belarusian Helsinki Committee considers the actions of the Ministry of Justice to be unlawful limitation of freedom, and said it would inform the international community about this evolution.¹³

13. Belarusian human rights watchdogs have prepared a report about the situation with human rights in Belarus. The report is to be reviewed in the UN Committee on Human Rights. The following organizations participated in the preparation of these materials: International Federation for Human Rights (FIDH), Belarusian Helsinki Committee (BHC),

⁴ According to Zhanna Litvina, chairperson of the Belarusian Association of Journalists. <http://baj.by/m-p-viewpub-tid-1-pid-8189.html>

⁵ <http://baj.by/m-p-viewpub-tid-1-pid-8189.html>

⁶ Ibid.

⁷ <http://www.belarus.non-gov.org/organizers.htm>

⁸ <http://www.article19.org/work/regions/europe/partners.html>

⁹ <http://www.ifj.org/en/articles/ifj-protests-against-legal-harassment-of-belarus-association-of-journalists>

¹⁰ <http://www.wan-press.org/article10805.html>

¹¹ http://www.europarl.europa.eu/comparl/afet/droi/sakharov/prizewinners_en.htm

¹² <http://www.ifj.org/en/articles/ifj-protests-against-legal-harassment-of-belarus-association-of-journalists> See also: <http://www.exiledjournalists.net/page.php?id=595&category=news> (accessed 4 May 2010).

¹³ <http://baj.by/m-p-viewpub-tid-1-pid-8189.html> (accessed 4 May 2010).

Belarusian Association of Journalists (GABAZh), "Viasna" Human Rights Center, Assembly of Democratic Non-Governmental Organizations of Belarus and Congress of Independent Unions (Belarus). As informed by Radio Svaboda, the report is to be used for the UN Universal Periodic Review of the Republic of Belarus in May 12, 2010.¹⁴

14. On March 22 the Supreme Court upheld the Order of the Ministry of Justice obliging the GABAZh to revoke its membership cards and halt issuance of similar cards, which it held to be in breach with the media law; and to halt the operation of the associations internal Legal Centre for Media Protection, which provides legal defence¹⁵ to GA BAZh members saying it was not constitutionally established. The Supreme Court also confirmed the order to revise the text on the GABAZh website.¹⁶ The judge Anatol Tsierach announced the verdict at 2.30 pm on March 22, 2010. As soon as the judge read the verdict, it came into effect. It will be possible to appeal against the court decision to the Chairman of Supreme Court of Belarus or his Deputies only.

15. The complaint against the Court's ruling was rejected despite the fact that the prosecutor failed to identify how the law was violated, according to the International and European Federations of Journalist which condemned the decision by the Supreme Court.¹⁷

16. The GABAZh faces closure if they fail to comply and receive a second warning within the next twelve months, according to the IFJ that has along with the European Federation of Journalists publicly condemned the decision by the Supreme Court.¹⁸

17. On March 25th the GA BAZh, Reporters without Borders (RSF) and the Committee to Protect Journalists reported that police conducted raids on independent newspapers and the homes of prominent journalists.¹⁹ The board of GA BAZh adopted a declaration on March 22 where it stated that it considered the police searches and interrogations of journalists as part of special operation directed against independent journalism in Belarus; that the police searches, implemented at the organization members' private apartments, were lacking sufficient grounds; consequently; that the searches are regarded as gross interference into the freedom of journalistic activity; it demanded that the responsible authorities to return immediately the journalists' personal belongings, required for carrying out their professional activity; it appealed to the Public Prosecution bodies with a demand to restore the course of law, to defend the journalists' broken rights and lawful interests and, thus, to re-establish the freedom of speech in Belarus in the long run; it demanded the authorities to honor the Belarusian journalists' right for profession and take concrete steps on settling mutual relations between the press and the government in our country.²⁰

Legal environment in Belarus

18. According to Articles 2 and 3 of the Constitution of Belarus the individual's rights and freedoms are supreme goal and value of society and the State. The people are the sole source of state power and the repository of sovereignty in the Republic of Belarus.

19. The Constitution of Belarus states in Article 22 states that all shall be equal before the law and entitled without discrimination to equal protection of their rights and legitimate interests. According to Article 23 restriction of personal rights and liberties shall be permitted

¹⁴ <http://charter97.org/en/news/2010/2/12/26313/> accessed on 4 May 2010.

¹⁵ Article 2.4.3, Article of Association of Public Organisation "Belarusian Association of Journalists" (GA BAZh).

¹⁶ http://www.ifex.org/belarus/2010/03/25/baj_harassed/

¹⁷ Bulletin of the European Federation of Journalists, Newsletter March 2010.

¹⁸ <http://ifj.org/>

¹⁹ On 16 March, Minsk police raided the offices of the news website **Charter 97**, the newspaper **Narodnaya Vola**, and the homes of three journalists to confiscate computers (<http://www.guardian.co.uk/media/greenslade/2010/mar/25/press-freedom-belarus>, accessed 4 May 2010).

²⁰ Adopted by the BAJ Board on March 22, 2010. <http://baj.by/m-p-viewpub-tid-1-pid-8208.html> (accessed on 4 May 2010). See also: <http://charter97.org/en/news/2010/4/29/28556/> Accessed on 4 May 2010.

only in instances specified by law, in the interest of national security, public order, the protection of morals and health of the population as well as rights and liberties of other persons.

20. Article 28 provides that everyone shall be entitled to protection against unlawful interference with one's private life, including encroachments on the privacy of one's correspondence and telephone and other communications, and on one's honour and dignity.

21. Article 29 states that the right of people to be secure in their houses shall be guaranteed and that no person shall have the right, save in due course of law to enter the premises or other legal property of a citizen against one's will.

22. Article 33 of the Constitution of Belarus guarantees everyone freedom of thoughts and beliefs and free expression. No one shall be forced to express one's beliefs or to deny them. No monopolization of the mass media by the State, public associations or individual citizens and no censorship shall be permitted.

23. Article 34 guarantees citizens of Belarus the right to receive, store and disseminate complete, reliable and timely information of the activities of state bodies and public associations, on political, economic, cultural and international life, and on the state of the environment. State bodies, public associations and officials shall afford citizens of the Republic of Belarus an opportunity to familiarize themselves with material that affects their rights and legitimate interests. The use of information may be restricted by legislation with the purpose to safeguard the honour, dignity, personal and family life of citizens and the full implementation of their rights.

24. Article 36 of the Belarus Constitution states that "everyone is entitled to freedom of association".

25. The legal act on Public Associations No. 3252-XII of October 4, 1994 (Amended as of January 4, 2010) defines public association in Article 1 as "a voluntary association of citizens associated, in the order established by the legislation, on the basis of common interests for joint exercise of civil, social, cultural and other rights." The Act on Public Associations (PAA hereinafter) does not cover trade unions. According to Article 2, citizens of the Republic of Belarus have the right to establish, on their own initiative, public associations and to join and operating public associations. According to Article 5 public associations, are to be established and operated in accordance with the Constitutions of the Republic of Belarus, the present law, other acts of legislation on the basis of their constituent documents. – Legal persons cannot be members of public associations according to Article 11. The rights of public associations are listed in Chapter 2 of the PAA. According to Article 20 public associations have the right to create their own mass media and carry out publishing activity in the order established by the legislation. Public associations may according to Article 30 of the PAA join international public associations.

26. The law on Mass Media no. 427-Z of July 17, 2009 (**MMA** hereinafter) defines journalist in Article 1 paragraph 7 as a "natural person engaged in collection, editing, creation (preparation), storage of informational reports and /or materials for the legal person which is entrusted with functions of the editorial board of the mass medium, who is connected with that legal person through labour or other contractual relations. Mass media information is defined in paragraph 11 of Article 1 as applying to print and broadcasting media as well as other informational reports and in paragraph 15 as applying to information on the internet as well.

27. Mass media are subject to state registration according to Article 11 of the MMA. Grounds for refusal of state registration are set forth in Article 15 and permissibility to invalidate such registration set forth in Article 16. The status of journalists is set forth in Article 34 which provides that the journalist in his activities is governed by the Constitution,

the MMA, other law and norms of journalists association; the rights are set forth as well as obligations such as the duty to “present the service certificate upon request when carrying out his/her professional activities. The form of the service certificate of journalist of the mass medium registered in the territory of the Republic of Belarus shall be established by the republic body of the state administration in the sphere of mass information.

28. According to Article 8 of the Constitution, the Republic of Belarus shall recognize the supremacy of the universally acknowledged principles of international law and ensure that its laws comply with it.

International legal obligations of Belarus

29. Belarus applied for membership of the Council of Europe in 1993, and obtained a guest status. Its application however, was suspended in 1997 in the absence of progress in the areas of democracy, human rights and the rule of law.²¹ Belarus is an associate member of the Venice Commission and hence of relevance to emphasize the main Council of Europe standards and principles concerning the political freedom of expression and association although Belarus is not party to the European Convention on Human Rights.

30. Belarus is a party to the International Covenant on Civil and Political Rights (CCPR hereinafter), which it ratified without any reservations in 1973.²² The CCPR fully protects citizen’s freedom of expression and information (Article 19), freedom of association (Article 22) and other fundamental rights, an obligation that all signatory states, Belarus included, are due to comply with. The Constitution of the Republic effectively imports international guarantees into national law through Article 8 which confirms that basic rights and freedoms (universally acknowledged values of international law) are core values of the constitutional order.

31. International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfill human rights. The obligation **to respect** means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation **to protect** requires States to protect individuals and groups against human rights abuses. The obligation **to fulfill** means that States must take positive action to facilitate the enjoyment of basic human rights.²³

32. It is according to Article 2 of the CCPR obligatory for the Republic of Belarus to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the CCPR without distinction of any kind such as political or other opinion. If necessary, legislation should be enacted to properly guarantee these rights. Crucially, States parties are required to provide remedies to persons whose rights under the CCPR are breached. The Human Rights Committee, which oversees the implementation of the treaty by the States parties, has in its jurisprudence interpreted this right to require a forum to be available to hear an allegation of a violation of a Covenant right when it is “sufficiently well founded to be arguable under the [CCPR]”. Commonly, it is the courts and administrative authorities that provide these remedies. Without this right to enforce a treaty right before the domestic authorities by way of remedy, the actual substantive rights of the CCPR would be deprived of much practical effect.²⁴

²¹ <http://www.assembly.coe.int/CommitteeDocs/2009/Belarusmai.pdf>

²² Belarus signed the International Covenant on Civil and Political Rights on 19 March 1968 and ratified it on 12 November 1973.

²³ Human Rights Committee, FAct Sheet No. 15 (Rev. 1).

<http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf> (accessed May 5th 2010).

²⁴ For greater detail on the scope of the obligation entailed by this key article, see General Comment No. 31 on the nature of the general legal obligation imposed on States parties to the Covenant (CCPR/C/74/CRP.4/Rev.6

33. The guarantees established by human rights treaties are intended to protect the fundamental rights of human beings rather than to benefit the signatory states. The CCPR does not contain any provision regarding its termination and does not provide for denunciation or withdrawal. It is clear that the CCPR is not the type of treaty, as the UN Human Rights Committee states: "which by its nature implies a right of denunciation".²⁵ The CCPR "codifies in treaty form the universal human rights enshrined in the Universal Declaration on Human Rights". As such the CCPR "does not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted, notwithstanding the absence of specific provision to that effect". The rights enshrined in the CCPR "belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long standing practice, that once people are accorded the protection of rights under the [CCPR], such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party . . ."

²⁶

34. Belarus ratified the Optional Protocol in 1992²⁷ and thereby recognised the competence of the Human Rights Committee to consider complaints from individuals who allege that their rights under the CCPR have been violated.

35. Belarus is a member of UNESCO since 1954.²⁸ Participants of the World Press Freedom Day on 3 May 2010 adopted the so-called Brisbane Declaration, which calls on UNESCO member states Governments "to enact legislation guaranteeing the right to information in accordance with the internationally-recognized principle of maximum disclosure."

36. The UNESCO Brisbane Declaration underscored the principles of a free, pluralistic and independent media as a cornerstone of democratic societies and development. It reaffirmed freedom of expression and universal access to information as essential foundations of inclusive knowledge societies; and that the right to information is an integral part of the right to freedom of expression and that both are fundamental underpinnings of democracy and all other rights and freedoms. It furthermore emphasized that the right to information is critical for informed decision-making, for participation in democratic life, for monitoring of public actions, and for enhancing transparency and accountability, and represents a powerful tool to fight corruption.²⁹

37. Access to diversity of information has been recognized from the inception of the United Nations. In 1946, the first session of the United Nations General Assembly adopted Resolution 59 (1) which stated that freedom of Information is a fundamental human right and . . . the touchstone of all freedoms to which the United Nations in consecrated.³⁰

Freedom of expression of the press in international law and standards

38. As a party to the CCPR, Belarus has binding legal obligations to protect freedom of expression protected under Article 19 of the CCPR and freedom of association protected under Article 22 of the CCPR as well as other fundamental civil and political rights therein protected.

²⁵ General Comment No. 26. Continuity of obligations.: 08/12/97. CCPR/C/21/Rev.1/Add.8/Rev.1. Sixty first session 1997.

²⁶ General Comment No. 26. Continuity of obligations.: 08/12/97. CCPR/C/21/Rev.1/Add.8/Rev.1. Sixty first session 1997.

²⁷ Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force* March 23, 1976.

²⁸ <http://erc.unesco.org/portal/UNESCOMemberStates.asp?language=en>

²⁹ <http://www.wbfd2010.org/news/17-news/124-conference-adopts-brisbane-declaration>

³⁰ Cf., Herdis Thorgeirsdottir, *Journalism Worthy of the Name: Freedom within the Press and the Affirmative Side of Article 10 of the ECHR*, Kluwer Law International (2005).

39. An interpretation of international law and standards protecting freedom of expression and freedom of association as core political rights means that the full enjoyment of these rights is the most potential force to guarantee other fundamental individual rights, strengthen democracy and the rule of law; prevent repression, corruption, crime and conflicts.

40. Article 19 of the CCPR states that (1): Everyone shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally or in writing or in print, in the form of art, or through any other media of his choice. (3) The exercises of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for the respect of the rights or reputations of others; (b) for the protection of national security or public order (ordre public), or of public health or morals.

41. Paragraph 1 requires protection of the “right to hold opinions without interference”. This is a right to which the Covenant permits no exception or restriction.³¹ The right to opinion has been taken to mean more than simply the right to hold an opinion, equivalent to having a thought, as “holding an opinion could not be interfered with if no one knew about it”.³² Protecting opinion separately emphasizes the significance to form an opinion without any kind of interference, entailing a corollary duty for those traditionally associated with opinion formation in society (as the media)³³ and authorities as stated in the Preamble of the CCPR recognize that “political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights”.

42. Paragraph 2 requires protection of the right of freedom of expression, which includes not only freedom to “impart information and ideas of all kinds”, but also freedom to “seek” and “receive” them “regardless of frontiers” and in whatever medium, “either orally, in writing or in print, in the form of art, or through any other media of his choice”.

43. The social dimension of protecting the free flow of information requires that no one can be arbitrarily impeded from expressing, imparting or receiving information. This has been continually affirmed by the UN Human Rights Committee, the treaty monitoring body established under the CCPR and the European Court of Human Rights, which monitors the European Convention of Human Rights as well as the Inter American Court of Human Rights which monitors the American Convention on Human Rights.

44. The case law on Article 10 of the European Convention reveals a mature understanding of the role of a free press as a basic condition for the “progress and development of every man”. As the Court has held, “freedom of expression . . . is applicable not only to “information” or “ideas” . . . but also to those which offend shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”.³⁴ In a landmark decision on press freedom in 1979 the European Court of Human Rights set forth a general principle: “. . . not only do the media have the task of imparting [such] information and ideas: the public also has a right to receive them.”³⁵

45. Freedom of expression is a cornerstone upon which the very existence of democratic society rests. It is indispensable for the formation of public opinion. It is also a *sine qua non* for the development of political parties, trade unions, scientific and cultural societies and in general, those who want to influence the public. It represents, in short, the means that

³¹ General Comment No. 10: Freedom of Expression (Art. 19) 29/6/83.

³² Quoting the chairman of the UN Human Rights Committee, cf., Herdís Thorgeirsdóttir, *Journalism Worthy of the Name: Freedom within the Press and the Affirmative Side of Article 10 of the European Convention on Human Rights* (Martinus Nijhoff Publishers) 2005 (Chapter 3 Opinion, journalism and dignity).

³³ Ibid.

³⁴ *Handyside v. the United Kingdom*.

³⁵ *Sunday Times v. the United Kingdom*, para. 65.

enable the community when exercising its options, to be sufficiently informed. Consequently it can be said that a society that is not well informed is not a society that is truly free. Without effective freedom of expression, in all its form, democracy is enervated, pluralism and tolerance begin to break down, the mechanisms for citizen oversight and complaint are unable to function properly, and the groundwork is laid for authoritarian system to take root in society.³⁶

46. The right to freedom of expression is not absolute and its enjoyment may be subject to limitations. Abusive exercise of the right to freedom of expression is subject to subsequent imposition of liability. However, beyond what is strictly necessary, such restrictions are not to limit the full scope of freedom of expression or become direct or indirect methods of prior censorship. As the Human Rights Committee reiterated recently in a case against Belarus the right to freedom of expression is of paramount importance in any democratic society, and that any restrictions on its exercise must meet strict tests of justification.³⁷ The Committee found the authorities in Belarus to have discriminated against a political candidate's and his assistant's freedom of expression rights and the right not to be discriminated against on grounds of political opinion.³⁸ Pursuant to article 19, paragraph 3 such limitations are permissible as are provided for by law and that are necessary (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. The Committee also found Belarus in breach of the guarantee that everyone is equal before the law and no one may be discriminated against on any ground, such as **political opinion** under Article 26 of the CCPR.

47. The Committee recalled in this case against Belarus that in order to ensure the full enjoyment of rights protected by article 25 [right to take part in the conduct of public affairs, to vote and to be elected], the free communication of information and ideas about public and political issues between citizens is essential; it requires the full enjoyment and respect for the rights guaranteed inter alia by article 19 of the [CCPR], including the freedom to publish political material, to campaign for election and to advertise political ideas.³⁹

48. The exercise of any political right requires the full enjoyment of other civil and political rights protected under the CCPR. For journalists to be able to exercise their protection they need to be able to enjoy the protection of their association.

49. Political speech enjoys special protection due to its social dimension.⁴⁰ Journalists doing investigative reporting seeking to reveal the truth about political, controversial matters need the protection of their associations.⁴¹ Journalist associations provide the paradigm for self-regulation of journalists and set the framework of ethical rules that journalists must respect when they seek to reveal the truth.

50. States that do not merely respect fundamental individual rights but are also determined to guarantee their protection, in order to safeguard democracy and the rule of law, must take concrete actions for the fulfillment of these rights.⁴² This means that States are not only obliged to refrain from interfering with basic human rights like freedom of

³⁶ Cf., Inter American Court of Human Rights, Advisory Opinion OC-5/85 of November 13, 1985.

³⁷ Human Rights Committee view of 20 March 2009; Viktor Korneenko on his own behalf and on behalf of Aleksandar Milinkevich v. Belarus. Communication 1553/2007.

³⁸ Human Rights Committee view of 20 March 2009; Viktor Korneenko on his own behalf and on behalf of Aleksandar Milinkevich v. Belarus. Communication 1553/2007.

³⁹ Ibid; referring to its General Comment on Article 25, paragraph 25, A/51/40, Vol. 1 (1996), CCPR/C/21/Rev.1/Add.7.

⁴⁰ Herdís Thorgeirsdóttir, *Journalism Worthy of the Name: Freedom within the Press and the Affirmative Side of Article 10 of the ECHR*, Kluwer Law International 2005.

⁴¹ Ibid., Journalists for example avail themselves of the protection Article 10 of the European Convention affords if they do not adhere to their professions codes of ethics. See also: http://www.aej.org/page.asp?p_id=176

⁴² CDL(2008) 0398, *Report on Self-regulation within the media in the handlings of complaints* by Herdís Thorgeirsdóttir. Study no. 415/2008, Strasbourg 7 April 2008.

expression and freedom of association; they also have the duty to take affirmative steps to ensure that press freedom is not violated.⁴³

51. States parties to the CCPR must recognize that the fulfillment of the obligations deriving from the treaty is essential for the promotion and protection of human rights; also must they recognize the importance for the protection of human rights, of the First Optional Protocol which grants the Human Rights Committee the competence to receive and consider communications from individual in State parties who claim to be victims of violations of the rights set forth in the CCPR.⁴⁴

52. The Venice Commission has emphasized the core principles underlying the effective realization of journalistic freedoms subject to the danger facing journalists in Europe whether stemming from corrupt market forces or political oppression.⁴⁵

Issues addressed

53. On March 22 the Supreme Court in Belarus upheld the Order of the Ministry of Justice of January 20 obliging the GABAZh to revoke its membership cards and halt issuance of similar cards, which it held to be in breach with the media law; and to halt the operation of the associations internal Legal Centre for Media Protection, which provides legal defence.⁴⁶

54. The restrictions placed on the GABAZh must be assessed in the light of the consequences which arise for the association, the journalists that are its members and for the situation of journalism in Belarus on the whole. A violation of the association's rights to issue press cards has consequences for journalists; subsequently for the press in whole to act as the public watchdog and is hence also a violation of freedom of expression and information and the corollary right of the public to form an opinion on controversial political matters protected under Article 19 of CCPR.

55. As a party to the CCPR, Belarus has binding legal obligations to protect fundamental civil and political rights such are at stake here; freedom of expression (Article 19), freedom of association (Article 22), the right to participation in public life (Article 25) and the right to equality before the law and non-discrimination (Article 26).

56. The obligation of Belarus, as party to the CCPR, to bring its legislation and practice in line with international standards is called into question. Although fundamental rights and freedoms are provided for in Section II of the Belarusian Constitution (See III above) their implementation in *lex specialis* like the media law and the law on public associations appears in practice not to recognize that the ideal of these rights is to enable journalists as well as other citizens to enjoy "freedom from fear and want [which] can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights", as stated in the preamble to the CCPR which Belarus signed and ratified in 1973 without any reservation.⁴⁷ The mass media law in Belarus is even in conflict with the constitutional commitment that: the attainment of individual rights manifests the supreme goal and value of society, as stated in Article 2 of the Constitution of Belarus.

⁴³ Herdís Thorgeirsdóttir, *Journalism Worthy of the Name: Freedom within the Press and the Affirmative Side of Article 10 of the ECHR*, Kluwer Law International 2005.

⁴⁴ Pilot workshop for Dialogue on the Concluding Observations of the Human Rights Committee. 18/10/2002. HRI/TB/FU/1.

⁴⁵ CDL (2008)039; *Report on the self-regulation within the media in the handling of complaints*. By Herdís Thorgeirsdóttir (Study no. 415/2008, 7 April 2008).

⁴⁶ Article 2.4.3, Article of Association of Public Organisation "Belarusian Association of Journalists" (GA BAZh).

⁴⁷ Belarus signed the International Covenant on Civil and Political Rights on 19 March 1968 and ratified it on 12 November 1973.

57. The domestic law imposes restrictions on these civil and political rights freedoms beyond what is permitted in international law. Article 4 of the CCPR states that in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed the States parties to the treaty may take measures derogating from their obligations under the CCPR to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination on grounds prohibited under the said article.

58. Belarusian authorities have not advanced arguments in accordance with Article 4 of the CCPR nor of any pressing social need to give priority to the application of its national law over its human rights obligations under international law.⁴⁸

59. Based on incomplete information the implementation of the mass media law in Belarus appears a violation of various provisions of the CCPR read together. The Ministry of Justice's Order restricts the rights of journalists to freedom of expression and the right to seek and impart information. An actual enjoyment of freedom of expression of the press requires that journalists enjoy the effective protection of their respective trade union or association. By denying the GABAZh to issue press cards for their journalists the Belarusian authorities are denying journalists the rights to protect their interests through their association.⁴⁹ At the same time the domestic legal situation is stripping the journalists' association, the GABAZh of effective power to protect members' interests.⁵⁰

60. The rights to freedom of expression and of association and the right to participation in public life are of paramount importance to any democratic society and any restriction of these must meet a strict test of justification.

61. The Human Rights Committee has observed with regard to a case against Belarus (No. 1296/2004) that the right to freedom of association relates not only to the right to form an association but also guarantees the right of such an association freely to carry out its statutory activities.⁵¹

62. The protection afforded by Article 22 of the CCPR extends to all activities of an association. For the interference with freedom of association to be justified, any restriction on this right must cumulatively meet the following conditions in the Human Rights Committee views: (a) it must be provided by law; (b) may only be imposed for one of the purposes set out in paragraph 2; and (c) must be "necessary in a democratic society" for achieving one of these purposes. The reference to the notion of "democratic society" indicates, in the Committee's opinion, that the existence and operation of associations, including those which peacefully promote ideas not necessarily favorably received by the government or the majority of the population, is a cornerstone of a democratic society.⁵²

63. The GABAZ is an association in affiliation with the IFJ; the issuing of membership cards (press cards) is according to European standards usually done by journalists associations and not by the state. Press cards identify cardholders as reporters or practicing journalists. They are generally accepted as means of identifications but give no authority or privileges. Press cards as identification cards may serve legitimate purposes in facilitating journalists to gain admittance to limited access events. In the United Kingdom the UK Press

⁴⁸ See f.ex. 628/1995, *Tae Hoon Park v. Republic of Korea*, views of 20 October 1998.

⁴⁹ *Wilson and the National Union of Journalists, Palmer, Wyeth & the National Union of RAIL Maritime & Transport Workers, Doolan & Others v. the United Kingdom*, applications no. 30668/96, 30671/96 and 30678/96, judgment 2 July 2002.

⁵⁰ Concurring opinion of Mr Gaukur Jörundsson in *Wilson and the National Union of Journalists, Palmer, Wyeth & the National Union of RAIL Maritime & Transport Workers, Doolan & Others v. the United Kingdom*

⁵¹ *Aleksander Belyatsky et al. v. Belarus*, No. 1296/2004, views of 24 July 2007.

⁵² *Aleksander Belyatsky et al. v. Belarus*,

Card Authority is a voluntary scheme for issuing press/media credentials to professional news gatherers. The scheme comprises so-called gate keepers which represent journalists and other media personnel (employed or freelance) whose work involves gathering material for editorial publication in all media. The gatekeepers issue cards to their members or those they represent and are responsible for ensuring that the conditions are adhered to.⁵³ In most member states of the Council of Europe press cards are issued by journalistic associations often in co-operation with the news corporations as a form of verifying that the recipients are bona fide journalists, i.e. journalists apply for membership of the national association providing proof they are practicing journalists. The authorities do not issue press cards unless in the case of foreign correspondents wanting to have access to limited events in a host country and hence represent their national press cards and prove that they are working as correspondents in the respective country.⁵⁴ In Denmark there is an official Danish press card, a visible proof of the Danish Union of Journalists and all members are entitled to a press card, which grants entry beyond police cordons so the press can report from the centre of events.⁵⁵

64. Belarusian authorities have not advanced any arguments as to why it would be necessary to restrict the right of the journalists association (GABAZh) to issue identification cards to its members.⁵⁶ As the Human Rights Committee has held “the mere existence of reasonable and objective justifications for limiting the right to freedom of association is not sufficient. The State party must further demonstrate that the prohibition of an association is necessary to avert a real and not only hypothetical danger to national security or democratic order, and that less intrusive measures would be insufficient to achieve the same purpose”.⁵⁷

65. Taking into account the severe consequences of ordering the GABAZh to withdraw all membership documents issued previously to members and to see to it that they cannot be used in the future is disproportionate and does not meet the requirements of permissible restrictions.⁵⁸

66. Article 26 of the CCPR stipulates that all persons are equal before the law. Equality implies the application of laws as regulations as well as administrative decisions by authorities should not be arbitrary but should be based on clear coherent grounds, ensuring equality of treatment. To deny journalists and their association the means necessary to practice their basic freedom of expression rights which everyone is entitled to without adequate reasoning seems arbitrary.⁵⁹

67. As the Venice Commission has emphasized the danger facing journalists in Europe is taking various forms.⁶⁰ Preventing the GABAZh in affording its members legal protection does not seem proportionate with any of the purposes justifying restriction under Article 22 paragraph 2. The prohibition of such legal protection of GABAZh members **has a chilling effect on journalism** as it promotes a situation where conduct is suppressed by fear of penalization at the interests of the members or the association. It prompts self-censorship and therefore hampers serious and responsible journalism to the detriment of other rights and freedoms underlying the democratic ideal.⁶¹

⁵³ http://news.bbc.co.uk/2/hi/europe/country_profiles/4789300.stm

⁵⁴ There is a foreign press association in Sweden <http://www.fpa-sweden.org/membership.htm>

⁵⁵ <http://www.journalistforbundet.dk/sw95036.asp>

⁵⁶ Cf., 1039/2001, Boris Zvolzozkov et al. v. Belarus, views of 17. Oct. 2006.

⁵⁷ Jeong-Eun Lee v. Republic of Korea, Communication No. 1119/2002, Views adopted on 20 July 2005, para.7.2.

⁵⁸ Cf., CCPR communication no. 1296/2004, Aleksander Belyatsky et al. V. Belarus, views of 24 July 2007.

⁵⁹ CCPR communication No. 633/1995, Gauthier v. Canada.

⁶⁰ CDL (2008)039; *Report on the self-regulation within the media in the handling of complaints*. By Herdís Thorgeirsdóttir (Study no. 415/2008, 7 April 2008).

⁶¹ Herdís Thorgeirsdóttir, *Journalism Worthy of the Name: Freedom within the Press and the Affirmative Side of Article 10 of the ECHR*, Kluwer Law International (2005).

68. As regards the accreditation system under the mass media law in Belarus, the Human Rights Committee is of the view that “an accreditation system, however justified and prescribed by law, operates as a restriction on the right to impart information”.⁶² Given the serious press-freedom problems in the country, it means the discussion is not only about the membership cards but also about who is allowed to be journalist at all.

69. The accreditation scheme on the basis of the mass media law in Belarus does not ensure that there will be no arbitrary exclusion from access to journalism. Even if it did, the issue of licensing journalists remains a very controversial one and has been dealt with in an advisory opinion of the Inter American Court of Human Rights.

70. Article 19 of the CCPR does not say explicitly that freedom of expression shall not be subject to prior censorship as is the wording of Article 13 of the American Convention of Human Rights. That provision has, however, not been interpreted as granting scope to licensing according to the Inter American Court of Human Rights.

71. In an advisory opinion assessing the compatibility of domestic norms of compulsory membership in an association prescribed by law for the practice of journalism with the right to freedom of expression protected in the American Convention on Human Rights the Inter American Court concluded that there was no such compatibility.⁶³ The Court elaborating on the individual and social dimension of freedom of expression very much in line with the than more developed case law of the European Court of Human Rights held that in principle the mass media should be open to all; that the mass media made the exercise of freedom of expression a reality and should hence be the true instruments of that freedom and not vehicles for restriction.

Positive Obligation

72. Belarus has an obligation under Article 2; paragraph 1 of the CCPR to respect and ensure the rights recognized by the CCPR has immediate effect for all States parties. Reservations to Article 2 would be incompatible with the CCPR when considered in the light of its objects and purposes.

73. Where there are inconsistencies between domestic law and the CCPR, Article 2 requires that the domestic law or practice be changed to meet the standards imposed by the CCPR substantive guarantees.

74. The beneficiaries of the rights recognized by the CCPR are individuals. Many of the rights recognized by the Covenant, such as the freedom of association (article 22) may be enjoyed in community with others. The fact that the competence of the Committee to receive and consider communications is restricted to those submitted by or on behalf of individuals (article 1 of the Optional Protocol) does not prevent such individuals from claiming that actions concerning legal associations like the GABAZh amount to a violation of their own individual rights as journalists.

75. As the Human Rights Committee has submitted: The requirement under article 2, paragraph 2 to take steps to give effect to the CCPR rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.⁶⁴

⁶² CCPR communication No. 633/1995, Gauthier v. Canada.

⁶³ Inter American Court of Human Rights, Advisory Opinion OC-5/85 of November 13, 1985.

⁶⁴ *General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant: 26/05/2004. CCPR/C/21/Rev.1/Add. 13. (General Comments).*