ARTICLE 19
GLOBAL CAMPAIGN FOR FREE EXPRESSION

OSCE
The Representative
on Freedom of the Media

MEMORANDUM

on

The draft Law of the Republic of Belarus "On the introduction of Amendments and Additions to the Law 'On Press and other Mass Media'"

by

ARTICLE 19
Global Campaign for Free Expression

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I. Introduction

This Memorandum has been prepared by ARTICLE 19, Global Campaign for Free Expression, based on the request of the OSCE Representative on Freedom of the Media. It contains an analysis of the Republic of Belurus' draft law "On the Introduction of Amendments and Additions to the Law 'on Press and Other Mass Media'" (draft Law) for compliance with international standards regarding the right to free expression. The draft Law has been prepared by the Belarusian authorities. The version analysed here is the latest draft which has been made available to ARTICLE 19, obtained in September

2003. The comments are based on an unofficial English translation of the draft Law.[1] The views reflected herein are those of ARTICLE 19.

There are some positive features in the draft Law, including Article 3, which guarantees the right to freedom of opinion and expression, Article 4, which prohibits censorship, and Article 6, which prohibits various restrictions on freedom of the media. At the same time, ARTICLE 19 has very serious concerns with the draft Law. A number of its provisions impose significant restrictions on freedom of expression and the general scope of the law is extremely broad. One problem lies in the attempt to regulate every aspect of the media, and every media sector, in a single piece of legislation. This leads to legal regimes for registration, licensing, accreditation and access to information that are vaguely delineated and often inappropriate. More importantly, the imposition of registration, licensing and accreditation systems, all overseen by bodies which are not independent of government, represents an excessive exercise of State control over the media, inconsistent with international guarantees of freedom of expression.

In our view, the seriousness of the shortcomings in the draft Law very significantly outweigh any advantages and we question whether a law of this sort is needed at all. While a law containing the benefits noted would be useful, the majority of the provisions in the draft Law are unnecessary or are harmful to freedom of expression.

ARTICLE 19's main concerns with the draft Law are discussed in more detail below, following an overview of Belarus' international and constitutional obligations regarding freedom of expression.

II. International and Constitutional Standards

This section of the Memorandum provides a brief overview of Belarus' international and constitutional obligations relating to freedom of expression. For a more detailed statement of these obligations, please refer to our earlier analysis of the proposed Draft Law of the Republic of Belarus on Mass Media, prepared in January 2002.[2]

Freedom of expression, a fundamental human right, is protected by Article 19 of the *Universal Declaration of Human Rights* (UDHR),[3] binding on all States as a matter of customary law. Article 19 of the UDHR states:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

Freedom of expression is also guaranteed by a number of legally binding international human rights treaties, including the *International Covenant on Civil and Political Rights* (ICCPR),[4] widely seen as an authoritative elaboration of the rights set out in the UDHR.

[1] ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments based on mistaken or misleading translation.
[2] Available on the ARTICLE 19 website at: www.article19.org
[3] UN General Assembly Resolution 217A(III), 10 December 1948.
[4] UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.

Belarus ratified the ICCPR in November 1973. Belarus is not yet a party to the *European Convention on Human Rights*,[5] which guarantees freedom of expression at Article 10. However, as a European State in transition, Belarus should attempt to comply with relevant European human rights standards. Guarantees of freedom of expression are also found in the two other major regional human rights systems, at Article 13 of the *American Convention on Human Rights*[6] and Article 9 of the *African Charter on Human and Peoples' Rights*.[7] Although the decisions and statements adopted under these systems are not directly binding on Belarus, at the same time they provide persuasive evidence of the scope and implications of the right to freedom of expression, which is of universal application.

Belarus is a member of the OSCE and is hence has made a commitment to respect the standards of the *Final Act of the Conference on Security and Co-Operation in Europe* (Final Act),[8] which sets out human rights obligations of Members. The Final Act declares that the participating States "will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development." The Final Act also states that the participating States will "act in conformity with the purposes and principles" of the UDHR.[9]

These standards have been expanded and elaborated on in subsequent OSCE documents. For example, paragraph 9 of the 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE states:

> The participating States reaffirm that
>
> - everyone will have the right to freedom of expression including the right to communication. This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards. In particular, no limitation will be imposed on access to, and use of, means of reproducing documents of any kind, while respecting, however, rights relating to intellectual property, including copyright;[10]

In a related vein, paragraph 26 of the same document states:

> The participating States recognize that vigorous democracy depends on the existence as an integral part of national life of democratic values and practices as well as an extensive range of democratic institutions. They will therefore encourage, facilitate and, where appropriate, support practical co-operative endeavours and the sharing of information, ideas and expertise among themselves and by direct contacts and co-operation between individuals, groups and organizations in areas including the following:

[5] Adopted 4 November 1950, in force 3 September 1953.
[6] Adopted 22 November 1969, in force 18 July 1978.
[7] Adopted 26 June 1981, in force 21 October 1986.
[8] OSCE, Helsinki, 1 August 1975.
[9] *Ibid*., Clause VII.
[10] 5 June - 29 July 1990.

…
- access to information and protection of privacy,
…
- journalism, independent media, and intellectual and cultural life,

These standards were reaffirmed in 1991, at paragraph 26 of the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE.[11]

International law does permit limited restrictions on the right to freedom of expression and information in order to protect various private and public interests. Article 19(3) of the ICCPR states:

> The exercise of the rights provided for in paragraph 2 of this article [the rights to seek, receive and impart information and ideas] 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 respect of the rights and reputation of others;
> (b) For the protection of national security or of public order, or of public health or morals.

This article subjects any restriction on the right to freedom of expression to a strict three-part test. This test requires that any restriction must a) be provided by law; b) be for the purpose of safeguarding a legitimate public interest; and c) be necessary to secure this interest.[12]

To be "provided by law" implies not only that the restriction is based in law but also that the relevant law meets certain standards of clarity and accessibility. The third part of the test, the requirement of necessity, means that even where measures seek to protect a legitimate interest, the government must demonstrate that there is a "pressing social need" for the measures. Furthermore, the restriction must be proportionate to the legitimate aim pursued and the reasons given to justify the restriction must be relevant and sufficient.[13]

Articles 33 and 34 of the Constitution of Belarus protect the right to freedom of expression and information in the following terms:

> Article 33 [Expression]
> (1) Everyone is guaranteed freedom of thoughts and beliefs and their free expression.
> (2) No one shall be forced to express his beliefs or to deny them.
> (3) No monopolization of the mass media by the State, public associations or individual citizens and no censorship shall be permitted.
>
> Article 34 [Information]
> (1) Citizens of the Republic of Belarus shall be guaranteed the right to receive, store, and disseminate complete, reliable, and timely information on the activities of state bodies and public associations, on political, economic, and international life, and on the state of the environment.

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[11] 10 September - 15 October 1991.

[12] For an elaboration of this test, see *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991 (UN Human Rights Committee), para. 9.7.

[13] *Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, 2 EHRR 245 (European Court of Human Rights), para. 62. These standards have been reiterated in a large number of cases.

> (2) 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.

These rights are subject to a number of specific exceptions including national security, public order, the protection of the morals and health of the population, and the rights and liberties of other persons.

At the same time, Article 8 of the Constitution recognises the supremacy of international law over domestic laws:

> Article 8 [International Law]
> (1) The Republic of Belarus shall recognize the supremacy of the universally acknowledged principles of international law and ensure that its laws comply with such principles.

III. Analysis of the Draft Law

III.1 Scope

The scope of the draft Law is excessively broad in a number of ways. First, a print mass medium is defined at Article 1(13) as a print publication which has a permanent name, an ordinal number, numerated pages and a rate of distribution of at least once a year. Although the intention appears to be to include only true mass media, this might cover, among other things, most annual reports by various organisations, as well as a wide variety of regular reports which could in no way be classified as mass media. Article 1(23), defining mass media generally, is equally overbroad, including within its ambit "any form of periodical distribution of information".

Second, there are problems with attempting to apply the same regulatory system to a range of different types of media. Internet issues are covered below but it is well established that different regulatory approaches are required for different media in accordance with the guarantee of freedom of expression. As the European Commission of Human Rights has stated:

> Article 10 of the [European Convention on Human Rights] clearly distinguishes between the degree of control that the State may legitimately exert over broadcasting, television or cinema enterprises, precisely by regulating access to these commercial activities by licensing procedures in which a wider margin of discretion is left to the States, and control over forms of exercise of freedom of expression, including the press and other printed media, which are subject only to the limitations laid down in para.2 of Article 10.[14]

For example, pursuant to Article 11, all mass media are required to register. But Article 33(1) recognises that broadcasters carry out their activities on the basis of a broadcasting license. There is no reason to require broadcasters to go through two different official processes to operate.

[14] *Gaweda v. Poland*, Commission Report of 4 December 1998, Application No.26229/95, para.49.

The draft Law also covers "web-based" mass media. Some conditions are placed on the scope of Internet publications, for example that they be mass media involved in collecting, storing, processing and distributing information on a regular basis and whose editorial office has producer and distributor status. At the same time, the definition will still include a wide range of Internet communications and attempting to regulate these is potentially very problematic. We have serious concerns about any attempt to apply regulatory frameworks designed for the print and broadcasting sectors to the Internet and similar efforts in other countries have often run into constitutional problems.[15]

Recommendations:

- The definition of a print media outlet should be far more precisely defined so that only true mass media are covered.
- The draft Law should not attempt to apply the same regulatory rules to the print and broadcast media.
- The broadcast media should not be required to register in addition to obtaining a broadcasting licence.
- The draft Law should not attempt to regulate the Internet.

III.2 Content Restrictions

III.2.1 The Basic Principles of Mass Media Activity

Article 2 of the draft Law sets out a number of 'basic principles' of mass media activity. It is not entirely clear what the role of these principles is and they do not appear to be directly applicable. At the same time, even as general principles, they are problematical. For example, Article 2(1) states that the "mass media must disseminate information which corresponds to reality." The use of legal measures to prohibit the distribution of false information cannot be justified as a legitimate restriction on freedom of expression. National courts and international human right bodies around the world have held that false news provisions violate the right to freedom of expression.[16]

[15] See, for example, the US Supreme Court decision in *Reno v. American Civil Liberties Union*, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).

[16] For national court decisions, see *Hector v. Attorney-General of Antigua and Barbuda* [1990] 2 AC 312 (Privy Council); *R. v. Zundel* [1992] 2 SCR 731 (Supreme Court of Canada); *Chavunduka & Choto v. Minister of Home Affairs & Attorney General*, 22 May 2000, Judgment No. S.C. 36/2000 (Supreme Court of Zimbabwe). The UN Human Rights Committee and the UN Special Rapporteur on Freedom of Opinion and Expression have also expressed concern about the presence of false news provisions in national laws. See *Annual General Assembly Report of the Human Rights Committee*, UN Doc. A/50/40, 3 October 1995, para. 89; *Annual General Assembly Report of the Human Rights Committee*, UN Doc. A/51/40, 16 September 1996, para. 154; *Concluding Observations of the Human Rights Committee: Uruguay*, UN Doc. CCPR/C/79/Add.90, 4 August 1998, para. 10; *Concluding Observations of the Human Rights Committee: Armenia*, UN Doc. CCPR/C/79/Add.100, 19 November 1998, para. 20; The Special Rapporteur on Freedom of Opinion and Expression, *Annual Report to the UN Commission on Human Rights, Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, para. 99; The Special Rapporteur on Freedom of Opinion and Expression, *Annual Report to the UN Commission on Human Rights, Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, para. 205.

A number of other provisions in Article 2 are problematical inasmuch as they are directive statements about what the media may and may not do and yet at the same time they represent general social goals. Such principles have no place in a media law, although media bodies may wish to recognise them as ethical guidelines for their work. Some of these provisions even refer to ethical rules which, by definition, should not be enforced through the law. Provisions which are in this sense problematical include:

- Article 2(3), stating that mass media activities must "proceed from the equality of all categories of citizens";
- Article 2(4), stating that mass media activities must "observe and respect human rights";
- Article 2(5), stating that the mass media must "provide free expression";
- Article 2(6), stating that mass media activities must "be directed at developing national culture"; and
- Article 2(7), stating that journalists must "follow professional ethical norms and universal moral norms."

Recommendations:

- The role of Article 2 of the draft Law should be clarifed and, in particular, it should be expressly stated that it may not serve as a basis for imposing sanctions on the media.
- The particular goals set out in Article 2 should be reconsidered in favour of rules that do not relate to what are, almost in essence, ethical matters.

III.2.2 Other Content Restrictions

Article 51 lists a number of forms of expression which are prohibited in the media. Article 51(1.1) prohibits the dissemination of information on behalf of political parties or non-governmental organisations which are unregistered, have not been re-registered or have been abolished. This is not a legitimate restriction on freedom of expression. There is no reason why the media should not cover, or even promote, parties and organisations which have not yet been registered. Indeed, registration of these groups should, as with the media, be a purely formal process. In the case of groups which have been abolished, the court decision abolishing them may append such conditions as the court sees fit, including, if legitimate, a prohibition on future media promotion. There is, therefore, no need for a general prohibition on this.

Article 51(1.2) makes it illegal to disseminate material "propagandizing the use and consumption of drugs…and also information on ways and methods of developing, using and acquiring drugs, psychotropic substances and other stupefying drugs". This fails to satisfy the "necessity" branch of the three-part test for restrictions, which requires such restrictions to be proportionate to the legitimate aim pursued. In particular, the provision is overbroad, effectively precluding any public discussion regarding psychotropic substances and narcotics. This result is in contrast to the international legal perspective that wide latitude must be given to freedom of expression when the information at issue

is related to a matter of public importance.[17] Drug use and the criminal activity associated with drug trafficking are both issues of significant public interest, the discussion of which should not be silenced. The harm caused by this provision far exceeds any limited gains that might be achieved in terms of preventing drug use.

All of the provisions in Article 51(1), to the extent that they are legitimate, should in any case be found in laws of general application rather than media specific laws. For example, to the extent that it is legitimate to prohibit incitement to racial hatred, this is equally legitimate for all forms of incitement and there is no reason to apply a special hate speech regime to the mass media.

The problems with special rules for the mass media are highlighted when they are read in conjunction with the regime of sanctions. Article 62 provides that the State governing body responsible for the mass media may issue a warning to media which breach the rules in Article 51. Pursuant to Article 63(3), a law suit may be initiated to suspend any media outlet which has been issued with two such warnings within the space of a year. Suspension of a media outlet is a very severe sanction and ARTICLE 19 is of the view that it cannot be justified under any circumstances for print media. Suspension simply for having been warned for breach of the illegitimate content restrictions found in Article 51(1) is, for obvious reasons, highly problematical.

Article 8(2) bans the "distortion by the mass media of generally accepted norms of the language used". This is extremely problematical. First, what constitutes a generally accepted language norm is an impossibly subjective notion, subject to change over time, so that it lacks the precision required of any restriction on freedom of expression. Second, it is simply not legitimate for the State to enforce, through the law, linguistic norms. The right to freedom of expression includes the right to use language as one wishes, including colloquial terms, slang and even linguistic distortions. All of these forms may be used to exrpess different ideas and notions and there is no legitimate reason to ban them.

Recommendations:

- Article 51(1) should be removed from the draft Law and Articles 62 and 63 should be amended accordingly.
- Article 8(2) should be removed from the draft Law.

III.2.3 "Must Carry" Requirements

Article 21(1) requires the mass media to carry various public messages, including court decisions demanding distribution of information, messages from the State governing body in the sphere of mass media about the activities of an editorial office, and information about emergencies, breaches of human rights and affairs relating to the fight against crime. Article 37(1) requires State broadcasters to ensure the distribution of statements and addresses of the President and other high profile officials. Article 37(2) allows the President to address the nation through the State broadcaster without prior agreement.

[17] See, for example, *Castells v. Spain*, 23 April 1992, Application No. 11798/85 (European Court of Human Rights), para. 42.

Requiring the mass media to carry certain types of messages is both unnecessary and may be abused. Public messages are a matter for editorial decision-making and should not be imposed as a legal requirement. Such requirements are very rare in other countries and yet media coverage of matters of public importance is perfectly adequate. The best way to ensure such coverage is by promoting a diverse, independent media, not by imposing obligations on the media.

Furthermore, positive obligations of this sort are open to abuse. Independent media may be harassed, and even closed, for allegedly failing to fulfill these vague requirements. In addition, public bodies may abuse their right to have messages carried in the media.

Even in relation to public service broadcasters, the Committee of Ministers of the Council of Europe has voiced concern over "must-carry" requirements, stating:

> The cases in which public service broadcasting organisations may be compelled to broadcast official messages, declarations or communications, or to report on the acts or decisions of public authorities, or to grant airtime to such authorities, should be confined to exceptional circumstances expressly laid down in laws or regulations.[18]

Article 37 is particularly problematical inasmuch as it undermines the independence of the State broadcaster and grants the President and relevant officials a virtually unfettered right of access, clearly falling outside of the exceptional circumstances referred to above. This is likely to be particularly problematical during election periods.

Recommendation:

- Articles 21(1) and 37 should be removed from the draft Law.

III.2.4 Right of Reply

Articles 56-58 provide for a right of reply. Article 56(1) gives citizens of Belarus, foreign or stateless citizens, State bodies and legal entities the right to reply to information in the mass media which does not correspond to reality and offends their honour, dignity or business reputation. Article 56(2) provides that, if the mass media outlet cannot prove that the information was true, it must carry a refutation, correction or clarification. Article 57 deals with the procedures for replies and Article 58 sets out various grounds for refusing a reply.

A mandatory right of reply is a highly disputed area of media law. In the United States, it is seen as unconstitutional on the grounds that it represents an interference with editorial independence.[19] In Europe, in contrast, the right of reply is the subject of a resolution of the Committee of Ministers of the Council of Europe.[20] In many Western European

[18] No. R (96) 10 on the Guarantee of the Independence of Public Service Broadcasting Recommendation, adopted on 11 September 1996.

[19] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

[20] Resolution (74) 26 on the right of reply, adopted on 2 July 1974. See also the Advisory Opinion of the Inter American Court of Human Rights, *Enforceability of the Right to Reply or Correction*, 7 HRLJ 238 (1986).

democracies, the right of reply is provided by law and these laws are effective to a varying extent. The purpose of a right of reply is to provide an individual with an opportunity to correct inaccurate facts which interfere with his or her right to privacy or reputation. Advocates of media freedom, including ARTICLE 19, generally suggest that a right of reply should be voluntary rather than prescribed by law.

In any case, certain conditions should apply:

- the reply should only be in response to incorrect facts which breach a legal right of the person involved, not to comment on opinions that the reader or viewer doesn't like;
- it should receive similar prominence to the original article or broadcast;
- it should be proportionate in length to the original article or broadcast;
- it should be restricted to addressing the incorrect or misleading facts in the original text; and
- it should not be taken as an opportunity to introduce new issues or comment on other correct facts.

The right of reply in the draft Law fails to conform to these standards in important aspects. First, the law refers to information that offends the honour, dignity or business reputation of the individual claiming the reply, but does not stipulate that the information must breach a legal right. Second, the draft Law neither restricts replies to addressing the incorrect or misleading facts nor allows media outlets to refuse replies on the grounds that they introduce new issues. Third, Article 56(2) places the onus on the media outlet to prove that the information is true; instead, it should be on the party claiming the right of reply to prove that it was false.

Recommendation:

- Articles 56-58 should be amended to bring them into line with the comments above.

III.3 Independence of Regulatory Bodies

It is well established under international law that bodies with regulatory or administrative powers over the media should be *independent* of government. For instance, the Committee of Ministers of the Council of Europe Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector states that Member States should establish "independent regulatory authorities for the broadcasting sector" and "include provisions in their legislation… which enable them to fulfil their missions in an effective, independent and transparent manner."[21] ARTICLE 19 has publisehd a set of principles on broadcast regulation, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*, which state that the institutional autonomy and independence of such bodies should be guaranteed and protected by law in the following ways:

- explicitly in the legislation which establishes the body;

[21] Recommendation No. R (2000)23, adopted 20 December 2000.

- by a clear statement of broadcast policy as well as of the powers of the regulatory body;
- through the rules relating to membership;
- by formal accountability to the public through a multi-party body; and
- in funding arrangements.[22]

These standards relate specifically to broadcasting, in part because relatively few States have regulatory bodies dealing with all media or the print media specifically. However, the underlying reasons for independence in relation to broadcast regulators apply equally to other bodies which regulate the media.

Article 25 of the draft Law stipulates that the State governing body in the sphere of mass media is "the Ministry of Information of the RB." A ministry is obviously not independent and yet this body is given extensive powers over the media, for example, in relation to registration and warnings for content breaches.

Article 27 provides for the creation of a Public Council for Co-ordination, Public Control and Settlement of Problematical Issues in the Sphere of Mass Media. The procedure for creating this body shall be defined by the State governing body responsible for the mass media which, as noted, is not itself an independent body. The Council will also include representatives from State bodies, further undermining its independence.

Article 33(2) provides that broadcast licences will be awarded by a State body selected by the Council of Ministers. Again, the manner of selection of the body totally fails to promote the independence of this body. Finally, pursuant to Article 60, the Ministry of Foreign Affairs is given powers in relation to journalists working for foreign mass media.

Recommendation:

- All bodies with regulatory powers in relation to the media should be independent of government and their independence should be protected in the manner noted above. Significant changes should be made to the draft Law in relationship to the bodies noted above to bring it into line with international standards in this regard.

III.4 The Registration System

Articles 11-17 set out a registration regime for all mass media, overseen by the State body responsible for mass media. As noted above, under III.1 Scope, we are of the view that it is not legitimate to impose a registration requirement on broadcasters, in addition the need to obtain a broadcasting licence, or on Internet media as defined in the draft Law. The comments below relate to the registration system for the print media.

Under international law, *license* requirements for the print media cannot be justified as a legitimate restriction on freedom of expression since they significantly fetter the free flow of information, they do not pursue any legitimate aim recognised under international law

[22] (London: ARTICLE 19, 2002), Principle 10.

and there is no practical rationale for them, unlike for broadcasting where limited frequency availability justifies licensing.

On the other hand, *technical registration* requirements for the print media do not, *per se*, breach the guarantee of freedom of expression as long as they meet the following conditions:

- there is no discretion to refuse registration, once the requisite information has been provided;
- the system does not impose substantive conditions upon the print media;
- the system is not excessively onerous; and
- the system is administered by a body which is independent of government.

However, registration of the print media is unnecessary and may be abused, and, as a result, is not required in many countries. ARTICLE 19 therefore recommends that the media not be required to register. As the UN Human Rights Committee has noted: "Effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression."[23]

In any case, the registration system established under the draft Law fails to meet the minimum conditions noted above and, as a result, breaches the right to freedom of expression.

First, pursuant to Article 13(1), media outlets are required to provide an unduly wide range of information to register, including their language, expected circulation and subject matter. None of this information is required for purposes of technical registration. Furthermore, these may change over time, placing an unnecessary obligation on the media outlet to correct this information periodically. An excessive level of documentation – including the legal entities State registration, copies of statutory documents and the regulations of the editorial office – is required to be submitted for registration purposes, pursuant to Article 13(2). Again, this is excessive and may lead to abuse.

Second, the system imposes substantive conditions upon mass media outlets by allowing for a refusal to register, pursuant to Article 14(4.2), for a range of reasons, set out in Article 16. These include where the title, general subject matter or specialisation of the mass media do not meet the requirements of Article 51. Restrictions on content, to the extent that they are legitimate, should be imposed through laws of general application, not the registration process. The illegitimacy of this provision is compounded by the fact that some of the requirements of Article 51 are themselves illegitimate restrictions on the right to freedom of expression (Article 51 is critiqued above under III.2.2 Other Content Restrictions).

Third, all publications over 500 copies are required to register, and even publications under that circulation must submit information to the registering body (Article 14). Belarus has already been found by the UN Human Rights Committee to have breached

[23] General Comment 10(1) in Report of the Human Rights Committee (1983) 38 GAOR, Supp. No. 40, UN Doc. A/38/40.

the right to freedom of expression by requiring publications with too small a circulation to register.[24] Although the circulation figure in that case was only 200, ARTICLE 19 is of the view that a circulation of 500 is still too low for a registration requirement, particularly in light of the other obligations imposed on such publications.

Fourth, where a mass media changes its name or content, or undergoes a legal reorganisation, it must re-register pursuant to Article 15. This is unduly onerous; it is sufficient if the media outlet provides the relevant updated information to the registering body. The problems with this article are compounded by the fact that a failure to reregister may lead to revocation of the registration certificate, pursuant to Article 17(3.1).

Fifth, Article 11 of the draft Law provides that the registration fees will be set by the Council of Ministers. It should be made explicit in the law that such fees shall not be excessive and shall not exceed the costs associated with administering the system.

Finally, Article 20 of the draft Law provides for the distribution of foreign mass media only after they have received permission for this from the State body responsible for mass media, the procedures for which shall be established by that same body. This effectively submits foreign mass media to a licensing regime, contrary to the principles noted above. Paragraph 26.1 of the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE states, in part:

> The public will enjoy similar freedom to receive and impart information and ideas without interference by public authority regardless of frontiers, including through foreign publications and foreign broadcasts.[25]

Recommendations:

- The registration system should be abolished.
- If the system is retained, it should meet the following conditions:
  - a far smaller range of information and documents should be required to be provided for registration;
  - the registering body should not be allowed to refuse registration based on substantive grounds relating to its title, subject matter or specialisation;
  - the lower limit of 500 copies for registration should be increased;
  - media outlets should not be required to reregister when there are changes, for example relating to status or content; and
  - the law should explicitly state that registration fees will be reasonable and limited to covering the costs of administering the registration system.
- Article 20 should be removed from the draft Law.

III.5 Journalists Rights and Obligations

Various articles in the draft Law deal with journalists' rights and obligations. There are a number of problems with these provisions.

[24] See *Laptsevitch v. Belarus*, 20 March 2000, Communication No. 780/1997.
[25] Note 11.

First, the draft Law effectively elevates ethical principles to legal obligations, for example providing at Article 44(1) that journalists must act in accordance with, among other things, professio nal ethics and providing, at Article 46, that the Journalists' Ethics Code is to be approved by self-regulatory bodies. This runs counter to the very idea of ethics, which are by definition personal or professional rules that should not be enforced by law.

Second, Article 10(3) of the draft Law places restrictions on who may found a mass media outlet, including that such individuals are at least 18 years old and have not been stripped of the right to produce and distribute mass information. It is quite clear that restricitons on who may engage in media activities, including through founding media outlets, represent a breach of the right to freedom of expression. This flows from the very nature of the right, which stipulates that everyone has the right to express themselves through any media.[26] This provision might, for example, prevent students from founding a student newspaper.

Third, Article 44(4) sets out a range of obligations for journalists, many of which are problematical, many because they are by their very nature ethical rather than legal. A particular problem with these obligations is that they are very general in nature and hence susceptible of wide interpretation, contrary to the requirement that restrictions on freedom of expression be prescribed by law. For example, Article 44(4.3) provides that journalists must verify the accuracy of information received. It is quite unclear what verify means in this context and what steps must be taken in this direction. In any case, it is clear that this should be an ethical rather than legal requirement.

Many of these obligations are, in any case, simply illegitimate. For example, Article 44(4.4) provides that only truthful information may be disseminated. The problems with false news provisions have been noted above. Article 44(4.6) requires journalists to protect the confidentiality of their sources of information. It is up to journalists, not the law, to regulate relations between them and their sources of information; this is thus an ethical obligation.

Fourth, Article 45(2) requires journalists to obtain professional identity cards on dangerous assignments. It is unclear what the goal of this provision is, but it is fairly clearly open to abuse. We note that the 1991 Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE included paragraph 34, stating:

> The participating States will adopt, where appropriate, all feasible measures to protect journalists engaged in dangerous professional missions, particularly in cases of armed conflict, and will co-operate to that effect. These measures will include tracing mission journalists, ascertaining their fate, providing appropriate assistance and facilitating their return to their families.[27]

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[26] See *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5 (Inter-American Court of Human Rights).
[27] Note 11.

However, these provisions are designed to ensure the safety of journalists on dangerous assignments, not to place further obstacles in their way when wishing to undertake these assignments. Article 45(2) places no apparent obligation on the authorities to provide identity cards at all and the notion of a dangerous assignment is not defined.

Recommendations:

- Articles 44(1) and 46, elevating journalists' ethics to legal obligations, should be removed from the draft Law.
- Article 10(3), placing restrictions on who may found a mass media outlet, should be removed from the draft Law.
- Article 44(4), setting out a range of obligations for journalists, should be removed from the draft Law.
- Article 45(2), requiring journalists to obtain professional identity cards on dangerous assignments, should be removed fom the draft Law or significantly amended to make it clear that it is not a barrier to participation in dangerous assignments and that it is, instead, intended to promote the safety of journalists engaged on such assignments.

III.6 Accreditation System

Article 37 provides for accreditation of journalists. Accreditation grants journalists the right to access the authority or organisation and obligates these bodies to provide accredited journalists with certain information. The procedure for accreditation is to be defined by the Council of Ministers. A journalist can be stripped of his or her accreditation if, among other things, he or she disseminates information "not corresponding to reality, discrediting the honour, dignity and business reputation of…a legal entity which accredited the journalist."

As noted above, it is well established that bodies with regulatory or administrative powers over the media should be independent of government. This applies equally to accreditation as to other matters.[28] The Council of Ministers is clearly not independent and therefore should not exercise undue control over accreditation. Finally, Article 37(5), providing that journalists may lose their accreditation for disseminating false information or information defaming the honor and dignity of State authorities and so on, constitutes a clear violation of freedom of expression. The problems with false news provisions have already been noted. Laws aimed at the protection of reputation cannot be justified if their purpose or effect is either to protect the reputation of the State, or to prevent legitimate criticism of officials or the exposure of official wrongdoing.[29] Furthermore, a provision of this nature is practically an invitation to abuse. Any public body which had been criticised by a journalist would be tempted to strip that journalist of his or her accreditation.

[28] See, for example, the UN Human Rights Committee case holding that Canadian accreditation procedures to parliament breached the guarantee of freedom of expression. *Gauthier v. Canada*, 7 April 1999, Communication No. 633/1995.

[29] See ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (London: ARTICLE 19, 2000), p.5.

Recommendations:

- Article 37 should be amended to provide for an independent body to accredit journalists and the law should clearly state the criteria for accreditation, which should be of a purely technical nature, and the rules of accreditation.
- Article 37(5) should be removed from the draft Law.

III.7 Undue Interference

A number of provisions in the draft Law are either completely unnecessary or represent undue interference in the internal organisation of media outlets, a matter which should not, by-and-large, be regulated by law but should, rather, be left to the founders, editors, staff and so on to arrange on such terms as they may see fit.

Article 19(1) provides that distribution is carried out on contractual or other legal terms by various entities. This is clearly either unnecessary, to the extent that it really does not say anything, or illegitimate, to the extent that it restricts the manner in which distribution may take place.

Article 21(2) provides that the founder shall have the right to compel a mass media outlet to carry messages on his or her behalf. This represents undue interference in the internal affairs of media outlets and also represents a negative development inasmuch as editorial independence of media outlets from their owners is to be promoted.

Article 23 provides that advertising shall be carried out in accordance with the law on advertising. Inasmuch as that matter is already covered by law, there is no need to repeat this in the draft Law.

Article 32 provides that broadcasting is carried out by a broadcaster using his own or leased equipment and that the rules relating to this shall be defined by law. The first part of this is unnecessary as it essentially says nothing and the second part is redundant inasmuch as this law, if and when it is adopted, will not be dependent on the draft Law for its effect.

Article 28 sets out various roles for self-governing media bodies. Self-governance means, by definition, that these bodies are not regulated by law, so this provision is illogical and unnecessary.

Article 38 sets out various rights of a founder of a mass media outlet, as well as some restrictions on founders. The former include the rights to act as editorial office, to transfer his rights to a third party and to suspend publication in cases envisaged by the statute, while the latter prohibits the founder from interfering outside of cases envisaged by the draft Law, the regulations of the editorial office and the treaty between the founder and the editorial office. These provisions are totally unnecessary and are matters to be arranged between the founder and the staff. The rule against the founder interfering is also largely ineffective, given the breadth of the rights of founders, including the right to act as editorial office.

Article 40 provides for the adoption of regulations for the editorial office, setting out in detail what they must address, including the language, the proposed print run and so on. Article 40(3) sets out a range of further topics which these regulations may address. As with the other matters noted above, the adoption of such a regulation, and decisions as to what it should contain, are a matter between the founder and the staff. This concern is exacerbated by Article 62, which gives the State body responsible for mass media the power to issue a warning to a media outlet for breach of the regulation of the editorial office. As noted above, two such warnings can lead to the suspension of the media outlet, effectively leading to a situation whereby what should be an internal matter can result in the highest possible sanction.

Articles 41 and 42, respectively, provide for the status of the chief editor and of the editorial board. As with the other provisions criticised here, these represent undue interferenced in the internal affairs of media outlets.

Article 44(3) provides that journalists enjoy rights derived from this law and other laws, This is unnecessary as it basically says nothing.

Articles 45(3) and 45(4) address relations between media outlets and journalists, providing, respectively, that media employers must provide for insurance for journalists and that, in case of a death of a journalist while carrying out professional duties, the employer must provide certain payments. Any rules relating to these matters should be found in laws of general application, not in media-specific legislation. There is no reason why media outlets should be placed under special obligations in this regard.

Article 59 provides that international cooperation relating to the mass media shall be carried out on the basis of treaties and private agreements. This is unnecessary as it basically says nothing.

Recommendations:

- Articles 19(1), 21(2), 23, 28, 32, 38, 40, 41, 42, 44(3) and 59 should be removed from the draft Law.
- Articles 45(3) and 45(4), dealing with insurance, should, to the extent that they are legitimate, be found in laws of general application and not in a media-specific law.

III.8 Freedom of Information

Articles 48 to 50 provide for a partial right to access information held by public authorities and non-governmental organisations, partially implementing the corresponding constitutional obligation. Article 48 provides that citizens are entitled to receive information from these bodies and that these bodies are required to present information to citizens, for example through press conferences. The editorial office has the right to request information from these bodies and the information shall be provided within 10 days. Article 49 sets out certain categories of information to which access cannot be denied and Article 50 sets out other categories of information to which access may be restricted.

These moves towards greater openness are positive and ARTICLE 19 welcomes the commitment behind them. However, they fail fully to meet Belarus' obligations in this regard. The government should enact separate legislation implementing the right to freedom of information. The limited regime provided for in the draft Law is deficient in many regards and needs to be heavily supplemented in order to fully implement the right to information. Furthermore, this legislation should apply to everyone, not just to members of the media.

Freedom of information is an important component of the international guarantee of freedom of expression, which includes the right to seek and receive, as well as to impart, information and ideas. There can be little doubt as to the importance of freedom of information. During its first session in 1946, the United Nations General Assembly adopted Resolution 59(1) which stated:

> Freedom of information is a fundamental human right and… the touchstone of all the freedoms to which the UN is consecrated.[30]

In recognition of the importance of giving legislative recognition to freedom of information, in the past five years a record number of countries from around the world – including Fiji, India, Japan, Mexico, Nigeria, Pakistan, South Africa, South Korea, Thailand, Trinidad and Tobago, the United Kingdom and practically all European States – have taken steps to enact legislation giving effect to this right. In doing so, they join those countries which enacted such laws some time ago, such as Sweden, the United States, Finland, the Netherlands, Australia, and Canada.

In his 2000 Annual Report, the UN Special Rapporteur on Freedom of Expression elaborated in detail on the specific content of the right to information:

> 44.[T]he Special Rapporteur directs the attention of Governments to a number of areas and urges them either to review existing legislation or adopt new legislation on access to information and ensure its conformity with these general principles. Among the considerations of importance are:
>
> - Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; "information" includes all records held by a public body, regardless of the form in which it is stored;
> - Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;
> - As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government;
> - A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided

[30] 14 December 1946.

in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;

- All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);
- The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;
- The law should establish a presumption that all meetings of governing bodies are open to the public;
- The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;
- Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.[31]

Most of these minimum requirements are missing from the draft Law, including possibly the most important element, namely a limited regime of exceptions. As stated in ARTICLE 19's *Principles on Freedom of Information Legislation* (ARTICLE 19 Principles), based on international law and comparative practice:

> All individual requests for information from public bodies should be met unless the public body can show that the information falls within the scope of the limited regime of exceptions. A refusal to disclose information is not justified unless the public authority can show that the information meeds a strict three part test.[32]

The three part test is as follows: the information requested must relate to a legitimate aim listed in the law, for example the protection of national security; the disclosure must threaten to cause substantial harm to that aim; and the harm to the aim must be greater than the public interest in having the information.

Recommendations:

- A full law guaranteeing everyone the right to freedom of information should be passed to replace the access provisions in the draft Law, in accordance with the following principles:
  - "information" should be defined to include all records held by a public body, regardless of the form in which the information is stored;
  - the list of bodies covered by right to information should include all branches and levels of government including local government, elected bodies, bodies which operate under a statutory mandate, nationalised industries and public corporations, non-departmental bodies or quangos, judicial bodies, and private bodies which carry out public functions;

[31] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 44.
[32] (London: June 1999), Principle 4.

- the law should contain a comprehensive regime of exceptions, each of which should be subject to a harm test and a public interest override provision;
- a three-level process for deciding requests should be provided for, including an internal appeal within the public body, an appeal to an independent review body and an appeal to the courts;
- any system of fees should not deter requests for information;
- public bodies should be required to publish key categories of information;
- public bodies should be under an obligation to maintain their records in good condition and to prevent the destruction of information;
- whistleblowers should be protected; and
- the law should provide for a system of promotional and educational activities for the public and public sector employees regarding the right to information the access regime.

III.9 Sanctions

Chapter 10 addresses the question of responsibilities for a failure to respect the various provisions of the draft Law. As noted above, Article 62 provides for the State governing body for the mass media to issue written warnings in two cases, both of which are illegitimate, as noted above. Article 63 provides for suspension of a mass media outlet in cases where two warnings have been issued within a year. Article 64 sets out a long list of breaches of the draft Law by various actors – founders, editors, journalists, State bodies, etc. – which may attract sanction, providing simply that breach will lead to criminal, civil, administrative or other responsibility. Finally, Article 65 provides for various exemptions from liability, such as where the information is a compulsory official message or comes from a news agency, where the information is a word-for-word transcript of various official bodies and so on.

ARTICLE 19 is of the view that the print media should never be subject to suspension, banning or revocation of permission to publish, which would in any case be in breach of the rules regarding registration, set out above. In our view, warnings and fines, along with the applicable criminal law for crimes by individuals, are sufficient to achieve any legitimate regulatory goals.

In any case, sanctions, like other restrictions on freedom of expression, must be clear and proportionate.[33] This implies that is it clear from the law who is responsible for each potential breach of the law and what particular sanctions may ensure for each type of breach. It implies further that the authorities should have at their disposal a range of graduated sanctions for breach of the law, starting with a warning, so that a sanction corresponding to the nature and level of the breach may be applied. The law should require any sanctions to be proportionate and to be decided upon only after the media outlet in question has been given an opportunity to be heard. Furthermore, all sanctions should also be open to review by the competent courts.[34]

[33] See *Tolstoy Miloslavsky v. United Kingdom*, 13 July 1995, Application No. 18139/91 (European Court of Human Rights).
[34] On this topic, see for example: Council of Europe, Committee of Ministers, Recommendation R(2000)23, adopted on 20 December 2000, Guideline IV.

The regime of sanctions set out in Article 64 is excessively general, failing to establish clearly who is responsible for what sort of wrong and which wrongs will lead, respectively, to the different types of sanctions available. It therefore utterly fails to conform to the standards set out above.

Recommendations:

- The print media should not be subject to suspension, banning or the revocation of permission to publish.
- A more graduated system of penalties should be established. More serious sanctions should only be considered where other sanctions have failed to address the problem.

III.10 Miscellaneous Provisions

Exit Data

Article 29 of the draft Law provides for a range of exit data to be printed on all print media, including the time the issue was approved for printing, the print-run and the registering body. This is excessive and serves no legitimate aim. Article 30 provides for exit data for Internet publications. As noted above, the Internet should not be subject to regulation of this sort.

Archive Copies

Article 31 requires all print media to provide various bodies, including the State body responsible for mass media, with free copies of each edition. It is unclear why this body should receive a free copy, as the only legitimate purpose of requiring these copies is for archive purposes.

Broadcasting Licensing

Article 33(5) provides that the procedure for issuing and cancelling broadcast licences shall be prescribed by the State management body appointed by the Council of Ministers. This is totally inadequate as a basis for licensing broadcasters, which is a complex matter, requiring a dedicated law of its own. At the very minimum, clear and fair procedures for obtaining broadcast licences need to be set out in law, along with the criteria to be taken into account in assessing competing licence applications.

Protection of Sources

Article 53 provides for protection of sources, prohibiting the disclosure of sources by editorial offices and providing that a mandatory order for source disclosure can only be made by a court after application by a body investigating a case.

Article 53(1) fails to respect the basic principle that it is for journalists, as a matter of ethics and professionalism, to protect their confidential sources, rather than something that should be regulated by law.

The European Court of Human Rights has held that "[p]rotection of sources is one of the basic conditions for press freedom" and that an order for disclosure is not compatible

with the right to freedom of expression "unless it is justified by an overriding requirement in the public interest."[35] The Committee of Ministers of the Council of Europe has adopted a Recommendation on the Right of Journalists not to Disclose Their Sources of Information which has expanded on this theme. Pursuant to this Recommendation, an order for disclosure should not made necessary unless it can be convincingly established that:

> *i.* reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and
> *ii*. the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that:
> - an overriding requirement of the need for disclosure is proved,
> - the circumstances are of a sufficiently vital and serious nature, [and]
> - the necessity of the disclosure is identified as responding to a pressing social need….[36]

While positive in principle, Article 53(2) does not incorporate these protections against mandatory source disclosure.

Hidden Cameras

Article 54 prohibits filming individuals without their knowledge unless measures have been taken to prevent identification of the individual and where such information does not breach a constitutional right and is necessary in the public interest. This is unreasonably harsh and fails to take into account the reality of work in the broadcast media. For example, it is not possible to film a crowd scene and yet respect this rule. Furthermore, the provision on public interest should be amended so that it is phrased as a balancing test rather than an absolute standard. Thus, dissemination of such images should be permitted whenever the overall public interest is served by such dissemination.

Recommendations:

- Article 29, providing for exit data for print media, should be amended to narrow the range of information which must be printed.
- Print media should not be required to provide the State body responsible for mass media with free copies of their editions.
- The matter of broadcasting licensing needs to be dealt with in detail, preferably in a law specifically dedicated to this issue and in accordance with the minimum standards noted above.
- Article 53(1) should be removed from the draft Law.
- Article 53(2) should be amended to incorporate the protections noted above.
- Article 54 should either be removed from the draft Law altogether or significantly amended to bring it into line with the standards noted above.

[35] *Goodwin v. UK* (1996) 22 EHRR 123, para. 39.
[36] Recommendation No. R (2000) 7, 8 March 2000, Principle 3.