COMMUNICATION SUBMITTED FOR CONSIDERATION UNDER THE FIRST OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Before:
The United Nations Human Rights Committee
c/o OHCHR – UNDOG
1211 Geneva 10, Switzerland
Fax No. (41 22) 917 9022

On behalf of:
Shamsiy Sa'di
Reader of Oina Newspaper

Represented by:
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I. APPLICANT/STATE CONCERNED

A. Information Concerning the Applicant of the Communication

1. Shamsiy Sa'di ("Applicant") is a citizen of the Republic of Uzbekistan and resident of the village of Oq Machit in the Samarkand region of Uzbekistan. He has two grandchildren. He is a member of the country's Tajik ethnic minority. During the period relating to this Communication, he was a regular reader of the newspaper Oina. (See Annex 1 for Applicant's letter appointing ARTICLE 19 to represent him before the Committee, English translation and Tajik original.)

B. State Party Concerned

2. The State Party to the International Covenant on Civil and Political Rights ("the Covenant" or "ICCPR") and the First Optional Protocol against which this Communication is directed is the Republic of Uzbekistan ("Uzbekistan" or "the Respondent State").

3. Uzbekistan formally acceded to the ICCPR and the Optional Protocol on 28 September 1995, which, in accordance with Article 49(2) of the Covenant, came into force for that country on 28 December 1995.

II. ARTICLES VIOLATED/EXHAUSTION OF DOMESTIC REMEDIES/OTHER INTERNATIONAL PROCEDURES

A. Articles of the ICCPR Allegedly Violated

4. This case arises in relation to a refusal by the Press Department of Samarkand region to re-register the newspaper Oina ("Oina" or "the newspaper"), which Applicant purchased and read on a regular basis. It is submitted that this case involves violations of Article 19, relating to Applicant's right to freedom of expression (in particular, his right to receive information and ideas in print), and of Article 27, relating to Applicant's right, in community with the other members of the Tajik minority in Uzbekistan, to enjoy his own culture – in combination with Article 2, which requires the State Party to take proactive measures to "respect and ensure" the rights recognised in the Covenant.

B. Exhaustion of Domestic Remedies

a. Exhaustion of domestic remedies by Oina

5. As detailed more fully below, after the denial of Oina's re-registration application by the Press Department, the editor of Oina, Rakhim Mavlonov ("Mavlonov") appealed to the civil court of first instance, which declined jurisdiction, instructing Mavlonov that the case should be brought in the economic court system. Mavlonov complied by bringing the case to the commercial court of first instance, which, inter alia, directed that Oina be re-registered. This decision was vacated on appeal to the commercial appellate

court. The Supreme Court in the economic court system vacated all decisions below on the basis that the commercial courts did not have jurisdiction of the case.

6. Mavlonov then returned to the civil court of first instance, which this time heard the case, deciding in favour of the Press Department. The appellate court affirmed. A request to the Supreme Court to review the legality of the decisions below was sent back to the appellate court, which found that the civil court decisions were legal. A second request to the Supreme Court for supervision review of the decisions below resulted in a letter to Mavlonov indicating the Supreme Court's view that all of those decisions had been legal. Three more requests, for further levels of Supreme Court review, were responded to by officials not empowered to take the requested actions. The effect was to invalidate the requests. At this point, Mavlonov concluded that no options for further judicial review remained.

b. Consequent exhaustion of domestic remedies by Applicant

7. Applicant does not presently have, and never did have, any practical possibility of challenging in the courts the denial of Oina's re-registration application. In the first place, he could not have joined with Oina in the original suit, because the civil court system denied jurisdiction of the case and sent it to the economic courts, where Applicant, as a reader, had no standing to sue.[1] When the case was sent back to the civil court system, eight months had passed. There had been no coverage of the litigation by the media, and Applicant had no way of knowing then that a civil case was being initiated. Consequently, Applicant had no reasonable opportunity of participating in the civil litigation at that point. And, once he had missed the opportunity to participate at the trial level, he was barred from participating in any of the appellate proceedings.[2]

8. Nor could Applicant have litigated the issues thereafter on his own behalf, having been unable to join Oina in the original suit, because of the combination of Articles 60 and 100 of the Code of Civil Procedure, whose effect was to make the decision of the courts regarding the issue of Oina's re-registration final as to Applicant.[3]

9. The only other hypothetical possibility for Applicant would have been to seek a finding that the registration regime itself was unconstitutional. However, only the Constitutional Court has jurisdiction to decide the constitutionality of laws;[4]

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[1] See Code of Economic Procedure Code, Articles 2 and 23 (establishing jurisdiction over controversies in the economic sphere and also providing that if a part of a claim is not economic, exclusive jurisdiction for the case lies in the civil courts). Russian versions of the Respondent State's laws cited in notes 1-5 (relating to exhaustion of remedies), note 45 (defamation) and note 46 (content restrictions) are provided at Annex 2.

[2] See Code of Civil Procedure Code, Article 310 (providing that only parties in original suit can appeal); Article 348-7 (only original third parties can join in a (cassation) appeal).

[3] Article 100 of the Code of Civil Procedure enshrines the principle that the subject matter of a claim which has already been decided in a final judgment may not be litigated anew. Article 60 of that same Code further mandates that prior judicial decisions on a particular issue are to be admitted as prima facie evidence and do not require additional proof.

[4] See Article 1 of the Law on the Constitutional Court of the Republic of Uzbekistan (1995).

and, Applicant, as an ordinary citizen, had (and has) no standing before this court.[5]

10. In consequence, it would have been perfectly futile for Applicant to have attempted to initiate proceedings in the local courts to vindicate his rights under Articles 19 and 27 of the Covenant. As the Committee has explained, it is a "well established principle of international law and of the Committee's jurisprudence" that one is not required to "resort to appeals that objectively have no prospect of success".[6] Moreover, it does not matter whether the unavailability of a remedy is *de jure* or *de facto*; in either case, a victim is excused from the futile exercise of pursuing it.[7]

11. Under these circumstances, the Committee should agree that Applicant must be treated as having exhausted domestic remedies.

C. Other International Procedures

12. This matter has not been submitted to any other international forum for investigation or settlement.

III. BRIEF SUMMARY OF FACTS

13. From November 1991 until April 2001, Oina was the only unofficial Tajik-language newspaper serving the Samarkand region of Uzbekistan. It was devoted principally to issues relating to the education of Tajik youth in the region.

14. Applicant regularly purchased and read copies of Oina. After reading them, he typically passed them on to his two grandchildren, who were students in a Tajik-language school. Applicant found the newspaper's coverage to be of great importance and relevance. He was unable to find the information it published anywhere else.

15. In April 2001, after the opting out of one of Oina's founders, Mavlonov, as Oina's editor, applied to the Press Department (the relevant authority) to re-register the newspaper. In a closed-door meeting, the Press Department rejected the application, as a result of which Oina was forced to stop publication. The basis for the rejection, apparently, was that some of the content of certain Oina articles incited inter-ethnic hostilities, while other content insulted certain public officials; in addition, the application materials were cited as having "numerous faults".

16. Mavlonov challenged the Press Department decision through the court system, without success. Various new reasons were adverted to, by various courts, as

[5] Article 19 of the Law on the Constitutional Court of the Republic of Uzbekistan (1995) provides that only the President and a limited number of high-ranking officials can initiate a proceeding in the Constitutional Court.

[6] *Pratt and Morgan v. Jamaica* (Communication Nos. 210/86, 225/87 (1989), ¶12.3). An annex of all authorities cited in this Communication has been provided for the Committee's convenience.

[7] *Dermit Barbato v. Uruguay* (Communication No. 84/1981 (1990), ¶9.4).

justifications for upholding the initial Press Department decision. These included that the financial situation of Oina's founder was insecure, that its published articles did not comply with its own internal statute, and that Mavlonov was not a professionally-trained journalist. At one point during the judicial process, Mavlonov submitted a second application for re-registration to the Press Department. That application too was rejected.

17. Oina remains shut down to this day. There is no unofficial Tajik-language newspaper serving the region. Applicant is unable to access the kind of information that Oina published, and fears that the unavailability of that kind of information, regularly conveyed by Oina, specifically threatens his enjoyment of Tajik culture by putting the very sustainability of that culture at risk.

IV. DETAILED FACTS AND PROCEDURAL HISTORY

For the Committee's convenience, a time-line for the events described in this Section IV is provided at Annex 3.

A. Establishment and Operation of Oina Newspaper

18. Oina was initially registered on 8 November 1999. The founders were the Samarkand City Bogishamal District Hokimiyat (a district government body), and KAMOL, a private firm. Mavlonov was editor.

19. Oina was published almost exclusively in the Tajik language, principally for a Tajik audience. It was the only non-governmental Tajik-language publication in the Samarkand region. Presently, no non-governmental Tajik-language publication is published there. (Sample front pages of Oina are reproduced at Annex 4.)

20. Tajiks constitute roughly 5% of the entire population of Uzbekistan.

21. Issues of Oina were published bi-weekly, and were distributed to dozens of Tajik-language schools. Each such school received between 25 and 100 copies.

22. In addition to the schools, Oina had approximately 3000 subscribers, and approximately 1000 copies of the newspapers were sold by street vendors.

23. One of the schools which had a subscription to Oina was Secondary School No. 21, in the Samarkand region, where Applicant had worked as a Director in charge of procurement and maintenance. Applicant represents that Oina was regularly read at the school, by both teachers and students.

24. Consistent with the goals of its statute (its internal operating document: see Annex 5, English translation and Tajik original), Oina published articles containing educational and other materials for Tajik students and young persons, to assist in their education, to promote a spirit of toleration and a respect for human values, and to assist in their intellectual and cultural development. In addition to publishing reports on events and matters of cultural interest to this readership (including interviews with prominent Tajik personalities), the newspaper published samples of students' work.

25. Oina also detailed particular difficulties facing the continued provision of education to Tajik youth in their own language, including shortages in Tajik-language textbooks, poor wages for teachers and the forced opening of Uzbek-language classes in some Tajik schools.

26. Applicant regularly purchased and read issues of Oina. Often, he would pass the newspaper on to his grandchildren.

27. Applicant found the information conveyed in Oina, relating to the education of the Tajik youth in the region, very valuable. This information was not otherwise reasonably available to him.

28. In the spring of 2000, the KAMOL firm exercised its right to opt out as founder. The District Hokimiyat also opted out at around the same time. According to the Respondent State, the Law on Mass Media (Annex 6, English translation and Uzbek original) and applicable regulations, required that the newspaper re-register.

29. Oina applied for re-registration, with the KAMOLOT Foundation's Samarkand City branch (a public entity) and SIMO, a private firm formed by Mavlonov, as the newspaper's two founders. The application was approved by the Press Department of the Samarkand Regional Hokimiyat, the entity responsible for registration applications in the Samarkand region (hereinafter "Press Department"), and Oina was re-registered on 17 August 2000.

30. Oina resumed publication shortly thereafter. Its circulation was approximately as before; the same schools, in addition, continued to subscribe to and to receive copies of the newspaper.

B. Closing of Oina

31. The last issue of Oina was published on 7 March 2001. It contained, among other things, an interview with a Tajik writer (hereinafter, "Tajik writer interview", described at paragraph 41 below).

32. Shortly after the publication of the Tajik writer interview, the head of the KAMOLOT Foundation, wrote a letter to the Press Department informing it that KAMOLOT was opting out.

33. According to the Press Department, this opt-out triggered a duty on Oina to apply for re-registration. Accordingly, in a decision dated 28 March 2001 (Annex 7, English translation only), pursuant to its authority under Article 16 of the Law on Mass Media and applicable regulations, the Press Department (a) cancelled Oina's license to publish, (b) directed an order to all printing shops in the region prohibiting them from printing copies of Oina, and (c) noted that Oina could apply for re-registration and that the Press Department would consider any such submission "in strict compliance with law".

34. Shortly thereafter, Mavlonov, with SIMO, submitted a re-registration application, including certain information, as required both by Article 13 of the

Law on Mass Media and by paragraph 4 of a regulation entitled "On the procedures of Registration of the Mass Media Organs in the Republic of Uzbekistan" (hereinafter "Registration Regulation B", Annex 8, English translation and Uzbek original). This information related, among other more technical matters, to the newspaper's founders, its aims and objectives, its target readers and its sources of funding.

35. The Press Department formed a commission consisting of five members to review the re-registration application. One of the commission members was Mr. Hojaev, who was the "inspector on protecting state secrets in print media". He was the official responsible for implementing the then-existing system of prior censorship[8]: he reviewed all publications prior to their release for compliance with law. (Newspapers cleared for publication were given an official stamp; those without stamps were prohibited from publishing. See Annex 9 for an example of such stamp.) Each issue of Oina had been submitted to him, and he had approved each one.

36. Neither Mavlonov nor any other representative of Oina was informed when a decision with respect to the Oina re-registration application would be taken. Nor was anyone from Oina invited to provide evidence or to represent Oina before the commission.

37. Some time after 27 April 2001, the offices of Oina received by post a document titled "Decision of the meeting of the mass media organs registration commission under the Samarkand regional hokimiyat press department" (hereinafter, "Press Department decision", Annex 10, English translation and Uzbek original). It was dated 27 April 2001. It is the only document ever received by Oina reporting and explaining the Press Department's decision with respect to the re-registration application.

38. The Press Department decision indicated that the commission members had "familiarised themselves with the documents presented …". Comments of various of the commission members relating to certain content published by Oina were recorded. These included:

    - "Oina newspaper published articles inconsistent with the idea of independence, articles inciting inter-ethnic hostility. Such newspaper that publishes articles violating the law should not be re-registered".
    - Mr. Hojaev, the person who had previously reviewed issues of Oina and had approved their publication, commented that "[i]n the indicated article the Samarkandian Tajiks are called 'unfinished Tajiks', which is insulting, his other articles carry the message that 'Samarkand is a city of Tajiks', which is violating the law".
    - A third member commented that "[t]he newspaper articles carried a message that Siyab district hokimiyat officials are far from enlightenment, which is openly insulting. It is impermissible to damage the honour of leaders and citizens and making personal negative remarks".

[8] In May 2002 the Office of the Chief of State Press Committee's State Secrets Inspectorate, which had been the responsible state censor since 1991, was abolished. However, the Office existed and was active in the period relevant to this Communication.

39. In denying Oina's application, the commission resolved as follows:

> Due to the fact that the newspaper Oina grossly violated Article 6 of the Law "On Mass Media", which prohibits to call for forced split of the territorial integrity, to incite inter-ethnic hostility, or harm the honor of citizens through the mass media; due to the numerous faults committed as becomes clear from the materials presented, and pursuant to the Law "On Mass Media" and mass media organs registration Regulations and Resolution of the Cabinet of Minister of 23 May 2000 devoted to the improvement of mass media activity towards enlightenment and national ideology building, it is unsuitable to re-register the newspaper Oina.

40. The Press Department decision does not identify any of the "offending" articles to which the commission members appeared to be referring. However, based on the passages quoted by the commission members and a search by Applicant and others through Oina's articles, it is believed that the only two articles which could have been before the commission on which the above comments might have been based are the Tajik writer interview, and an open letter published on 23 November 2000 (hereinafter, "Open Letter").

41. The Tajik writer interview (Annex 11, English translation and Tajik original) was generally inspirational in tone, describing how Tajik children should be raised and educated and specifically recommending that teachers be paid better salaries. In the course of the interview, the writer remarked that there were some "unfinished Tajiks", by which he meant to refer to ethnic Tajiks who thought of themselves as Uzbeks but who were in fact not familiar enough with Uzbek ways to really be counted as such. In another place, the writer referred with evident affection to Samarkand as "a pearl of Tajik culture".

42. The Open Letter (see Annex 12, English translation and Tajik original) addressed the mayor of Samarkand City and sought an explanation for why the local city government had failed to allocate necessary funds to purchase Tajik-language school textbooks. It also questioned whether closing down Tajik classes was consistent with the government's policy of encouraging equality and the friendly co-existence of all nationalities. Additionally, it asserted that a city garden, named after a famous poet, stood in need of the urgent attention of the governing authority of one of the districts of the city (the Siyab District); and it concluded by explaining that such attention was needed because, in the words of another well-known poet, the officials "are deprived of knowledge and education themselves".

C. Challenging the Denial of Re-Registration in the Courts

43. Mavlonov filed suit to challenge the Press Department decision in the Temiryul Inter-district Civil Court**.** On 17 September 2001, the court dismissed the case for lack of jurisdiction and sent it to the Economic Court.

44. Mavlonov proceeded to the Samarkand Regional Economic Court on behalf of Oina. He argued that the opting out of the founders should not have obliged Oina to seek re-registration, and that in any event the denial of the re-registration application was improper. On 20 November 2001, this court held that Oina in fact was required to re-register because such requirement was

triggered by the opt-out of a founder (Annex 13, English translation and Uzbek original). However, the court ordered the Press Department to register Oina within one month and also awarded Oina court fees and related expenses. Finally, the court granted Oina's motion to allow SIMO to replace it as plaintiff, based on the technicality that the newspaper itself did not have the status of a legal person, while SIMO did.

45. The Press Department appealed. On 20 December 2001 a three-judge appellate panel of the Samarkand Regional Economic Court affirmed the holding that Oina was required to re-register (Annex 14, English translation and Uzbek original). However, it rejected the holding of the court below that Oina was properly replaced as plaintiff by SIMO. Because the newspaper was not a legal person, however, this court held that the court below had lacked jurisdiction to try the case. On this basis, the court vacated the decision requiring the re-registration of Oina.

46. Mavlonov brought an appeal to the Higher Economic Court (the highest court in the economic court system) for cassation review. That court upheld the decision of the regional court, but on a somewhat different basis (Annex 15, English translation and Uzbek original). It held, in particular, that the economic court system did not have subject-matter jurisdiction because registration decisions are to be appealed, if at all, only to the civil courts.

47. Mavlonov returned to the inter-district court, where he had begun, but this time as plaintiff himself. A decision was rendered on 27 May 2002 (Annex 16, English translation and Uzbek original).

48. In its decision, the inter-district court noted a new allegation by the Press Department, that SIMO's financial situation was insecure; it also prominently noted remarks by the Press Department that Mavlonov was "not a qualified journalist by education".

49. The court held, first, that, under the authority of paragraph 9 of Registration Regulation B, the founder's opting out did indeed trigger a new obligation on Oina to re-register. Second, it upheld the Press Department's denial of the re-registration application. In so doing, it *did not* advert to any alleged violations of Article 6 of the Law on Mass Media. The basis for its holding, instead, was that there were shortcomings in the re-registration application: specifically, the date of the newspaper's statute did not correspond to the date of its adoption, four pages of SIMO's charter were missing, and the name of SIMO's director had not been updated.

50. Mavlonov appealed to the Samarkand Regional Civil Court, which delivered its judgment on 28 June 2002, affirming the decision of the inter-district court (Annex 17, English translation and Uzbek original). After rehearsing the technical requirements for registration as set forth in Registration Regulation B at paragraph 4 (for example, that the applicant provide information as to its aims and tasks, its target audience, its source of funding, its address, and so on), this court wrote: "Based on these Regulation requirements and the law "On Mass Media", the newspaper's activity was not compliant with its aims and was contrary to the law, which was correctly mentioned" by the Press Department in its decision. At another point, the court wrote that it "also takes into

consideration the financial situation of [SIMO] because according to [Oina's] statute … it is not a legal person and it operates using its founder's [SIMO's] bank account, and [SIMO] has only 20,000 UZS [roughly USD 20] in its bank account".

51. It is probably accurate to say that *two* grounds employed by the regional court in this decision were that Oina (1) published materials inconsistent with its statute in that these materials were "not compliant with its aims", and (2) was not, or its founder was not, sufficiently secure financially. It is less clear what the court meant in saying that Oina's activities were "contrary to the law". One possibility is that the court was saying that the application materials did not comply with the technical requirements of paragraph 4 of Registration Regulation B. However, in view of the fact that this court expressly mentioned the grounds cited by the Press Department in its decision, the probability is somewhat greater that it had in mind the Press Department's allegation that some of Oina's articles violated the content restrictions imposed by Article 6 of the Law on Mass Media.

52. The next step provided for in the procedural law of Uzbekistan, after a merits decision at the appellate level, is for the losing party to launch a supervision protest to the Chair of the Samarkand Regional Civil Court, asking for a review of the legality of the decision taken by the regional court.

53. Just prior to taking a step of this sort, however, Mavlonov applied once again to the Press Department to re-register Oina with SIMO as founder. The application was submitted on 20 August 2002.

54. In a letter dated 20 September 2002 (Annex 18, English translation only[9]), the Press Department denied this second application. The letter indicated that the Press Department had inquired into the financial resources of SIMO, and had determined that its funds were "not sufficient even for the publication of one issue of the newspaper". Additionally, the letter indicated that "[i]t is disappointing that in the new documents that you submitted for re-registration no changes were noticed in the aims and objectives, name and target group of the newspaper" – notwithstanding that the regional court had not objected to the aims and objectives, or any other features, of the statute, but had only alleged that Oina's *practices* were not consistent with it.[10]

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[9] Mavlonov's lawyer during these proceedings obtained an English translation of this document, the original of which, however, has been lost.

[10] We do not challenge this reason separately in this Communication, as it does not appear to have been a factor in the Press Department decision and was not adverted to by any court. We note, however, the irony that the second denial *criticises* Oina's statute while the first denial, in the Press Department decision, criticises Oina for not having complied with that very statute!

It is also worth noting that, in a letter dated 10 June 2003, from the Press Department to the Office of the President of the Republic of Uzbekistan (see Annex 19, English translation and Uzbek original), the Press Department purported to give an explanation for why the *first* re-registration application was rejected, writing:

> The documents submitted for re-registration were not compliant with law and the financial position of the only founder – the firm SIMO – was not strong enough to publish the newspaper and *pursuant to these circumstances* the re-registration was denied. (Emphasis supplied.)

However, *this reason was employed by the Press Department for the second denial but not the first.* In fact, this letter directly contradicts the Press Department decision.

55. At the same time, Mavlonov continued with the appellate process. Believing that it would be futile to appeal for supervisory review to the regional court, he wrote directly to the Supreme Court, requesting review by that body. However, the Supreme Court forwarded the request to the Chair of the Samarkand Regional Civil Court, thereby preserving the correct appellate procedure. That Chair, on 5 November 2002, denied the request (Annex 20, English translation and Uzbek original), writing: "Having considered the civil case merits in a comprehensive and objective way and having proved in the court hearing that your claims had been groundless the Court has determined that the order of the Head of the Regional Mass Media Department No. 15 of 28 March 2001 regarding the suspension of the activity of the newspaper *Oina* and the revocation of Certificate No. 00760 of 17 August 2000 have been affirmed as lawful". The Chair provided no legal or factual analysis.

56. Mavlonov next applied to the Chair of the Supreme Court, as provided for as the next step in the procedural process, again for supervisory review.

57. The only officials who have power under the law to authorise supervision review in the Supreme Court are the Chair and her Deputies. Upon receiving a request for supervisory review, the Chair or a Deputy Chair has the right to initiate such review, which, if granted, would be heard consecutively by the Civil Collegium, the Presidium, and finally by the Plenum, the highest body of the Supreme Court. Any request to the Supreme Court must be addressed to the Chair and it is up to the Supreme Court to decide whether a response will come from a Deputy or from the Chair herself.

58. The Supreme Court returned to Mavlonov a letter dated 2 May 2003, signed by the head of the Civil Collegium (Annex 21, English translation and Uzbek original). Supervision review was again denied. The letter stated that the decisions below were proper in light of the fact that the SIMO firm did not have sufficient financial resources.

59. However, this letter was ineffective, because the head of the Civil Collegium is not one of the persons empowered to make decisions relating to Supreme Court supervision review.

60. Mavlonov subsequently sent three requests to the Supreme Court. Each received a negative response. The first, dated 27 July 2004 (Annex 22, English translation and Uzbek original), rehearsed some of the reasons which had moved some courts below (particularly relating to SIMO's finances), but concluded summarily that there were no grounds for "cancellation" of any of those decisions. Similarly, the last two, dated 20 August and 23 September (Annexes 23 and 24 respectively, English translations and Uzbek originals) gave no reasons of their own for denying the requests, and simply referred to previous responses.

61. All three letters were signed by persons other than the Chair or her Deputies. Accordingly, all three of these requests, again, failed to advance the appellate process.

62. Mavlonov concluded that further requests to the Supreme Court would be futile, and that, therefore, all domestic remedies had been exhausted.

V. REQUEST FOR INTERIM MEASURES PURSUANT TO RULE 92 OF THE RULES OF PROCEDURE OF THE COMMITTEE

63. For every month during which Applicant is unable to read Oina he suffers irreparable damage therefrom. Accordingly, Applicant requests the Committee, pursuant to its authority under Rule 92 of its Rules of Procedure, to find desirable, and to report to the Respondent State that it so finds, that the Respondent State take the interim measure of registering Oina pending the Committee's final determination of the matters raised in the present Communication.

64. In support of this request, Applicant notes that, in regularly purchasing and reading issues of Oina, he was exercising, and would be exercising in the future, his fundamental right under Article 19 of the Covenant to receive information in print, and his right under Article 27, in community with the other members of the Tajik community in the Samarkand region, to enjoy his culture and to use his own language. We emphasise again that Oina was particularly focused on education issues for the Tajik youth; that it was the only reliable source of objective and critical information on such matters; and that it would therefore be highly likely going forward to report on and analyse, just as it had reported on and analysed in the past, developments relating to that education (relating, for instance, to the lack of sufficient Tajik-language textbooks, or to the inadequacy of teacher salaries). On most such occasions from this moment forward, Applicant would purchase and read such analyses in Oina were they available, which they are not solely due to the Respondent State's improper intervention. From this moment forward, therefore, as long as Oina remains shut down, Applicant will lose opportunities to exercise his right to receive information in print on issues of considerable importance to him and his community, and also his right to enjoy his culture and to use his own language.

65. Moreover, in many of these cases, the possible news article or analysis would be a "perishable commodity", and its publication at some indefinite and potentially distant point in the future would be of little value to Applicant. As the European Court of Human Rights (ECHR) has correctly noted in this regard, "news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest". It is for this reason, the ECHR went on to note, that prior restraints on the press, including, of course, the wholesale shutting down of a newspaper, "are such that they call for the most careful scrutiny …".[11]

66. It is submitted that in the ordinary course of things this kind of event will occur frequently over the period that the Committee considers this Communication. Should Applicant continue to be unable to read Oina, each time such type of event occurs (that is, an event which Oina in all likelihood would have covered and analysed), Applicant will suffer violations of the rights just mentioned.

67. In addition, and quite independently of the *value* or *interest* of the publication of Oina to Applicant and to the Tajik minority community, Applicant has an indisputable right *under Article 19 specifically* to receive and read newspapers of his choice (provided, of course, that they are available for purchasing and/or

[11] *Ekin Association v. France* (Judgment of 17 July 2001, Application No. 39288/98, ¶56).

reading). Every day that passes without Applicant's being able to read Oina, if such inability is the direct result, as it is here, of a forcible intervention of the Respondent State to keep him from being able to do so, constitutes a violation of Applicant's Article 19 rights. And, with every day that passes without publication, the difficulty of recommencing publication of Oina increases, as relationships with printers and suppliers fade, subscriptions expire, community identification with the newspaper weakens, and so on. That is, every day that passes without publication increases the risk that Applicant will not ever be able to exercise his Article 19 right to receive information in print by purchasing and reading issues of Oina which would have been available to him but for the Respondent State's actions.

68. For these reasons, Applicant requests the Committee to find it desirable that Oina be registered over the period during which the Committee considers his Communication, and that the Committee forward a request to this effect to the Respondent State.[12]

VI. LEGAL ARGUMENT: THE CLOSURE OF OINA VIOLATES ARTICLES 19 AND 27 OF THE COVENANT

A. Law of the Respondent State Applied by the Press Department

69. The Press Department is authorised by paragraph 2 of a registration regulation entitled "On the registration of mass media on the Republic of Uzbekistan" (hereinafter "Registration Regulation A", Annex 25, English translation and Uzbek original) to grant or deny applications for the registration or re-registration of mass media, including newspapers. As already briefly indicated, Article 13 of the Law on Mass Media, mirrored by paragraph 4 of Registration Regulation B, provides that an application for registration must include specifications of "(1) founder(s), (2) name, working language(s) and legal address, (3) aims and tasks; (4) supposed readership (viewership, audience); [and] (5) supposed periodicity of publication or broadcast, volume of the publication, sources of funding, material and technical supply". These provisions *do not* require the Press Department to grant registrations even if the required materials in fact have been submitted; and no other article of the Law on Mass Media, nor any applicable regulation, constrains the Press Department to grant applications under any specific circumstances.

70. On the other hand, Article 15 of the Law on Mass Media empowers the Press Department to refuse to register (or re-register) a mass medium under certain circumstances. Of pertinence here is Article 15(1), which provides for such refusal if a mass medium's "aims and tasks … contradict the Constitution of the

[12] While it is submitted that the considerations in the text demonstrate the existence of irreparable harm, we note that is not a condition precedent of granting interim measures that a Communication prove in the first instance that irreparable harm would result in the absence of such measures: the Committee may make its own inquiry into irreparable harm, and may direct the taking of interim measures pending the outcome of that inquiry. *Weiss v. Austria* (Communication No. 1086/2002 (2002), ¶7.1); see also Gino J. Naldi, "Interim Measures in the UN Human Rights Committee" (53 *International and Comparative Law Quarterly* 445 (April 2004)).

Republic of Uzbekistan and this law".[13] Additionally, Article 16 provides that the "registering organisation" may "cease" a mass medium's activity. However, no criteria or guidance are given as to when it may do so.[14]

71. Paragraph 4 of Registration Regulation B empowers the Press Department to "conduct an expertise of information provided in an application as well as conformity of material and technical supply and sources of funding".

72. The Press Department was presumably acting under Article 15 of the Law on Mass Media and Registration Regulations A and B in denying Oina's application for re-registration. In particular, and as already described in detail, it denied the application based on its findings that Oina "grossly violated" Article 6 of the Law on Mass Media, and that there had been "numerous faults committed as becomes clear from the materials presented".

B. The Denial of Oina's Re-Registration Application Violated Article 19 of the Covenant

73. Article 19 of the Covenant provides, in pertinent part:

> 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, whether orally, in writing or in print, in the form of art, or through any other media of his choice.
> 3. The exercise 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 of public order (*ordre public*), or of public health or morals.

74. Freedom of expression, as protected under this article of the Covenant, has been recognised by international tribunals, national courts and commentators as vital not only to the development of the individual, but to the securing and protecting of democracy itself. As the Committee has explained: "It is in the essence of [free and democratic] societies that its citizens must be allowed to inform themselves about alternatives to the political system/parties in power, and that they may criticize or openly and publicly evaluate their Governments … within the limits set by Article 19, paragraph 3".[15]

75. Other international tribunals are in accord. For example, the ECHR has repeatedly stated that "freedom of expression … constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment".[16] The Inter-American Court

[13] Other bases for denying applications, as set out in this article, are: if the mass medium has the same name as that of an earlier-registered mass medium (15(2)); if the application has been submitted within one year of the effective date of a court order demanding a cessation of the same entity's activities (15(3)); and if one or more of the founders of the mass medium are "based outside" the country (15(4)).

[14] Article 12 of the Law on Mass Media provides that an existing registration may be "deemed void" if the registered entity has not carried out any activities within three months of being registered.

[15] *Aduayom et al. v. Togo* (Communication Nos. 422-24/1990 (1996), ¶7.4).

[16] *Lingens v. Austria* (Judgment of 8 July 1986, Application No. 9815/82, ¶41).

of Human Rights has explained that "[f]reedom of expression is a cornerstone upon which the very existence of a democratic society rests".[17] And the African Commission on Human and Peoples' Rights has affirmed "the fundamental importance of freedom of expression as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms".[18]

76. It is equally well-recognised that the press plays a special and fundamental role as "public watchdog", a role that is essential to ensuring that the public – like Applicant – is informed on matters of interest and importance to it. For Applicant, the state of minority language education in the Samarkand region is one such matter. Given this, the rights of the press under Article 19 are of especial concern. As the Committee has stressed:

> [T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.[19]

77. The ECHR has made the same fundamental point, emphasising the "pre-eminent role of the press in a State governed by the rule of law",[20] and remarking that "[f]reedom of the press … enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society".[21] The Inter-American Court of Human Rights has similarly stated: "It is the mass media that make the exercise of freedom of expression a reality".[22]

78. Of course, some restrictions on freedom of expression, as the Committee has explained, are permissible. But because freedom of expression is "of paramount importance in any democratic society, … any restrictions to the exercise of this right must meet a strict test of justification".[23] In particular, once it has been established that a person's right to freedom of expression has been restricted, the restriction must be shown to have been (1) provided by law, (2) in pursuit of a legitimate aim and (3) necessary in pursuit of that aim.

79. The ECHR has echoed the need for a strict justification of restrictions on freedom of expression. In the specific context of the denial of a registration application by a newspaper – a denial whose effect was to impose a prior restraint on that newspaper – that Court warned that "the dangers inherent in prior restraints are such that they call for the most careful scrutiny".[24]

80. The responsibility of providing a justification for restrictions on freedom of expression, the Committee has taught, falls squarely on the State Party, and where such justification is lacking in specifics and details, it must fail. In,

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[17] *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, ¶70) ("*Compulsory Membership*").
[18] Declaration of Principles on Freedom of Expression (adopted at the 32nd Session, 17-23 October 2002: Banjul, The Gambia, preamble).
[19] General Comment No. 25 (1996), ¶25.
[20] *Thorgeirson v. Iceland* (Judgment of 25 June 1992, Application No. 13778/88, ¶63).
[21] *Castells v. Spain* (Judgment of 24 April 1992, Application No. 11798/85, ¶43).
[22] *Compulsory Membership*, note 17, ¶34.
[23] *Laptsevich v. Belarus* (Communication No. 780/1997 (2000), ¶8.2).
[24] *Gaweda v. Poland* (Judgment of 14 March 2002, Application No. 26229/95, ¶35).

Laptsevich, for example, the State Party had generally argued that the legal provisions under which it had acted to restrict the dissemination by an author of pamphlets criticising the government and the President, were in compliance with Article 19. The Committee rejected this general contention, remarking that the State Party had not "made any attempt to address the author's specific case and explain the reasons for the requirement" imposed pursuant to the legislation. The Committee went on to assert that, "[i]n the absence of any explanation justifying the registration requirements and the measures taken", it could not say that the State Party had met its justificatory burden, and it concluded that a violation of Article 19 had occurred.[25]

a. Applicant's freedom of expression was restricted

81. There can be no question but that Applicant had a right, protected under Article 19, to access the information contained in Oina by purchasing or otherwise (legally) acquiring it and reading its contents. This is not to say that Applicant had a right *that such information be published in print.* But at the time in question, Oina existed as a continuing newspaper concern, publishing information of high relevance to Applicant, information which he actively sought out and which was not reasonably available to him through any other means. That information, so to speak, was out there for his taking, and it only ceased to be so as a result of an intervention by the Respondent State. Under such circumstances, such intervention was a restriction on Applicant's right to receive information in print.

82. The ECHR has remarked on precisely this situation, in the context of Article 10 of the European Convention, asserting that the freedom to "receive information" "prohibits a government from restricting a person from receiving information *that others wish or may be willing to impart to him*".[26]

83. The Committee has also remarked quite suggestively on this point, although it must be acknowledged that its jurisprudence in this context is not as yet fully developed. In a situation in which the ability to receive available information was at stake, it noted its concern "[w]ith respect to freedom of expression … that the exercise of those rights is unduly restricted under present laws concerning … information on abortion. The prohibition of interviews with certain groups outside the borders by the broadcast media *infringes upon* the freedom to *receive* and impart information under article 19, paragraph 2, of the Covenant".[27] Here, there is a strong suggestion that a restriction on one's ability to access and receive otherwise available information is indeed a *restriction* on one's freedom of expression.

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[25] *Laptsevich*, note 23, ¶8.5.

[26] *Sirbu v. Moldova* (Judgment of 15 June 2004, Application Nos. 73562/01, 73565/01, 73712/01, 73744/01, 73972/01, 73973/01, ¶18 (emphasis supplied)). While the ECHR in this case declined to hold that Article 10 provided for a right to *seek* information from government bodies, it evidently recognised that the situation where, as with Applicant, a person wishes to receive information which *would be available in the absence of official interference*, such official interference represents an interference with the right to freedom of expression guaranteed under Article 10. See also *Gaskin v. United Kingdom* (Judgment of 7 July 1989, Application No. 10454/83, ¶52).

[27] Concluding Observations of the Human Rights Committee: Ireland (3 August 1993, CCPR/C/79/Add.21, ¶15 (emphases supplied)).

84. The Committee's remarks in *Gauthier v. Canada*[28] are also instructive. At issue in that case was the denial to a journalist of a permanent pass to the precincts of the Canadian Parliament (by means of a membership in the Parliamentary Press Gallery), preventing the journalist from accessing parliamentary proceedings – that is, in the terms of the present argument, preventing the journalist from being in a position to receive already-existing information. In finding that a restriction on the journalist's Article 19 rights had occurred on the facts before it, the Committee was explicit in its recognition of a "right guaranteed under paragraph 2 of article 19 to have access to information".[29]

85. Because, as we show now, the restriction on Applicant's right to receive information cannot be justified consistent with the requirements of Article 19, the Committee should conclude that the denial of Oina's re-registration application was in fact a violation of Applicant's rights under Article 19.

b. The restriction was not provided by law

86. It is highly doubtful that the closure of Oina qualifies as "provided by law". As the Committee has made clear, to be "provided by law", a restriction must not be unduly vague. For example, it has explained in the context of Article 12(3), relating to permissible restrictions on liberty of movement which are substantially similar to the permissible restrictions on expression provided for in Article 19(3): "The laws authorizing the application of restrictions should use precise criteria …".[30] And, in the specific context of Article 19, the Committee has expressed "concern [over] provisions which severely restrict freedom of expression by authorizing seizure of publications and by imposing penalties for broadly defined offences".[31]

87. While the Committee has not as yet developed a full jurisprudence on the concept of "precise criteria", it is submitted that, in order for a law to satisfy the "provided by law" standard, its language must be clear enough that ordinary persons can understand (with appropriate advice, where necessary) what is required of them. As the ECHR has noted, a law which satisfies the "prescribed by law" standard of Article 10 of the European Convention must be "formulated with sufficient precision" that an individual will be able to "foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail".[32]

88. Equally important, however, and in an important way following from the point just made, a law which vests unfettered discretion in officials as to its application cannot meet the standard of "provided by law". Indeed, in the very sentence quoted in part above (relating to Article 12(3)), in which the

[28] *Gauthier v. Canada* (Communication No. 633/1995 (1999)).
[29] *Ibid*., ¶13.5. There are differences, admittedly, between *Gauthier* and the present case. However, a fundamental similarity is this: in both cases, access was being sought to information which (1) existed and would have been available, but for the fact that access to it was restricted by the State, and (2) was of considerable importance. Under these circumstances, we have asserted in the text that a restriction on access to such information constitutes a *restriction* on freedom of expression, which must be justified under the terms of Article 19.
[30] General Comment No. 27 (1999) ("GC 27"), ¶13.
[31] Report of the Human Rights Committee (UN Doc. A/55/40, Vol. 1 at ¶36 (Morocco)).
[32] *Sunday Times v. UK (No. 1)* (Judgment of 29 March 1979, Application No. 6538/74, ¶49).

Committee warned against laws which are not sufficiently precise, it effectively *forbade* the vesting of unfettered discretion in officials, asserting that "the laws authorising the application of restrictions should use precise criteria and *may not* confer unfettered discretion on those charged with their execution".[33]

89. The ECHR is in accord, having written:

> In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise".[34]

90. The reason, indeed, why a grant of unfettered discretion should be taken to offend the "provided by law" standard is because, again, of concerns that persons will not be able to foresee what actions they may or may not take in order to be in compliance with the law in question. Where officials have unfettered discretion to apply a law in any manner they see fit, virtually any conduct at all may be subjected to the law, as long as some official or other sees fit to so subject it.

b.1. The reasons employed to deny Oina's re-registration application were not reasonably foreseeable

91. It could not have been reasonably foreseen that Oina's re-registration application would be denied based on any of the reasons cited by any of the authorities. We consider these reasons in turn.

92. First, there is the allegation in the Press Department's decision, that certain of Oina's articles violated prohibitions in Article 6 of the Law of the Mass Media on the "propagation … [of] racial, ethnic, and religious hostility" and on the dishonouring of citizens.

93. As to the incitement of inter-ethnic hostility, and as we have noted, the only reference we have been able to find to the phrases "unfinished Tajiks" and Samarkand being a "city of Tajiks" is in the Tajik writer interview. As explained, that article was an inspirational interview of a Tajik writer on ways and means of improving the education of the Tajik youth in the Samarkand region. If, despite the plain meaning of this article, it qualifies as "propagating ethnic hostility" for the purposes of Article 6 of the Law on the Mass Media, then that term ("propagating ethnic hostility") simply does not have a meaning that is readily accessible. To the contrary, one would have to conclude that the prohibition on "propagating ethnic hostility" is precisely the kind of "broadly defined offence" that the Committee was worried about in the Morocco Report just quoted (see note 31).

94. As to the allegation that some article or other dishonoured certain officials by suggesting that they are "far from enlightenment", Applicant has tried

[33] GC 27, note 30, ¶13 (emphasis supplied).
[34] *Hasan and Chaush v. Bulgaria* (Judgment of 26 October 2000, Application No. 30985/96, ¶84). See also, e.g., *City of Chicago v. Morales* (527 US 41, 62 (1999)).

assiduously to identify any article which might have had any such effect. As noted, he has speculated that the "Open Letter" might be the article to which the Press Department decision refers, but it is indeed only speculation. Thus, on the one hand, if a newspaper such as Oina can be shut down by a finding by the Press Department that some article, unidentified, dishonours certain officials, only vaguely identified, in some way not clearly specified, then it will never be ascertainable what comments on public officials will run the risk of shutting the entire newspaper down. Even if, however, it is the Open Letter which is the "offending" article, its content, as explained, is utterly benign. If, again, publication of such an article endangers the very operation of a newspaper because it may dishonour some public official, then ordinary persons are simply not in a position to determine which *other* articles might similarly jeopardise the very existence of a newspaper. In short, the use of the prohibition on dishonouring citizens, if applicable to Oina in the way indicated in the Press Department decision, shows that such prohibition is too imprecise to be counted as provided by law.

95. A third ground employed by the Press Department decision to deny Oina's re-registration application was that there were "numerous faults committed as becomes clear from the materials presented". Unfortunately, the Press Department decision does not identify such "faults". One can only guess that they are the ones identified by the inter-district court: that (1) four pages of SIMO's charter (the charter of the proposed founder) were missing, (2) the date of Oina's statute did not correspond to the date of the statute's adoption, and (3) the name of the director had changed.

96. Yet, it is submitted that the only plausible reading of the "technical" requirements provisions of Article 13 of the Law on Mass Media, and particularly of paragraph 4 of Registration Regulation B under which the Press Department is to "conduct an expertise" of the registration materials, is that, in the event of any technical shortcomings in an application, the Press Department should contact the applicant to ensure that the shortcomings are rectified. Here, the Press Department would be expected simply to have contacted Oina with a request for it to supply the pages missing from SIMO's charter and for it to update the name of the director. Oina, of course, could easily have complied.

97. That is not what happened, however. To the contrary, the Press Department appears to have denied Oina's application based on flaws which no-one could have suspected would have been fatal to an attempt to register the newspaper. In effect, therefore, it could not reasonably have been foreseen that the Law on Mass Media and applicable regulations could be applied to Oina in such a way as to close it down merely because of the technical defects in the application materials. Because in this respect too, the application of the Law on Mass Media and applicable regulations to restrict Applicant's freedom of expression could not reasonably have been foreseen, it should be concluded that that restriction (that is, the denial of the application for re-registration) was not provided by law.

98. Again, and as noted more fully below, the courts did not hesitate to add further grounds for affirming the Press Department's decision. Most notable, perhaps, was the inter-district court's mentioning that Mavlonov was not a journalist by education. It is true, as has been implied, that the court did not expressly rely on

this allegation in its affirmation of the Press Department decision. It is by no means certain, on the other hand, that this consideration played no role in the court's decision. Yet, it is perfectly clear that there is simply nothing in the Law on the Mass Media or the applicable regulations which remotely suggests that an editor *must be* a journalist by professional training.

99. To the extent that the "journalist" consideration motivated the inter-district court's decision, the denial of the re-registration application, and the resulting inability of Applicant to access the unique information Oina supplied, would be highly reminiscent of the facts of the ECHR's *Gaweda* case. There, a newspaper was denied the right to publish under its proposed title (and therefore, was not permitted to publish at all) because the courts imposed a requirement that any proposed title "embody truth". However, the applicable statute only required that a proposed title not be inconsistent "with the real state of affairs". On these facts, the ECHR concluded that the courts had "introduced new criteria, which could not be foreseen on the basis of the text specifying situations in which the registration of a title could be refused".[35] It concluded that the restriction on the applicant's freedom of expression was not prescribed by law. The Committee might well find this decision instructive when it reflects on the suggestion by the inter-district court that one may need to be a journalist by formal education if one is to be permitted to be editor of a newspaper. And it should conclude, as the ECHR did on similar facts, that the journalist-by-education requirement was not provided by law. Indeed, if anything, the facts here are even more egregious than the *Gaweda* facts: while in *Gaweda* the courts at least purported to be *interpreting* a provision that clearly existed in the law, here, the journalist-by-education requirement appears to have been pulled out of thin air.

100. Then there are the allegations that SIMO's economic situation was too insecure. On the one hand, documentation was submitted by Mavlonov showing that SIMO was in fact considerably better off than had been alleged. That point aside, however, there is nothing whatsoever in the Law on Mass Media or the applicable regulations which mandates *a refusal of a registration request* merely on the basis of poor economic performance.

101. Finally, it is submitted that the bewildering array of reasons cited by different courts, as well as by the Press Department, prove that *the registration regime itself* is not sufficiently clear as to qualify as provided by law in the sense of providing a foreseeable standard of conduct.

102. For the convenience of the Committee, we briefly recapitulate these reasons and their sources:

- The registration materials were not in order: Press Department decision; inter-district court decision.
- Content published by Oina violated the law: Press Department decision; regional court decision (possibly, depending on interpretation).
- Content published was not in conformance with Oina's statute: regional court decision.

[35] *Gaweda*, note 24, ¶43.

- SIMO's finances were insufficient: regional court decision; Press Department denial of second re-registration application; a Supreme Court decision.
- Mavlonov was not a journalist by educational training: inter-district court decision (possibly).[36]

103. Reasons come and go. The original Press Department decision did not mention financial matters.[37] Only one court mentioned the "journalist" problem. The Press Department later objected to the statute itself but no court ever made such a comment. The content published by Oina was illegal, the Press Department said once (but not later) and the regional court suggested; but apparently no other court, and not the Press Department the second time around, were concerned about what Oina had published in the past.

104. No one could possibly have known, based on this succession of reasons, what it was necessary to do to succeed in re-registering Oina. As the ECHR has helpfully remarked, "everything that goes to make up the written law, including enactments of lower rank than statutes … *and the court decisions interpreting them*" must be taken into consideration.[38] If the Committee were to reason similarly, it should conclude, based on the "court decisions interpreting" the Respondent State's registration regime, that that regime imposes requirements that are in no way foreseeable. It should conclude on this basis, therefore, that the registration regime in its entirety is not provided by law.

105. Because the denial of the Oina application and the consequent closure of the newspaper was not provided by law in the sense of being reasonably foreseeable, the Committee should conclude on this basis that the denial of the re-registration application was in violation of the Article 19 rights of Applicant.

b.2. Unfettered Discretion

106. We have already noted that a law which vests unfettered discretion in officials with respect to its application should be held by the Committee not to satisfy the "provided by law" standard. In this regard, the Committee has, on numerous occasions, expressed its concern that registration or licensing regimes in particular, which vest too much discretion in officials to deny or revoke registrations or licenses, may be in violation of Article 19 of the Covenant. It has noted, for instance, its concern with respect to the Printing and Publishing Act of Lesotho that "the relevant authority … has unfettered discretionary power to grant or to refuse registration to a newspaper, in contravention of article 19 of the Covenant. The Committee recommends to the State party to provide for guidelines for the exercise of discretion … and to bring its legislation into conformity with article 19 of the Covenant".[39] Again, the

[36] We note again that the Press Department, in its denial of Oina's second re-registration application, alleged that Oina's statute was itself defective. As already explained, we do not challenge this reason separately.

[37] As already pointed out (see note 10), the Press Department directly contradicted itself on this point, alleging falsely in its 10 June 2003 letter to the Office of the President that the decision of 27 April 2001 was based in part on the alleged fact that SIMO was not financially strong enough.

[38] *Ekin*, note 11, ¶46 (emphasis supplied).

[39] Concluding Observations of the Human Rights Committee: Lesotho (8 April 1999, CCPR/C/79/Add.106, ¶266).

Committee expressed "concern[] at the [Cambodian] Press Laws which impose license requirements …."[40] The license requirement in that case established no guidelines on when the registering authority could deny registration applications.[41]

107. If the Committee was concerned that the Lesothan and Cambodian regimes just referred to created problems under Article 19, it will surely find the registration regime created by the Law on Mass Media and Registration Regulations A and B to be profoundly troubling. As noted, the Press Department is under no statutory obligation *ever* to grant an application; its discretion to deny, in other words, is totally unfettered. It is to pass judgment on the "aims" of the applicant, on its sources of funding, and it is to determine if its past or future publications will violate any of the vague terms of Article 6 of the Mass Media Law. Given such discretion, the Uzbekistan regime provides Press Department officials and courts ample opportunity to use it to silence press outlets when it so suits them.

108. The very welter of reasons employed by the various authorities, already rehearsed above, goes to prove the degree of discretion actually vested in those authorities to wield the registration regime as a tool for censorship. Apparently, just about any reason will do as a pretext for shutting down disapproved content, and no higher authority will take umbrage at its employment, or, on the other hand, will hesitate to employ *a reason other* than the one employed by the lower authority, if a new reason suits the higher authority better. The Press Department decided to deny the re-registration application because it found the content of some articles not to its liking, and because of some unspecified defects in the application materials. The regional court, apparently not content with these reasons, came up with one of its own – the failure of Oina to comply with its statute – notwithstanding that this does not appear as a ground for refusing registration applications set out in the registration regime. And, while the Press Department initially did not appear to be concerned with the financial health of SIMO, other authorities appeared quite eager to employ that reason as a basis for denying the re-registration application.

109. In sum, virtually any reason appears to be a good reason for denying the registration requests of newspapers which the authorities wish to prevent from publishing; and this fact, the fact of unfettered discretion, was a direct cause of Oina's being shut down and Applicant's being unable to exercise his Article 19 rights. For this reason as well, the Committee should conclude that the denial of Oina's re-registration application was not provided by law.

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[40] Concluding Observations of the Human Rights Committee: Cambodia (27 July 1999, CCPR/C/79/Add.108, ¶18).

[41] See also Concluding Observations of the Human Rights Committee: Ukraine (12 November 2001, CCPR/CO/73/UKR, ¶22) (the Committee is "concerned about the absence of criteria for granting or denying licences to electronic mass media, such as television and radio stations, which has a negative impact on the exercise of freedom of expression and the press provided in article 19 of the covenant"); Concluding Observations of the Human Rights Committee: Kyrgyzstan (24 July 2000, CCPR/CO/69/KGZ, ¶21) ("[t]he Committee … is also concerned about the functions of the National Communications Agency, which is attached to the Ministry of Justice and has wholly discretionary power to grant or deny licences to radio and television broadcasters").

c. The denial of Oina's application and its subsequent closure was not in pursuit of a legitimate aim

110. One of the great difficulties here, as a result of the ever-changing reasons employed by authorities to shut Oina down, is that it is extremely unclear what aim or aims were being pursued to deny the re-registration application, or to affirm that denial.

111. We acknowledge that at least some of the aims implied in some of the reasons employed – for example, preventing the incitement of ethnic hostility, and preventing the dishonouring of citizens and public figures – may, if suitably framed, be counted as legitimate aims under Article 19. In other cases, one can only speculate as to what the aims pursued might be.

112. Regardless of what might be said on this score, however, it is far from clear whether *any* of the aims, as employed in this case, could be counted as legitimate for the purposes of the Committee's "strict test of justification". This is so for three different reasons. First, it is to be seriously doubted whether any registration scheme of the sort at issue here, *as applied to the print media,* could ever be deemed to be for a legitimate aim as recognised under the Covenant. Second, the simple fact is that there was no rational connection between any aim potentially asserted by the Respondent State and the shutting down of Oina. Given this fact, the re-registration denial cannot pass the "legitimate aim" prong of the three-part test under the Committee's jurisprudence. Finally, even if, in principle, some print media registration regimes operated by some State Parties could be based on a legitimate aim, the employment of Uzbekistan's registration regime to shut Oina down demonstrably did not pursue a legitimate aim: as we show below, the Respondent State has a pattern and practice of abusively employing apparently content-neutral provisions of its registration regimes to shut down the dissemination of content of which it merely disapproves.

113. These contentions are addressed in turn below.

c.1. Registration regimes for the print media like those of the Respondent State's do not serve any legitimate aim

114. A minimal registration regime – by which a proposed print media outlet identifies itself and provides a contact address – conceivably could be said to serve one or another of Article 19's legitimate aims. For instance, a simple identification requirement for press entities which are not otherwise officially registered (as commercial entities, for example) might be argued to be in the service of the protection of the rights of others.[42] But even if this were so, it would not begin to justify the actual registration regime of the Respondent State, a regime which requires detailed information as to the aims of the proposed press outlet, its target audience, its source of funding, and so on – information which has every potential of imposing *substantive conditions* on newspapers. Remarking generally on the imposition of such conditions, the special mandates on freedom of expression of the United Nations, the

[42] Even such a limited regime would have no justifiable application to Oina, however, because SIMO was in fact a registered company, and therefore was readily accessible in the event of an allegation that any of Oina's content had violated the rights of any person.

Organisation of American States and the Organisation for Security and Cooperation in Europe said: "Registration systems … which impose substantive conditions on the print media … are particularly problematical".[43]

115. A fundamental problem with the imposition of these substantive conditions – perhaps most transparently, the specification of aims and of sources of funding – is that they may be abused to serve the Respondent State's purpose of keeping control of the press, by conditioning the granting of registration on the having of "proper aims" and of not taking money from disfavoured persons or entities. The risk of these conditions being applied for these illegitimate purposes is significantly increased by the wide scope of discretion enjoyed by the authorities in applying the law, as detailed above.

116. It is, on the other hand, quite impossible to see what *legitimate* aim could be served by any of the substantive requirements at issue here.[44] Certainly, the legitimate protection of the reputations of others from attacks by the print media is not necessarily served by such a registration regime, particularly given the fact that Uzbekistan has a full regime of defamation laws of general character,[45] to which this draconian registration regime has nothing to add. Again, where content may legitimately be restricted in pursuit of the aim of national security or public order, or to protect public health or morals, there will be relevant *content-restrictive* laws which will secure compliance by means of a system of penalties.[46] Here too, it is simply impossible to see what a *registration* regime could *add* to these types of laws.

117. In sum, it is just not possible to see how the sort of registration regime at issue in this case, one which goes far beyond the requirement merely that the press outlet identify itself, could ever be said to be in service of any aim deemed legitimate under Article 19(3). Accordingly, it is submitted, and the Committee should so find, that this registration regime is *per se* in violation of Article 19 of

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[43] Joint Declaration (adopted 18 December 2003).

[44] Registration (or licensing) regimes *for the broadcast media* can be in the service of the legitimate aims of respecting the right of others to receive information (as enshrined in Article 19 of the Covenant), and of respecting the rights of minorities (enshrined in Article 27) to enjoy their culture and language. The potential legitimacy of such registration regimes for broadcasters is due precisely to the fact that the broadcast spectrum is finite. Given this fact, State Parties may be obligated, and in any case should, take steps to ensure that minority communities are served by broadcasters, and that there is a genuine diversity of viewpoints expressed through the airwaves, and so on. Licensing regimes which place some obligation on applicants with respect to serving the needs of their local communities may well be an efficient and equitable way of achieving these goals.

This, however, is in sharp contrast to the print media. No matter how many press outlets a country or region may have, nothing in principle stands in the way of others starting up new ones; there is no equivalent, for the print media, to the phenomenon of the unavailability of broadcast frequencies. Because of this, the fundamental basis legitimising some kind of license or registration scheme for broadcasters is completely absent with respect to the print media.

[45] See Article 100 of the Civil Code, Articles 40 and 41 of the Administrative Code, and Articles 139 and 140 of the Criminal Code. Russian-language versions of these articles, as well as of the content restriction provisions mentioned in note 35, are provided at Annex 26.

[46] Content restrictions occur in various places in the Criminal Code of the Respondent State, including at Articles 130 (production and distribution of pornographic items); 125 (disclosure of adoption information); 140 (humiliation/dishonouring); 150 (propagation of war); 156 (incitement of national, racial or religious hatred); 162 (disclosure of state secrets); 191 (illegal collection, disclosure and use of information); 192 (discrediting a competitor); 215 (desecrating state symbols/attributes); 239 (disclosure of inquiry and investigation information); and 244.1 (production and dissemination of materials harmful to public order and security).

the Covenant in failing to pursue any legitimate aim.[47] On this basis, the Committee should also find that a violation of Article 19 has occurred in the application of the Respondent State's regime to deny re-registration to Oina, with the perfectly foreseeable result of shutting it down.

c.2. The closure of Oina was not rationally connected to any legitimate aim

118. The only place where one can find even the glimmer of a reference to aims deemed legitimate under Article 19(3) of the Covenant is in the Press Department decision, in its references to the propagation of ethnic hostility and to the honour of city officials. As we show, however, on the facts of this case, the closure of Oina could not have served either of these aims. As we also briefly show, *none of the other reasons* for shutting down Oina could have advanced any legitimate aim. It follows that there was no rational connection whatsoever between any legitimate aim and the closure of Oina. Given this fact, and the Committee's jurisprudence, the Committee should conclude that the denial of Oina's re-registration application in fact served no legitimate aim.

c.2.1. Preventing the propagation of ethnic hostility

119. We have already acknowledged that the aim of preventing the propagation of inter-ethnic hostility may be an aim which falls under Article 19(3), under the concept of public order; it could also, in principle, fall under the "exception" provided for in Article 20(2) of the Covenant, calling for the prohibition of "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence …". Standing squarely in the way of the Respondent State's assertion of this legitimate aim in this context, however, is the Committee's decision in *Mukong v. Cameroon.*[48] In that case, a journalist and writer was arrested, detained, and was subjected to cruel and inhuman treatment, all because he had given an interview in which he had been critical of the country's government and president. The Committee found a violation of, among others, Article 19 of the Covenant. In addition to finding that such actions against the complainant were unnecessary, the Committee concluded that

> the legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights; *in this regard, the question of deciding which measures might meet the "necessity" test in such situations does not arise*". [49]

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[47] We recognise that, in the Committee's words, it "is not called upon to criticize in the abstract laws enacted by States parties. The task of the Committee under the Optional Protocol is to ascertain whether the conditions of the restrictions imposed on the right to freedom of expression are met in the communications which are brought before it". *Robert Faurisson v. France* (Communication No. 550/1993 (1996), ¶9.3). It is submitted, however, that if a law is shown not to be in service of any legitimate aim whatsoever, it is the law itself which is defective, and should itself be found, along with all of its applications, to be in violation of Article 19.

[48] *Mukong v. Cameroon*, (Communication No. 458/1991 (1994)).

[49] *Ibid.*, ¶9.7 (emphasis supplied).

120. This passage shows that the Committee is quite prepared to deny that there is any rational connection at all between a stated aim and a challenged restriction on expression. When no such connection exists, the Committee will conclude that *the aim was not being advanced at all*, and thus, no necessity analysis needs be engaged in.

121. In *Mukong*, the journalist was "muzzled" for speaking out on human rights and democracy. The Tajik writer interview (the only article even suggested by the Press Department as implicating inter-ethnic hostility) concerned an equally fundamental matter, namely, the education of the youth of a minority group. And, to repeat, that article, addressed to Tajiks, merely described certain Tajiks as not fully invested in the Uzbek culture. It is simply inconceivable that that content could in any way be taken by any rational observer to incite inter-ethnic conflict.

122. Applicant in this case, of course, is on the other end of the communication stream, so to speak, than was the *Mukong* journalist: he is the recipient of information in print rather than its imparter. But, as we have noted, Applicant's right to receive information is rooted in precisely the same medium – the newspaper – as was the journalist in *Mukong*; indeed, as it might be said, just as that journalist's right had been inappropriately muzzled, Applicant was inappropriately *disabled* from accessing information of equally fundamental importance as the information which the *Mukong* journalist wished to impart. If, therefore, the "question of deciding which measures might meet the "necessity" test" in the *Mukong* situation did not arise because there was no rational connection between the muzzling of Mukong and the pursuit of the asserted aim, the Committee should conclude that keeping Applicant from obtaining information which would have been otherwise available to him, merely because Oina published the Tajik writer interview, also was not rationally connected to, and hence did not pursue, the legitimate aim of preventing inter-ethnic hostility.

c.2.2. Dishonouring city officials

123. Nor does the question of employing a necessity analysis arise (and thus, the question of the pursuit of a legitimate aim must be decided in the negative) in the case of the articles, *whatever they were*, which allegedly defamed or dishonoured certain unspecified Siyab District officials – notwithstanding the fact that the protection of the rights and reputations of others is indeed a legitimate Article 19 aim. As explained, the Press Department decision did not specifically identify which such officials were offended, and only vaguely identified the allegedly "offensive" remarks. One can only conclude that certain comments in the Open Letter (or some other unknown article, perhaps) which may have been critical of the actions of some officials might have annoyed them. But no rational observer could conclude, based on the actual content of the Open Letter, that any official was remotely *dishonoured* by it. If the question of deciding which measures might meet the "necessity" test" in the *Mukong* situation did not arise, it surely does not arise on some unspecified annoyance taken by some officials in the context of Oina's discussion of issues of importance to Applicant and other members of the Tajik minority in such articles as the Open Letter.

c.2.3. Other reasons

124. For completeness, we consider very briefly, and in turn, whether any of the other reasons cited – faults in the application materials, financial insecurity, failure to comply with Oina's statute, Mavlonov's lack of formal education in journalism – could conceivably have advanced any of the legitimate aims provided for in Article 19(3).

125. The *defects in the re-registration application materials* were by any rational account of the most minor nature; even if the registration had been granted, it is quite inconceivable that any harm would have been caused to any of the values protected by Article 19(3).

126. As we develop in more detail below, the *financial insecurity of SIMO* might have had the consequence that Oina would not be able to continue to publish, but the only "right" implicated in that case was Applicant's right under Article 19 to receive information imparted by Oina (and Mavlonov's right to impart it), which could hardly have been protected by a forcible closure of Oina. And, it cannot be reasonably asserted that the rights of others, for example, in their reputation, were being protected by a requirement that SIMO be well-funded – on that reasoning, no person would be able to speak at all in Uzbekistan unless they could show they had sufficient finances to compensate any person whose honour they might offend. As to the other legitimate aims of Article 19(3): it beggars belief that a financial requirement on a founder could be in the service of national security or public health or morals.

127. Mavlonov vigorously disputed that Oina had in any way *deviated from the aims set out in its statute*, but even if it had, this would have represented at best a decision by Mavlonov, perhaps with others at the newspaper, to alter in some ways the message they wished to convey. It certainly could not be in service of any legitimate aim for the Respondent State to insist that a newspaper continue to convey a message that its editors prefer no longer to convey; and, of course, we have already dispensed with the potential argument that any alleged deviation from Oina's statutory aims violated either the prohibition against inciting inter-ethnic hostility or the prohibition against dishonouring persons. In short, therefore, the denial of the re-registration request on the ground that Oina was no longer publishing in accordance with its statute could not have actually served any legitimate aim.

128. While the inter-district court made mention of Mavlonov's lack of a *formal journalism credential*, it did not suggest that he was not an effective and competent journalist. Indeed, it is well recognised that many journalists work in a highly competent way, doing honour to the profession, without having a professional credential. (See Annex 26, Statement of the International Federation of Journalists.) It is simply not credible that the shutting down of a vital source of information, with no showing whatsoever of any failures in the

journalistic activities of the imparter of such information, could be in the real service of any legitimate aim.[50]

129. In sum, there simply was no connection at all between any of the reasons cited for denying Oina's re-registration application and the pursuit of any legitimate aim. Consequently, the Committee should find that the failure to re-register Oina and its subsequent forced closure served no legitimate aim, and was therefore a violation of Applicant's rights under Article 19 of the Covenant.

c.3. The only aim actually pursued by the Respondent State in shutting down Oina was the illegitimate one of censoring content of which it disapproved

130. The actual *conduct* of the Respondent State in employing the print registration regime (and in a fully parallel fashion, the registration regime for non-governmental organizations (NGOs)) to silence potential critics amply justifies the Committee's fears, detailed above, relating to the potential for abuse of registration regimes which vest too much discretion in officials. Specifically, the Respondent State has been engaged in a pattern and practice of systematically abusing its mass media and NGO registration regimes, not with the aim of protecting national security or public morals or the reputations of others, but rather, solely for the *illegitimate* purpose of preventing the dissemination of content of which it disapproves. The existence of this pattern and practice should persuade the Committee that no legitimate aim was in fact being served by the denial of Oina's re-registration application.

131. Consider first, the facts relating to Oina itself. This was a newspaper, as we have described, which served the vital interests of the Tajik minority in Samarkand. It was the only regular source of news and information on matters directly pertinent to that community which was published by a non-governmental entity. It had been publishing for over a year; all of its issues had passed through the office of the Official Censor of the region, Mr. Hojaev (a member of the Press Department's commission which ultimately refused the re-registration application on the ground that Oina had been publishing illegal content!). He had authorised the publication of each such issue.[51] When a founder opted out, however, allegedly triggering a requirement that Oina apply for re-registration, various officials and courts all of a sudden found a plethora of problems with the newspaper. It was publishing illegal content. It was not complying with the terms of its statute. It didn't have enough funds in its bank account. There were defects in its application materials. Its editor was not a journalist.

132. The inescapable conclusion to be drawn from this series of reasons is that the Respondent State, through various of its agents, was searching for ways of

[50] We no not mean to suggest that it is ever permissible for a state body to prohibit someone from practicing journalism, regardless of whether or not he or she possesses a formal credential. However, there is no need to make that case in the circumstances presented here.

[51] Such a system of prior censorship, of course, is in the highest tension with the dictates of Article 19. We do not challenge this system in this case because it was not responsible for Oina's not being able to continue publishing. (We note, moreover, that this system of prior censorship was formally abolished in May 2002.)

employing the mass media registration scheme for shutting down Oina because it merely disliked some of the stories it was publishing.

133. But Oina is not alone. The Samarkand Human Rights Initiatives Centre too was effectively prohibited from publishing: in its case, a bulletin which described the human rights situation in the Samarkand region. (See Affidavit of Komil Ashurov, Annex 27, English translation, Russian original.) The Centre began publishing the bulletins in November of 2002. Government officials had known about the bulletins for many months, because copies had been hand-delivered to some of them. While every issue had been published without being registered, the authorities apparently took no offence at their publication. That is, not until an unflattering portrait of the then-governor of the Samarkand region was published, alongside coverage of a student rally in the city. At that point, the Centre's head, Komil Ashurov, and its lawyer, were called into the office of the city prosecutor. They were asked to divulge the names of certain anonymous contributors to the bulletins and were shown a Press Department analysis concluding that, beginning with the very first issue, materials in the bulletins were objectionable and illegal. Ashurov was summoned again a short time later to the city prosecutor's office to sign a statement promising that he would cease his publication efforts, but declined to attend because he had not been served a subpoena. In late October of 2003, the Respondent State launched proceedings against Mr. Ashurov, based on his failure to register the bulletins. The lawsuit effectively ensured that the bulletins could no longer be published.

134. The registration regime for NGOs is employed to exactly similar ends. Take the case of the Open Society Institute Assistance Foundation. (See Affidavit of Alisher Ilkhamov, Annex 28, English original.) The Foundation, an NGO working in education and advocacy, apparently got the attention of the Respondent State for having published a scholarly ethnographic study of which the Respondent State disapproved. What did the Respondent State do? It did not launch a criminal or other case against the Foundation for publishing an allegedly illegal report. Rather, when the Foundation applied for re-registration as an NGO, even though it had been functioning for over seven years, fully registered and sometimes in direct partnership with the Government, the Respondent State all of a sudden found various difficulties which it hadn't noticed before. The address was improper, even though the Foundation had had previous registration applications approved when it had the same address. The electronic library had objectionable content, even though that library had been in place in previous registration periods. And certain educational materials – most of which, again, had been in place, in full public view, during periods when the Foundation had successfully applied for re-registration – were in violation of law. The conclusion here is also quite inescapable: the Respondent State took advantage of a registration scheme simply to ban content of which it did not approve – specifically, content inconsistent with the official view of the ethnicity in the country.[52]

135. Finally, the story of the Samarkand Tajik Cultural and National Language Centre's efforts to register as an NGO is a particularly striking example of how seemingly innocuous "technical" registration requirements are abused by the

[52] We acknowledge that the NGO registration scheme is different from the mass media registration scheme. However, both being registration schemes, the Respondent State's abuse of one of them is enlightening as to its objectives in abusing the other.

Respondent State. The Centre tried on six different occasions *over a two-year period* (from June 2002 until March 2004) to register, and was rejected every time. (See Annex 29 for original Uzbek official rejection letters.) Problems the first time round included that the Centre's statute was said to be in violation of law, the address provided by the Centre belonged to a member rather than to the Centre itself, thus violating certain registration rules, and the Centre had asserted that it had a membership of 52 persons, but "in fact", the registration materials only had named 10 people. On these grounds, the documents were not given "consideration" and were returned to the Centre's representative. A second rejection was on the ground that no letter confirming the Centre's statute had been received from the local authorities. A third rejection was founded on the allegation that the Centre's submission violated the law and registration procedures relating to NGOs. The letter accompanying the fourth rejection explained that the Social Associations Law was violated because the Centre's structure mentioned a "Board" at times and a "Conference" at other times; moreover, a registered entity must be called an "Association", not a "Centre". A fifth rejection was based, among other things, on the fact that the documents had been submitted more than two months after the last board meeting, and thus were in violation of the two-month rule. And a sixth rejection was based in part on the fact that the organisation's statute asserted that the Centre can maintain other regional offices, but the statute itself said that it was only a city organisation.

136. We are not informed whether the Centre has managed to overcome these obstacles to registration at the present time. Regardless, however, that six registration efforts over a two-year period met with resounding failure shows with great clarity the abusive use to which the NGO registration scheme is put by the Respondent State: in this case, to prevent efforts by members of the Tajik minority to do work on behalf of their own community and in service of promoting their own identity.

137. As these examples show, regardless of what the stated aim in employing the registration scheme might be – preventing the propagation of ethnic hostility, protecting the honour of citizens – the real aim, which emerges when one recognises the *pattern* of activity, is indeed merely to shut down the publication of content the government doesn't like. As the pattern makes clear, *the Respondent State had no legitimate aim in refusing to re-register Oina.* Lacking a legitimate aim, the denial of Oina's re-registration application and its subsequent enforced closure violated Article 19 of the Covenant.

d. The denial of Oina's re-registration application was not necessary to achieve any legitimate aim

138. Even if the Committee should find, despite the arguments presented above, that the Respondent State was pursuing legitimate aims in denying Oina's re-registration application and thereby restricting Applicant's freedom of expression, it should conclude that the restriction on Applicant's freedom of expression was *not necessary* for the achievement of any such aims.

139. The Committee has explained in numerous communications that a determination of whether a restriction is necessary for the pursuit of a legitimate

aim involves a careful consideration of the details of the situation before it: the object is to determine whether, on the specific facts of the case – rather than in the abstract – the restriction could be justified. In *Laptsevich*, for example (and as already noted), the Committee objected that the State Party did not "attempt to address the author's specific case".[53]

140. Not only must a necessity showing be tailored to the specific facts of the case. Members of the Committee have also asserted that a restriction must be *proportional* as a condition of its being found necessary. As described in the concurring judgment in *Faurisson*:

> This requirement of necessity implies an element of proportionality. The scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. It must not exceed that needed to protect that value.[54]

It follows that a showing merely that the restriction was "reasonable" or "desirable" is insufficient.

141. The ECHR has made the same point, with somewhat more elaboration, with respect to an appropriate necessity showing under Article 10 of the European Convention. As it said in the context of a newspaper's being enjoined from publishing a picture of a politician, as part of a story which alleged that he had received multiple salaries unlawfully: "the test of necessity in a democratic society requires the Court to determine [inter alia] whether the interference complained of … was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient".[55]

142. As we have noted repeatedly, various reasons were proffered at various stages of the national litigation to "justify" the effective shutting down of Oina. While we deny that any of the grounds, other than those relating to the incitement of inter-ethnic hostility and to undermining the honour of citizens, could be counted as legitimate aims on the basis of which a necessity analysis can be employed, we consider each of the aims cited in any of the pertinent decisions. In sum, the argument is simple: even if each of these aims was legitimate – that is, even if each of Oina's "defects" could with reason be said to exist and to endanger a legitimate aim, and even if the sanctioning of each could be said to be provided for by law – not one of them would justify the wholesale shutting down of the newspaper.

d.1. Technical defects in the application process

143. Turning first to the allegedly technical shortcomings of the application materials (the pages missing from SIMO's charter, the misstatement of the date of Oina's statute, and the change of the name of the director): these were at best mere technical shortcomings, easily rectified. Even if the Press Department had an interest in an orderly and predictable registration process, a simple expedient

[53] *Laptsevich,* note 23, ¶8.5.
[54] *Faurisson*, note 47 (Concurring Opinion of Elizabeth Evatt and David Kretzmer, ¶8).
[55] *Krone Verlag GmbH & Co. KG v. Austria* (Judgment of 6 November 2003, Application No. 40284/98, ¶42 (internal quotations omitted)).

would have been to contact Oina and request the necessary corrections. That was not what happened, though. Instead, no-one at Oina was even informed that the Press Department would convene a commission to consider its application. Instead, that commission met in secret, without input from anyone at Oina, at which meeting it effectively shut Oina down.

144. The Committee has expressed its views in this area on facts similar to those just recited, in *Laptsevich*. There, political leaflets which the author had distributed failed to comply with a technical requirement that they contain certain identifying information (serial number of edition, price per issue, index number, and so on). Based on this technical failure, the authorities confiscated the author's remaining copies of the leaflets and fined him.

145. The Committee found a violation of Article 19 based on the fact that the State Party had failed to provide a detailed explanation as to why "the breach of the requirements necessitated not only pecuniary sanctions, but also the confiscation of the leaflets still in the author's possession".[56] The implication is unavoidable, that the Committee was concerned that the effective silencing of the author (by means of confiscating the leaflets) was probably far too restrictive a response when a fine – or in fact, considerably less – might have been sufficient.

146. The same point applies here, albeit in the context of a "disabling" of a reader rather than the "speaking" of an editor:[57] specifically, something far short of making Oina unavailable to Applicant would certainly have sufficed to remedy the alleged technical defects in Oina's application materials. That is simply to say: with respect to defects in the application materials, just as the confiscation of the leaflets in *Laptsevich* was not necessary, nor was the shutting down of Oina.

d.2. Insufficient funds

147. Mavlonov denied on Oina's behalf that SIMO was financially insecure. Even if SIMO's funds *were* insufficient to publish the newspaper in its then-form and to its full distribution network, however, the denial of the re-registration application, and the consequent complete closure of the newspaper, was a completely unnecessary intrusion by the Respondent State. If there were literally not enough funds to publish the newspaper at all, the newspaper in fact simply would not have been published. If there were enough funds to print and disseminate a more limited run of the newspaper, that perhaps would have been done – but, of course, that option was foreclosed by the denial of the application. Indeed, any remedial action that Mavlonov or SIMO (or Applicant or any other reader for that matter) might have taken to remedy the alleged financial insecurity was pre-empted by the denial of the re-registration application and consequent total closure of the newspaper. It is submitted, in short, that the alleged shortage of funds of the newspaper gave no sufficient

[56] *Laptsevich*, note 23, ¶8.5.

[57] The critical point in *Laptsevich* is that, *where an Article 19 right is involved*, restrictions on the right should be no more than necessary to achieve a legitimate aim. Because, as we have shown, the denial of Oina's re-registration application imposed a restriction on Applicant's Article 19 rights, the *Laptsevich* point is fully applicable to him.

grounds *to the State* to shut Oina down, when natural market forces, together with the resolve of Oina and its readers, might well have worked to create the most sensible resolution of the problem.

d.3. Failure to comply with statute

148. Regarding the allegation that Oina's published materials deviated from the aims set out in its statute, all the Press Department needed to do was to interview Mavlonov to explain its concerns. While we would hope the Committee would reject the suggestion that a registration body has any business at all directing press outlets on whether or how to comply with their internal procedures and rules, as laid out in their statutes, there is little doubt that some such intervention by the Press Department, in negotiation with Oina, could have remedied any alleged difficult relating to compliance with the statute: either by the Press Department's coming to understand that there had not been any deviation, or by an adjustment to the statute as necessary. Yet, rather than taking this moderate step, the Press Department acted summarily, and in secret, to terminate the newspaper's activities.

d.4. Not a formally-trained journalist

149. Assuming that this was at least an informal ground for one court's having upheld the Press Department decision, we note again that there is no suggestion in any court opinion or Press Department decision that Mavlonov was not in fact a perfectly competent and professional journalist, albeit that he lacked a formal credential.[58] With no suggestion that the quality of the journalism suffered in any way, it cannot be credibly maintained that shutting the entire newspaper down for mere lack of the formal credential could have been necessary. Indeed, even if a formal credential were necessary (contrary to the representation of the International Federation of Journalists, see Annex 26), the Press Department could simply have notified Mavlonov that he needed to cease his journalistic functions, and to turn them over to a professionally-trained journalist, perhaps pending his obtaining of a professional credential. Rather than taking this more modest step, the very drastic step of shutting the newspaper down was taken. In view of the alternatives, this step could not have been necessary.[59]

d.5. Problematic content

150. Finally, we turn to the charges that some articles incited inter-ethnic conflict, and others dishonoured certain city officials. We treat these in turn.

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[58] It is submitted that the State has no right to prohibit persons from practicing journalism even if they do not necessarily hew to professional standards. Of course, remedies are typically available – for example, in civil defamation and in the application of legitimate content restrictions – for bad journalism which truly "crosses the line".

[59] To emphasise: we do not endorse the far-fetched notion that the possession of a professional credential may legitimately be required by the State as a condition of the practice of journalism or the publication of newspapers. Our point here is simply the following: even if, *per impossibile,* such a condition could permissibly be imposed, the failure to satisfy it could not be a ground, in the first instance, of the wholesale shutting down of a newspaper.

d.5.1. Inter-ethnic conflict

151. We have already noted the benign nature of the Tajik writer interview (which, as noted, is the only article published by Oina which we have been able to identify, based on the Press Department commission's comments, which the commission could conceivably have thought related to the potential incitement of inter-ethnic hostility). It is not at all plausible that the interview would have had any negative effect whatsoever on the state of inter-ethnic relations in the region. But that there must have been *a considerable effect*, in order to justify the silencing of the newspaper, is precisely what the Committee has strongly suggested.

152. For example, in *Keun-Tae Kim v. Korea*,[60] a Mr. Kim had distributed and read out, at a meeting attended by about 4000 participants, documents criticising the government and its foreign allies, and appealing for national reunification. He was found guilty of offences under the National Security Law. The Committee doubted that the publication "created a[ny] risk to national security …", and it went on to explain that none of the national courts which had heard the case had so much as considered "whether the contents of the speech or the documents *had any additional effect upon the audience or readers such as to threaten public security* …".[61] Lacking any proof of any such specific effect, the Committee concluded that a violation of Article 19 had occurred in the criminal conviction of Mr. Kim.[62]

153. There is no chance that the Tajik writer interview could be shown to "have [had] any … effect upon the audience or readers such as to threaten public security" by creating inter-ethnic conflict. The benign nature of the interview also puts the lie to any possible claim that the interview could have contributed in any way to racial or inter-ethnic hatred or discord. Accordingly, there is no chance of showing that shutting the newspaper down was necessary to prevent inter-ethnic conflict or discord. (Of course, the truth is probably precisely to the contrary: by publishing information as to the difficult situation in which the Tajik minority finds itself, particularly with respect to the education of its youth, Oina was likely contributing to mutual understanding between the ethnic groups in the region, and was therefore contributing to the minimisation of inter-ethnic conflict.)

154. Moreover, even if it were true that certain of Oina's articles did have the potential to incite inter-ethnic hostility, a sensible *initial* response to the problem would have been for the Press Department to have contacted Oina about its concerns and to have informed it as to how to proceed in the future so as to ensure compliance with all pertinent content-restrictive laws. Put otherwise, the reasonable response would have been for the Press Department to

[60] *Keun-Tae Kim v. Korea* (Communication No. 574/1994 (1999)).
[61] *Ibid.*, ¶12.4 (emphasis supplied)
[62] The ECHR has similarly found numerous violations of Article 10 of the European Convention, where the dissemination of material in print has allegedly endangered public order or national security. In these cases, precisely what the ECHR found to be missing was a close enough connection between the expression at issue and a significant risk of public disorder or damage to national security. See, e.g., *Surek v. Turkey* (No. 2), (Judgment of 8 July 1999, Application No. 24122/94); *Okcuoglu v Turkey* (Judgment of July 8, 1999, Application No. 24246/94).

have taken *remedial* action for an occasional past content error rather than to have taken the step of effectively censoring each and every *future* article by Oina by denying the re-registration application and thereby ensuring the closure of the newspaper. In sum, even if some of Oina's content were such as to incite inter-ethnic hostility, the closure of the newspaper was not necessary as a means of preventing such incitement in the future.

d.5.2. Dishonouring city officials

155. By the terms of the Press Department decision, and apparently not contradicted by any court decision, certain articles in Oina commented negatively on some Siyab District officials.

156. We have acknowledged that the protection of the "rights and reputations of others" is a legitimate aim under Article 19(3)(a). However, the Covenant contains a clear commitment to promoting, rather than restricting, public debate, and the Committee has noted the importance of the "free press and other media [being] able to comment on public issues without censorship or restraint and to inform public opinion".[63] The ECHR has echoed this fundamental point that comment by the press on political and public officials, relating to matters of public concern, is of great importance for the maintenance and protection of democracy, noting that a politician "inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance".[64]

157. Here, Oina was punished with the ultimate sanction of closure, for apparently commenting on certain officials in the context of a discussion of legitimate interest to the Tajik community. In the first place, however, as an examination of the Open Letter reveals, there is nothing in it which could reasonably be taken as *dishonouring* any Siyab District, or any other, official. But even if this were not true, that is, even if the reputations of some such officials might have been tarnished by the coverage, such officials had remedies in civil defamation proceedings, as well as rights of reply and correction (in the Law on Mass Media, Article 27). In view of these available alternatives, each of which is effective and relatively non-intrusive, and also in view of the need to protect the right of the press to be able to comment on public officials to communities for which such information is vital, the closure of the newspaper in such circumstances should be concluded to have been grossly unnecessary.

d.6. Disproportionate sanction

158. Finally, we note the wholly disproportionate nature of the sanction imposed on Oina: the denial of its re-registration application, with the inevitable result of its being shut down completely. That is, of course, the ultimate sanction for a newspaper and its readers, and we note that nothing in any of the reasons cited for denying the application, even if they were well-founded and were in service of a legitimate aim, justified such sanction. Technical defects, as we have noted, could, and would, have been remedied with a mere letter requesting changes.

[63] GC 25, note 19, ¶25.
[64] *Lingens*, note 16, ¶42.

The alleged insufficiency of funds could have been explained; even if, in fact, SIMO's funds were insufficient, it could have been offered a period during which it could have made efforts to improve its financial situation. The failure to comply with its statute could have given rise to a notification that such failure should be rectified. Problematic content could have been addressed with a similar notification and request that future issues comply with all applicable content restrictions. Even the fact of Mavlonov's lacking a formal journalism degree could have been addressed, as noted, by requesting that he obtain such degree or that he refrain from doing content-related work.

159. We do not, for a moment, suggest that all such requests by the Press Department would have been legitimate under the Committee's jurisprudence. Our point here is simply that all of these requests had every chance of remedying the alleged defects presented by Oina without resulting in the wholesale closure of the newspaper. It follows, it is submitted, that the denial of Oina's re-registration request and its subsequent shutting down was a wholly disproportionate sanction for any of its alleged defects, and as such was unnecessary to pursue any legitimate aim. The need to try first these more modest interventions is precisely the lesson *Laptsevich* teaches.

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160. For all the foregoing reasons, the Committee should find that the failure of the Press Department to re-register Oina, and the affirmations of this decision in the courts, were not necessary in the pursuit of any legitimate aim, and therefore violated the rights of Applicant under Article 19 of the Covenant.

C. The Closure of Oina Violated Article 27 of the Covenant

161. Article 27(1) of the Covenant provides:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and to practice their own religion, or to use their own language.

162. In its General Comment on this provision, the Committee explained that this article "establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which … [individuals] are already entitled to enjoy under the Covenant".[65] It went on to note that the "protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned".[66] Finally, the Committee has emphasised that Article 27 requires State parties to employ "[p]ositive measures of protection … against the acts of the State party itself, whether through its legislative, judicial or administrative authorities …".[67]

[65] General Comment No. 23 (1994) ¶1.
[66] *Ibid.*, ¶9.
[67] *Ibid.*, ¶6.1.

163. We note, to begin with, that Applicant, as a member of the Tajik minority in Uzbekistan, enjoys the full protections of Article 27. While Tajiks actually may constitute the majority of persons in the Samarkand region, there is no question that they are a minority as compared to the Uzbek population in the country as a whole. As such, they qualify as a minority so far as the coverage of Article 27 goes. As the Committee has explained, the provisions of Article 27, as provided in Article 50, extend to all parts of Federal States. Thus, "the minorities referred to in article 27 are minorities within such a State, and not minorities within any province. A group may constitute a majority in a province [or region] but still be a minority in a State and thus be entitled to the benefits of article 27".[68]

164. While the Committee has not specifically addressed the issue of the use of a minority language press, by both editors and readers, as a means of airing issues of significance and importance to the minority community, there is very strong indication that it would find merit in the proposition that the publication and reading of minority-language newspapers which carry information relating to the minority-language education of community youth is protected under Article 27. This is because of its fundamental recognition that *essential* elements of a minority group's practices are protected particularly under Article 27. See, for example, *Länsman et al. v. Finland* (noting that "reindeer husbandry is an essential element of [the] culture" of the Sami, and adding that the consideration of whether an activity is an essential element of the culture is not a question to be decided *in abstracto*, but rather in the concrete circumstances of the case).[69] Moreover, the Committee has noted, explicitly in the Article 27 context, that *education* in a minority language is a fundamental part of minority culture: "The Committee recommends that the State party take immediate steps to guarantee the rights of individuals belonging to racial minorities … especially with regard to their access to quality … education".[70] Finally, the Committee has made it clear that the question of whether Article 27 has been violated is whether the challenged restriction has an "impact … [so] substantial that it does effectively deny to the [complainants] the right to enjoy their cultural rights in that region".[71]

165. Based on these principles, the Committee should conclude that the closure of Oina violated Applicant's rights under Article 27.

166. First, the receipt of Oina by Applicant constituted an "essential" element of his enjoyment of his culture, of which community discussion is an integral part. As has been repeatedly emphasised, Oina was the only source of community-based, non-official information of profound interest to him as a member of the Tajik community. The continuing availability of Oina, in particular, was vital to Applicant's ability to be informed of and to participate in a Tajik community discussion of the quality and continuity of cultural education for Tajik youth in Samarkand. That, it is submitted, is more than enough to conclude that the existence of Oina, given the particular Samarkand context, was an essential element of the Tajik culture, the enjoyment of which Applicant is entitled to under Article 27.

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[68] *Ballantyne et al. v Canada* (Communications Nos. 359/1989 and 385/1989 (1993), ¶11.2).
[69] *Lansman et al. v.* Finland (Communication No. 511/1992 (1994), ¶¶9.2, 9.3).
[70] Concluding Observations of the Human Rights Committee: on Brazil (24 July 1996, CCPR/C/79/Add.66, A/51/40, ¶337).
[71] *Lansman*, note 69, ¶9.5.

167. Second, the denial of Oina's re-registration application, and the resulting closure of the newspaper, substantially threatened, and continues to threaten, Applicant's and his community's continued enjoyment of their cultural rights. Because Oina was the only Tajik-language unofficial source of information relating to education, it was the only source which could provide a critical view of official education practices. To put it simply: without continuing vigilance relating to the education of the Tajik young, particularly given a resistance in the region on the part of Samarkand officials to fund Tajik schools appropriately, there would be an increasing chance that the Tajik youth would not receive adequate education, in their language, customs and ways. A failure in that educational system could not but carry with it the very real risk of a dilution in the acquaintance of Tajik youth with their culture. Such a failure, in other words, would directly threaten the vitality of the Tajik culture in the region. But threats to the culture are doubtless threats to Applicant's ability to enjoy participating in it.

168. Applicant acknowledges that not every interference with the enjoyment of one's minority culture will count as a violation of Article 27. As was argued at length in the previous section, however, no legitimate aim was served by denying Oina's re-registration request, and in any event the wholesale shutting down of the newspaper could not be conceived as necessary even if some legitimate aim were in play.[72]

169. In sum, the Committee should conclude that the closure of Oina constituted a violation of Applicant's rights under Article 27 of the Covenant.

[72] While the Committee has not developed a detailed jurisprudence for when, exactly, an interference amounts to a violation of an Article 27 right, it has implied that the analysis might be close to the pertinent analysis under Article 12, the "exception" portion of which, in Article 12(3), is substantially similar to Article 19(3). See *Lovelace v. Canada* (Communication No. R.6/24 (1981), ¶16). It would follow that an Article 19 analysis of when a restriction on an Article 27 right is permissible is probably appropriate.

VII. RELIEF SOUGHT

Applicant hereby requests that the Committee:

1) declare a violation of the Applicant's rights under Articles 19 and 27 of the Covenant;

2) declare specifically that:

a) the denial of Oina's re-registration application was not provided for by law because the "defects" in the content of Oina's articles, in its application materials, in its finances, in its statute and with Mavlonov's journalist credentials were not defects which could have been foreseen to be fatal to Oina's application;

b) the denial of the application was not provided for by law because it was an illegitimate employment of unfettered discretion by officials of the Respondent State;

c) a registration regime of the kind operated by the Respondent State, applicable to the print media, imposing substantive constraints on such media and permitting the arbitrary refusal of applications for registration and re-registration, is *per se* in violation of Article 19 because it is not in pursuit of any legitimate aim;

d) in light of the previous point, the application of the registration regime to deny Oina's re-registration application pursued no legitimate aim;

e) the denial of the application was not rationally related to, and therefore was not in pursuit of, any legitimate aim;

f) the denial of the application was not in pursuit of any legitimate aim, as shown by the pattern and practice of the Respondent State in its operation of registration regimes to shut down the publication of content of which it merely disapproved;

g) the denial of the application was not necessary in the pursuit of any legitimate aim;

h) the denial of the application constituted a violation of Applicant's right to enjoy his culture and language;

3) request the Respondent State to direct the Press Department to grant Oina's request to re-register at the earliest possible moment;

4) request that the Respondent State award Applicant compensation for the violation of his rights under the Covenant; and

5) declare that the print registration regime, as contained in the Law on Mass Media and Registration Regulations A and B, should be brought into compliance with Article 19 of the Covenant.