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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION

**ON THE COMPATIBILITY WITH UNIVERSAL
HUMAN RIGHTS STANDARDS OF AN OFFICIAL WARNING
ADDRESSED BY THE MINISTRY OF JUSTICE OF BELARUS
TO THE BELARUSIAN HELSINKI COMMITTEE**

**Adopted by the Venice Commission
at its 87th plenary session
(Venice, 17-18 June 2011)**

On the basis of comments by

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I. Introduction

1. By letter dated 9 March 2011, the Chairperson of the Political Affairs Committee of the Parliamentary Assembly requested the Venice Commission to assess the compatibility with universal human rights standards of the Warning addressed by the Ministry of Justice of Belarus to the Belarusian Helsinki Committee.
2. The Venice Commission appointed Mr van Dijk and Ms Thorgeirsdottir as rapporteurs. They worked on the basis of an English translation of the Warning (CDL-REF(2011)028) and presented their individual comments (CDL (2011)050) and (CDL(2011)051).
3. The present opinion was drawn up on the basis of the rapporteurs' comments. It was adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011).

II. Preliminary observations

4. The following opinion intends to assess the compatibility of the official Warning addressed by the Ministry of Justice to the Belarusian Helsinki Committee (see §§21-25 below for details) with "universal human rights standards".
5. The assessment of the Warning requested by the Political Affairs Committee of the Parliamentary Assembly may have relevance not only for the Belarusian Helsinki Committee and its members, but more generally for human rights defenders in the country. For that reason, the present opinion, in some aspects, gives a broader assessment of some of the relevant domestic legislation and its compliance with international standards. However, it does not provide an analysis of the legislation or of the state of human rights in the country in general, as this would exceed the scope of the Parliamentary Assemblies' request.
6. For completion of the assessment, the rapporteurs used also the national legal internet portal of the Republic of Belarus: <http://law.by/>.
7. In many respects the issues raised by the request from the Chair of the Political Affairs Committee are similar, *mutatis mutandis*, to the ones raised by the request concerning a Warning addressed by the Ministry of Justice to the Belarusian Association of Journalists on 13 January 2010, which led to an opinion by the Venice Commission, adopted at its 85th Plenary Session (CDL-AD (2010) 053rev).

III. Background information and facts

A. The Belarusian Helsinki Committee

8. The Belarusian Helsinki Committee (hereafter BHC) was established in 1995 and is the sole remaining, registered independent human rights group in Belarus.¹ In many European countries, non-profit organisations exist that are called Helsinki Committees, are devoted to human rights and presumably are named after the Helsinki Accords: the Final Act of the Conference on Security and Co-operation in Europe held in Helsinki, Finland in 1975.
9. The BHC is a member of the International Helsinki Federation, which has consultative status both with the United Nations and the Organisation for Security and Co-operation in Europe.²

¹ Belarus: Threat to Close Lone Human Rights Group". *Human Rights Watch*. 2007-01-31. Retrieved 2007-07-09. http://www.delvie.ec.europa.eu/en/eu_osce/eu_statements/2007/Jan-May/EU%20statement%20on%20the%20Belarus%20Helsinki%20Committee.pdf

² <http://humanrightshouse.org/Articles/8679.html>.

10. The Charter of the BHC was adopted at its founding meeting 11 October 1995. Amendments and additions to the Charter (the Charter in a new wording) were registered by the Ministry of Justice of the Republic of Belarus on 23 January 2006.³

11. According to its Charter the BHC is a self-supporting, independent, non-commercial human rights public association, which acts on the basis of self-ruling and unites citizens of the Republic of Belarus on the basis of community interests. In its activities, it is independent from governmental and economic entities, and political and public organisations. Relationships with those entities and organisations are based on partnership, dialogue and co-operation.

12. According to Article 2 of the its Charter, the aim of the BHC is to defend human rights in Belarus as guaranteed by the Constitution of the Republic of Belarus and the current legislation, and as declared by the Helsinki Agreements and other international treaties on human rights, and to inform the broad public about the situation of human rights in Belarus and the world.

13. The subject matter of the activities of the BHC is to assist the State and public institutions in the strengthening and development of human rights, to monitor the respect thereof, and to assist in defence of citizens' rights and interests.

14. The Council of Europe introduced partnership status for national non-governmental organisations in 2003, in order to emphasize the role of certain NGOs in implementing the international human rights body's programme of action. The BHC was granted the status of Council of Europe partner organisation in 2008.

15. According to the Parliamentary Assembly of the Council of Europe's report on the state of human rights and democracy in Europe, there were attempts in 2006 to close down the Belarusian Helsinki Committee, the last remaining independent human rights organisation legally registered in the country.⁴

B. The activities of the Belarusian Helsinki Committee that gave cause to the Warning of Ministry of Justice

16. On 12 January 2011, the BHC sent a statement in English by e-mail to the Special Rapporteur of the United Nations on the Independence of Judges and Lawyers (hereinafter: the Special Rapporteur) that gave cause to the Warning.

17. In its communication to the Special Rapporteur, the BHC referred to the event on 19 December 2010, when the riot police dispersed a mass rally at Independence Square in Minsk, where 10-20,000 persons were protesting against the incumbent president and against alleged falsifications during the presidential election. The communication stated that 700 persons had been detained and served 10-15 days of administrative arrest, or had been fined for the participation in the rally for which no permission had been given. Besides, 5 presidential candidates and a dozen of their supporters had been arrested and later charged under article 293 of the Criminal Code (organisation of mass riot or participation in it).

18. In its statement, the BHC said that arrested persons were not allowed to meet their advocates in private, while the Minsk City Department of the Interior prohibited advocates from disseminating any information that might challenge "secrecy of investigation" and threaten to bring those who did not abide to criminal responsibility.

19. The statement also revealed that the Ministry of Justice had disseminated information on 29 December 2010 holding advocates responsible for abusing their rights. The BHC stated that

³ No. 26 Registration Certificate No. 00529.

⁴ Doc 11202, 28 March 2007, Report Committee on Legal Affairs and Human Rights.

it had information about intimidation of advocates providing legal assistance to those who were charged with organizing mass riot or participating in it, but could not disclose it, as these advocates were under the risk of losing their licenses in case the fact of disclosure of this information would become known to the authorities. The BHC provided examples where the Ministry of Justice had issued orders to advocates to fix disclosed information that they had given to the media, requesting them “to take measures to prevent facts of distorting information and to inform the Ministry about implementation of this order by 15 January 2011; otherwise the licence for advocate activities will be recalled”.

20. Finally, the BHC recalled the visit of the Special Rapporteur to Belarus in 2000, who noted “excessive executive control of the legal profession, particularly by the Ministry of Justice”, which “undermines the core values of an independent legal profession and the Basic Principles on the Role of Lawyers. Such control leads to abuses, resulting in allegations of harassment, intimidation and interference by the executive”. The BHC finally stated that the situation in Belarus in this sphere had not changed since 2000 at all.

C. The Warning of the Ministry of Justice of Belarus to the Belarusian Helsinki Committee

21. The Ministry of Justice of the Republic of Belarus issued a written Warning to the BHC on 12 January 2011, the day after the BHC had sent the above mentioned communication to the Special Rapporteur. The Warning stated that the said communication was “an attempt to discredit the Republic of Belarus in the eyes of the international community”.

22. In its Warning, the Ministry of Justice stated that the BHC communication contained unsubstantiated allegations of falsifications said to have taken place during the presidential elections and that it provided a tendentious account of arrests brought by the prosecution service against organiser of the riots on 19 December 2010. It also indicated that there was no truth in claims that lawyers providing legal assistance to persons accused of organising or taking part in protests were intimidated.

23. The Ministry of Justice accused the BHC of violating the Information Act of Belarus by disseminating inaccurate information discrediting the law enforcement agencies and judicial bodies of the Republic of Belarus.

24. Furthermore, according to the Ministry of Justice, BHC had infringed the Civil Code of Belarus by having used its international abbreviation and not the name of the organisation displayed according to its statutes in the heading of the document.

25. In light of the alleged infringements of the Law on Public Associations and the Law on Information, Information Technology and Protection of Information, as well as of the statutes of the BHC, the Ministry of Justice ordered:

1. That a written Warning be issued to the RHRNGO “BHC”;
2. That the RHRNGO “BHC” be required to:
 - 2.1. Draft and despatch a letter to the same addressee as for the statement, within two days, requesting the return of that document on account of the non-objective, incomplete and inaccurate information contained therein (evidence of this requirement having been met to be presented to the Ministry of Justice within two days after the letter is despatched to the addressee);
 - 2.2. Within one week:
 - 2.2.1. Hold a meeting of the governing body at which steps are to be taken to ensure that there are no further breaches of the law or of the statutes of the RHRNGO “BHC”, and also to hold to account those individuals who are guilty of the breaches referred to in the order. A copy of the minutes of this meeting is to be submitted to the Ministry of Justice by 24.01.2011;

- 2.2.2. What remains of the print run of the forms and stamps mentioned in this order is to be destroyed, and copies of relevant records are to be submitted to the Ministry of Justice by 24.01.2011.
3. A copy of this order is to be despatched to the governing body of the RHRNGO "BHC" for implementation.

D. Subsequent events

26. According to a letter of 21 February 2011, from several international human rights organisations to the permanent representatives of all member states of the UN Human Rights Council,⁵ most of those arrested during the mass demonstration against the presidential election outcome were not allowed to contact their families or a lawyer. No less than 700 people were arrested. Human Rights Watch research in Belarus has corroborated these findings.⁶ Several of those arrested have now been brought to court, have faced unsubstantiated charges and have received extreme sentences.⁷

27. In the months that followed the presidential election the crackdown continued in a more targeted way.⁸ At least 30 political opposition members, including three presidential candidates, remained in custody facing riot charges. If convicted, they face up to 15 years of imprisonment.

28. The authorities have not allowed the detainees to have private, confidential access to their lawyers. Some lawyers spoke up and tried to draw the attention of the civil society and the media to these facts. The Ministry of Justice asked the Minsk City Bar Association to revoke licenses of several defence lawyers working on these cases who had voiced concerns about the well-being or detention conditions of their clients.⁹ Six lawyers have been disbarred since December 2010.

29. A new report of harassment of lawyers in Belarus was submitted to the Special Rapporteur on 18 February 2011¹⁰ and again on 4 March 2011 from Belarusian human rights groups.¹¹ The senders asked the Special Rapporteur to respond to their e-mail as soon as possible and take all possible actions within the framework of her mandate. In cases where the alleged violations are time-sensitive in terms of involving loss of life, life-threatening situations or imminent on-going damage of very grave nature to victims, the Special Rapporteur usually sends an urgent appeal to the Government concerned. As a general rule, both urgent appeals and letters of allegation remain confidential until published in the report of the Special Rapporteur to the Human Rights Council.¹²

30. There have been numerous reported cases of intensified restrictions of general activities of human rights defenders and activists. Such persons have been harassed and repeatedly questioned by law-enforcement officers. Private homes of leading members of human rights groups have been searched, Warnings issued against individuals and organisations, and computers and data storage devices confiscated.¹³

⁵ The Human Rights Council is an inter-governmental body within the UN system made up of 47 States responsible for strengthening the promotion and protection of human rights around the globe. The Council was created by the General Assembly on 15 March 2006 with the main purpose of addressing situations of human rights violations and make recommendations on them. On 18 June 2007, the Human Rights Council adopted Resolution 5/1, by which a new complaint procedure was established to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances.

⁶ <http://www.civilrightsdefenders.org/downloads/110222BelarusletterforHRC1.pdf>

⁷ Council of Europe Commissioner for Human Rights, Ref. CommHR 001 (2011), 25.05.2011.

⁸ Parliamentary Assembly Council of Europe, Doc. 12494, 25 January 2011.

⁹ <http://www.civilrightsdefenders.org/downloads/110222BelarusletterforHRC1.pdf>

¹⁰ <http://prava-by.info/en/archives/1983>

¹¹ <http://spring96.org/en/news/41620>

¹² A/HRC/11/41/Add.1, 19 May 2009 – The Report of the Special Rapporteur on the Independence of judges and lawyers contains descriptions of inhuman treatment of prisoners in Belarus who did not have access to a lawyer during any stage of the criminal process including during the trial. See page 30.

¹³ Parliamentary Assembly Council of Europe, Doc. 12494, 25 January 2011.

31. The offices of the BHC, the workplace of the Human Rights Centre "Viasna" and offices of independent media have been searched. Due to the fact that carrying out work for unregistered organisations is unlawful, many NGO activists are vulnerable for criminal prosecution for their work.¹⁴

32. The International community reacted vividly to all these events. The European Union has extended several times its Belarusian sanctions blacklist.¹⁵ The Parliamentary Assembly of the Council of Europe has issued several reports and calls in response to the repression of opposition activists in the wake of the events on 19 December 2010¹⁶. The Council of Europe's Commissioner for Human Rights published a comment on 25 May 2011 on the persecution of Human rights Defenders.¹⁷

E. The Supreme Court's dismissal of the Belarusian Helsinki Committee complaint

33. The Supreme Court of Belarus, in a decision of 12 March 2011, dismissed the appeal of the Belarusian Helsinki Committee, which had asked the Court in a complaint of 4 February 2011:

- 1) To recognize the present Complaint justified, and to declare the actions of the Ministry of Justice of the Republic of Belarus of issuance of Order No. 18 of 12.01.2011 on passing a written Warning, as illegitimate and encroaching on the rights and legal interests of the NHRPA "Belarusian Helsinki Committee";
- 2) To oblige the Ministry of Justice to cancel the challenged Order as illegitimate;
- 3) To collect from the interested entity, in favour of the NHRPA "BHC", 35,000 roubles of return of the State duty.

34. The Supreme Court stated in its decision that it had "evaluated the proofs presented by the Ministry of Justice (the official translation of the BHC communication addressed to the Special Rapporteur, copies of publications on the websites of the Ministry of Justice and the NHRPA "Belarusian Helsinki Committee", copies of the prescriptions made to lawyers Sapelko, P. V., and Sidorenko, T. A., responses to the prescriptions to eliminate the detected violations, and the message of the Prosecutor's Office of the city of Minsk of February 22, 2011), and had found that the information contained in the application addressed to the Special Rapporteur was not quite complete and objective".

35. Furthermore, the Supreme Court stated: "The court has established a systematic use by the Public Association in its activities of its name, which does not correspond to the Charter. The fact of using the out-dated stamp for marking the mail correspondence was not disputed also by the representatives of the Public Association themselves. These violations of the Law of the Republic of Belarus "On Public Associations" make independent grounds for application of liability measures".

¹⁴ http://www.hrw.org/en/node/97152/section/7#_ftn89

¹⁵ http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/122172.pdf

¹⁶ PACE Political Affairs Committee condemns the prosecution of political opponents http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=6705; PACE President calls on the authorities to cease the continuous harassment of political opponents http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=6633; PACE relations with Belarus authorities to stay frozen http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=6539; PACE rapporteur on Belarus condemns continuing political repression http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=6411; PACE calls for the immediate release of detainees and maintains its suspension of special guest status http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=6305.

¹⁷ http://commissioner.cws.coe.int/tiki-view_blog_post.php?blogId=1&postId=140

36. The Supreme Court decided to reject the Belarusian Helsinki Committee's claim for satisfaction.

The decision came in force immediately after its announcement and is neither subject to appeal nor to appeal in cassation.

37. BHC challenged the decision of the Supreme Court before the President of the Supreme Court. The President delivered its decision on 27 June 2011 and dismissed the appeal.

38. It is to be noted that, if the Ministry of Justice issues two other Warnings for the same offence within a year, the association may be liquidated.

IV. Relevant constitutional provisions and relevant domestic legislation in relation to the Warning

A. Constitutional provisions

39. According to Articles 2 and 3 of the Constitution of the Republic of Belarus, the individual's rights and freedoms are the supreme goal and value of society and the State. The State shall assume responsibility before the citizen to create the conditions for free and dignified development of his personality. The people are the sole source of State power and the repository of sovereignty in the Republic of Belarus.

40. In its Article 7, the Constitution provides that the State and all bodies and officials shall operate within the confines of the Constitution and national law.

41. Section II of the Constitution deals with individual rights. It puts a positive obligation on the State to guarantee the rights and freedoms of the citizens of Belarus that are enshrined in the Constitution and laws, and specified by the State's international obligations. Article 21 provides that "safeguarding the rights and freedom of citizens of the Republic of Belarus shall be the supreme goal of the State".

42. Article 22 provides that everyone is equal before the law and shall have the right to equal protection of his/her rights and legitimate interests without any discrimination.

43. According to Article 23, "restriction of personal rights and freedoms shall be permitted only in the instances specified by law, in the interests of national security, public order, protection of the morals and health of the population as well as rights and freedoms of other persons. No one may enjoy advantages and privileges that are contrary to law".

44. Article 33 of the Constitution guarantees everyone freedom of thought and belief, and free expression. No one shall be forced to express his/her beliefs or to deny them. No monopolisation of the mass media by the State, public associations or individual citizens and no censorship shall be permitted.

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

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

47. The State is under the obligation to take all measures at its disposal to establish the domestic and international order necessary for the full exercise of the rights and freedoms of the citizens of the Republic of Belarus that are specified by the Constitution, as stipulated in Article 59. Furthermore, State bodies, officials and other persons who have been entrusted to exercise State functions shall, within their competence, take the necessary measures to implement and protect personal rights and freedoms. These bodies and persons shall bear responsibility for the actions violating the rights and freedoms of the individual.

48. Finally, according to Article 8 of the Constitution, the Republic of Belarus shall recognise the supremacy of the universally acknowledged principles of international law and ensure that its laws comply with it.

B. The Law on Public Associations

49. According to Article 5 of the Law on Public Associations No. 3252-XII of October 4, 1994, amended as of January 4, 2010 (hereinafter PAA), public associations shall carry out their activities in accordance with the Constitution of the Republic of Belarus, the Act and other legislative enactments and on the basis of their own constituent instruments.

50. Article 1 of the PAA defines a public association as “a voluntary association of citizens associated, in the order established by the legislation, on the basis of common interests for joint exercise of civil, social, cultural and other rights.”

51. According to Article 2 of the PAA, citizens of the Republic of Belarus have the right to establish, on their own initiative, public associations and to join and operate within public associations. According to Article 5, public associations are to be established and operated in accordance with the Constitution of the Republic of Belarus, the present law, and other acts of legislation on the basis of their constituent documents. According to Article 11, legal persons cannot be members of public associations. The rights of public associations are listed in Chapter 2 and Chapter 4 of the PAA. According to Article 20 of the PAA, public associations have the right to create their own mass media and carry out publishing activity in the order established by law.

52. Article 27 provides that, in the case of violation by a public association of the Constitution of the Republic of Belarus, the present law, other acts of legislation and/or constituent documents, except for the cases when violation entails the liquidation of the public association by the decision of a court, the appropriate registering body issues a written caution to the public association. The public association is obliged to inform the registering body in writing about the elimination of violations which have given ground for the issuance of the written caution and present confirming documents not later than three day term after the expiration of the term for the elimination of the violations stated in the written caution. The written caution may be appealed against to the Supreme Court of the Belarus within a month after its receipt.

53. According to Article 28 of the PAA, the activities of a public association having received an official Warning may be suspended for one to six months by the decision of a court, upon an application of the Ministry of Justice if the public association fails to adhere to the order within one month. The decision to suspend the activity of international and republican public associations or unions is taken by the Supreme Court of the Republic of Belarus upon application of the Ministry of Justice.

54. Article 29 provides for the liquidation of a public association in cases enlisted in the provision, among them if a violation occurs within a year after delivery of a written caution. The liquidation decision belongs to the Supreme Court upon application of the Ministry of Justice.

55. According to Article 30, public associations may join international public associations.

C. The Media Act

56. The Ministry of Justice accused the BHC of violating the laws governing NGOs and the media by distributing false information that does not correspond to reality.

57. The Warning refers to Article 4 of the Media Act No. 427-Z of July 17, 2008 regarding basic principles of mass media activities which entail truthfulness of information. According to its provisions, mass media shall disseminate information which corresponds to reality. In addition, information may not contradict the requirements of the legislation of the Republic of Belarus.

58. The Media Act applies to mass media having a periodic character and intended for an uncertain number of persons. According to Article 3 of the Media law, it covers mass media and "analogues of printed, television and broadcasting mass media disseminated through the global computer network Internet". It is hence questionable to refer to the Media Act in relation to the statement sent by the BHC to the UN Special Rapporteur in an e-mail.

59. Article 13 of the Media Act provides that mass media are subject to state registration, with the exception that no state registration is required for the mass media specifically established by the state bodies and other state organisations only for dissemination of their official reports.

V. Obligations of the Republic of Belarus to guarantee and respect fundamental human rights

60. Belarus is a party to the International Covenant on Civil and Political Rights and the First Optional Protocol thereto, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on All Forms of Discrimination against Women and the Optional Protocol thereto, and the Convention on the Rights of the Child. Belarus has assumed obligations and duties under international law by ratifying these treaties.

61. These international instruments contain the obligation to either respect, protect and fulfil human rights. The obligation to respect means that the State must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.

62. The human rights obligations under scrutiny here, for the member States of the Council of Europe and for the member States of the United Nations, flow principally from the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), respectively.

63. The Republic of Belarus is under the obligation to guarantee the rights and freedoms enshrined in its Constitution and laws of those under its jurisdiction, in line with its international obligations. As it is stated in the Preamble of the International Covenant on Civil and Political Rights, "in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone enjoys his civil and political rights."

64. The Republic of Belarus, which ratified the ICCPR on 12 November 1973, is also under the obligation to undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, without distinction of any kind including political and other opinion, as stated in Article 2 of the ICCPR.

65. Moreover, the Republic of Belarus is under the obligation to ensure that any person whose rights or freedoms are recognized under the ICCPR, have access to an effective remedy,

notwithstanding that the violation has been committed by persons acting in an official capacity (Article 2 (3)).

66. In addition, the Venice Commission points out that, although the Republic of Belarus is not yet a party to the ECHR, its standards are relevant for assessing the warrant, since Belarus wishes to become a member of the Council of Europe and, if admitted, will have to ratify the ECHR.

VI. The Warning in light of the freedom of association

67. Freedom of association is considered as essential to the effective functioning of a democracy. Consequently, any restriction of this right must meet strict tests of justification. It is protected under Article 22 of the ICCPR and Article 11 of the ECHR.

68. Article 22 of ICCPR reads as follows:

“1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.”

69. The protection afforded by Article 22 of the ICCPR, extends to all organisational and operational activities of an association. In the view of the Human Rights Committee, for the interference with freedom of association to be justified, any restriction on this right must cumulatively meet the following conditions: (a) it must be provided by law; (b) it may only be imposed for one of the purposes set out in paragraph 2; and (c) it must be “necessary in a democratic society” for achieving one of these purposes.

70. The reference to the notion of “democratic society” indicates, in the view of the Human Rights Committee, that the existence and operation of associations, including those which peacefully promote ideas not necessarily favourably received by the government or the majority of the population, is a cornerstone of a democratic society.¹⁸

71. Article 11 ECHR reads as follows:

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

72. According to Article 11 of the ECHR and the case law of the European Court of Human Rights (hereafter ECtHR), the right to freedom of association not only guarantees the right to

¹⁸ Cf., CCPR communication no. 1296/2004, *Aleksander Belyatsky et al. V. Belarus*, views of 24 July 2007.

form and register an association, but also includes those rights and freedoms that are of vital importance for an effective functioning of the association to fulfil its aims and protect the rights and interests of its members; the freedom of association presupposes a certain autonomy.¹⁹

73. Moreover, no restrictions may be placed on the exercise of the rights of associations to protect their rights "other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, the protection of public health or morals or the protection of the rights and freedoms of others." Restrictions on the freedom of association are to be construed strictly; only convincing and compelling reasons can justify restrictions on the freedom of association.²⁰

74. In the opinion of the Venice Commission, grounding liability measures –as the Warning does- on the fact that, in its statement to the Special Rapporteur, the BHC used its international abbreviation, and not its legal/organisational form, as mentioned in its statutes, would not meet these criteria.

75. The Venice Commission is of the opinion that the Warning by the Ministry of Justice is not proportionate with any of the purposes justifying restriction under the international human rights obligations that the Belarusian authorities are bound by. Indeed, the reason invoked by the authorities, *viz.* the use of the heading of the BHC's name in the statement, did not concern a pressing social need and was hence not relevant or sufficient for interfering in this manner.²¹

76. It lies at the heart of the freedom of association that an association may issue statements and disseminate information that relates to its purposes and functions. Additionally, the Warning constitutes a severe intrusion upon the right of the BHC to organise its own activities. Restrictions on these activities must be provided by law and pursue a legitimate aim, *in casu* the prevention of disorder and/or the protection of the rights and freedoms of others.

77. The Venice Commission stresses in that respect that for an association like the BHC, engaged in human rights and in the promotion of democracy the ability to speak freely, to raise awareness and to engage in advocacy is fundamental in order to fulfil its mission.

78. The Warning refers to the fact that the BHC has not acted in conformity with the law and its statutes. The Ministry of Justice, moreover, orders the BHC to hold a meeting of its governing body and lists which steps are to be taken to ensure that there are no further breaches of the law or its statute, and finally to hold to account those individuals who are responsible for these breaches.

79. With regard to its legal basis, in the Venice Commission's opinion the Warning is based on a broad interpretation of vague legal provisions, which in itself constitutes a violation of the requirement of a transparent legal basis for interference.²²

80. Furthermore, the interference does not meet, in the opinion of the Venice Commission, the requirements of a "pressing social need" and of proportionality in the sense of Article 22 of the CCPR²³ and of Article 11 of the ECHR.

81. The character of the Warning's allegations and the activities to which they relate (expression of opinion and dissemination of information), constitute, in the opinion of the Venice Commission, an unlawful interference with the BHC's freedom of association, even if provided by law and motivated by a concern to prevent disorder.

¹⁹ See, e.g., with respect to trade unions, ECtHR, *National Union of Belgian Police v. Belgium*, No. 4464/70, Judgment of 27 October 1975, § 39.

²⁰ ECtHR, *Gorzelik and Others v. Poland*, No. 44158/98, Judgment of 17 February 2004

²¹ ECtHR, *Koretsky and Others v. Ukraine*, no. 40269/02, No. 107, Judgment of 3 July 2008

²² ECtHR, *Koretsky and Others v. Ukraine*, no. 40269/02, No. 107, Judgment of 3 July 2008

²³ Cf., CCPR communication no. 1296/2004, *Aleksander Belyatsky et al. V. Belarus*, views of 24 July 2007.

82. In the opinion of the Venice Commission, the Ministry of Justice's Warning has, moreover, undeniably a chilling effect on the BHC's ability to fulfil its mission, to have an impact on public opinion, to challenge governmental policy and advocate for human rights.

VII. The Warning against the Belarusian Helsinki Committee in light of freedom of expression

83. Freedom of expression is a cornerstone of democratic rights and freedoms. Freedom of expression is essential in enabling democracy to work and for public participation in decision-making.

84. Article 19 of the ICCPR provides that:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, 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 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.

85. Paragraph 1 requires protection of the "right to hold opinions without interference". This is a right to which the Covenant permits no exception or restriction.²⁴ Protecting opinion separately emphasises the significance of forming an opinion without any kind of interference.

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

87. Article 10 of the European Convention of Human Rights reads:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

88. As the European Court of Human Rights has emphasised repeatedly, freedom of expression is one of the most important issues and one of the key pillars of a functioning democracy.²⁵

²⁴ General Comment No. 10: Freedom of Expression (Art. 19) 29/6/83.

²⁵ See CDL-AD (2010) 053 rev, § 60

89. The ECtHR case law provides that freedom of expression “constitutes one of the essential foundations of democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. Subject to legitimate restrictions it is applicable not only to ‘information’ or ‘ideas’ that are received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”²⁶

90. The scope of these two articles includes multiple activities relating to disseminating information. The BHC has, as one of its main purposes, to collect and disseminate information about the human rights situation in the Republic of Belarus. The BHC exercises the association’s right to impart information of all kinds, regardless of frontiers, in writing as it did through any media of its choice. That purpose in itself is fully legitimate.

91. The BHC communication to the Special Rapporteur concerns alleged infringements of the freedom of assembly, freedom of expression and the right to freedom of the person of hundreds of persons who protested against the way the presidential elections had taken place and against their outcome. It also concerns restrictions of their access to court and to legal aid. That the demonstrations and protests were not welcome to the Belarus authorities, in particular the incumbent president, in itself did not constitute a justification for dispersing the rally concerned, arresting participants and restricting their free access to their lawyers.

92. But even if, in the end, the conclusion would be that the interferences *were* justified under the international human rights standards, that would not mean that the BHC did not have the right to challenge them and bring them to the attention of the Special Rapporteur.

93. Indeed, the European Court of Human Rights has held that “freedom of expression (. . .) is also applicable to information or ideas which offend shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society”.²⁷ In a landmark judgment on press freedom of 1979 the European Court of Human Rights set forth the following general principle: “not only do the media have the task of imparting [such] information and ideas: the public also has a right to receive them.”²⁸

94. The most obvious role for NGOs dedicated to the protection of human rights is supplying information on the implementation and non-implementation of human rights treaties. The BHC as a defender of human rights has an essential watchdog role. In the opinion of the Venice Commission, its activities when imparting information should be protected in the same way as the press.²⁹ The BHC must be able to exercise its freedom of expression to attain the objectives of calling attention to wrong doings. The protection of human rights in any society is not effective unless those defending them can contribute to the public debate.

95. The Committee of Ministers of the Council of Europe, in a declaration on the freedom of political debate in 2004, reaffirmed the pre-eminent importance of freedom of expression and information for guaranteeing the right of the public to be informed on matters of public concern and to exercise public scrutiny over public and political affairs, as well as for ensuring accountability and transparency of political bodies and public authorities, which are necessary in a democratic society, without prejudice to the domestic rules of member states concerning the status and liability of public officials.³⁰

96. The BHC described in its statement to the Special Rapporteur that the whole advocate community in Belarus was being harassed by the Ministry of Justice and that lawyers were

²⁶ ECtHR, *Lingens v. Austria*, No. 9815/82, *Judgment of 8 July 1986*, § 41.

²⁷ ECtHR, *Handyside v. the United Kingdom*, No. 5493/72, *Judgment of 7 December 1976*.

²⁸ ECtHR, *Sunday Times v. the United Kingdom*, No. 6538/74, *Judgment of 26 April 1979*, § 65.

²⁹ ECtHR, *Társaság a Szabadságjogokért v. Hungary*, No. 37374/05, *Judgment of 14 July 2009*.

³⁰ Council of Europe Committee of Ministers’ Declaration on freedom of political debate in the media, adopted by the Committee of Ministers at the end of the 872nd meeting of the Ministers’ Deputies.

facing an immediate risk to see their licenses suspended if they would give their legal assistance to those arrested.

97. The content of the communication concerned a subject vital to the general interest of the people in Belarus. It touched upon the fundamental rights of access to justice about which the BHC was fully entitled to impart information. The Venice Commission is of the opinion that the communication can clearly be referred to as political speech, which under European Convention jurisprudence enjoys the highest protection of any kind of expression.³¹

98. The Ministry of Justice stated in its Warning that the information that the BHC disseminated was “unsubstantiated”, “deliberately misrepresented”, that there was “no truth” to the claims that lawyers providing legal assistance are “intimidated” (which is a value based opinion) and that the statement “fails to reflect the views” of others. The Supreme Court in Belarus confirmed the legality of the Warning by stating that the information contained in the BHC communication to the Special Rapporteur was “not quite complete and objective”.

99. Interference with freedom of expression is permissible only if it is prescribed by law and pursues a legitimate aim. The impugned measure must also be “necessary in a democratic society” in order to fulfil that aim (Article 10 ECHR).

100. Likewise, according to Article 19 of the ICCPR which reads essentially the same as Article 10 of the ECHR, no restrictions may be placed on the exercise of the rights unless provided by law and necessary for the respect of the rights or reputations of others; for the protection of national security or of public order, or of public health or morals.

101. According to the Ministry of Justice, the interference was justified as the communication was regarded as defamatory of the authorities in Belarus: “inaccurate information was disseminated, discrediting the law enforcement agencies and judicial bodies of the Republic of Belarus”.³²

102. The Venice Commission acknowledges that authorities may interfere with the right to disseminate information (Art. 19 (3) ICCPR and Art. 10 (2) ECHR) to protect the reputation of others, which is expressly protected as part of the right to privacy (Art. 17 (1) ICCPR and Art. 8 (1) ECHR)³³. Nevertheless, this does not include the protection of the reputation of the authorities themselves, all the more since the contribution of NGOs to the public debate is an essential aspect of democratic society.

103. It would be fatal for freedom of expression if political authorities could censor the public watchdog and public debate by contending that their opinions on matters of public interest were an attack on their reputation. The Special Rapporteur has reiterated that “the provisions on protection of reputation contained in international human rights law are designed to protect individuals, not abstract values or institutions.”³⁴

104. Authorities are expected to tolerate greater criticism to counteract the abuse of power.³⁵ The European Court of Human Rights has reiterated that there is little scope under Article 10 (2) of the ECHR for restrictions on debate on questions of public interest.³⁶ In a democratic system the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The public

³¹ Herdís Thorgeirsdóttir, *Journalism Worthy of the Name* – Martinus Nijhoff Publishers; Leiden; Boston; 2005.

³² The current Criminal Code of the Republic of Belarus of 15.12.2007, No. 71-3 contains severe provisions regarding defamation and insult at Articles 188, 189, 367, 368 and 369, came into force in January 2005 – (http://spring96.org/files/book/doklad_en.pdf). See also Article 19 comment: <http://www.article19.org/pdfs/analysis/belarus-defamation-provisions.pdf>

³³ Cf., Manfred Nowak, p. 353

³⁴ Ambei Ligabo, Report of the Special Rapporteur on the Promotion and Protection of the Right to freedom of opinion and expression, February 28, 2008. See: <http://www.icnl.org/knowledge/globaltrends/glotrends1-3.pdf>

³⁵ ECtHR, *Lingens v. Austria*, No. 9815/82, *Judgment of 8 July 1986*, § 42

³⁶ ECtHR, *Süreç v. Turkey* (no. 1) [GC], No. 26682/95, *Judgment of 8 July 1999*, § 61

interest in particular information can sometimes be as strong as to override even a legally imposed duties.³⁷

105. Considering the nature of the duties and responsibilities of the Belarus Helsinki Committee under its statute, the scope of interference of the State with the right to impart information on alleged violations of fundamental rights is consequently very limited.³⁸

106. With regard to the content of BHC's statement, it is worth mentioning that exaggeration is usually tolerated when much is at stake.³⁹ The terms used in BHC's communication were not offensive or insulting and the issues raised were clearly of public interest.

107. The assertion that lawyers in Belarus are being intimidated by authorities is a value-judgment based on facts. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof. As the European Court of Human Rights has stated in this regard: "a requirement of proof with regard to value-judgments infringes the freedom of opinion itself, which is a fundamental part of the right to freedom of expression".⁴⁰

108. Moreover, the motive of the BHC's reporting to the Special Rapporteur is a determining factor when evaluating the protection it enjoys – even if there had been inaccurate details regarding content or form of communication. It is the Venice Commission's conviction that the BHC acted in good faith and in the belief that it was in the public interest to report on the alleged human rights breaches taking place in Belarus.⁴¹

109. Authorities in Belarus contested the authenticity of the information that the BHC sent to the Special Rapporteur. It is then open to them to react appropriately and without excess to what they perceive as defamatory accusations devoid of foundation or formulated in bad faith.⁴²

110. In the opinion of the Venice Commission, the grounds invoked to justify issuing the Warning directed at the BHC do not stem from a pressing social need in a democratic society; they are disproportionate and the reasons adduced are not relevant or sufficient.

111. Indeed, interfering with the rights of the BHC must be directed to a legitimate aim. The Venice Commission considers that the authorities have not adequately shown that they are genuinely seeking to achieve one or more of the legitimate objectives in the qualifying paragraphs relevant to freedom of expression.

112. Furthermore, it is worth recalling the Constitution of Belarus according to which it is the State's duty to create the conditions for the citizens of Belarus in accordance with their rights and freedoms. In this regard, instead of reprimanding the NGO for informing and sending out a communication about serious human rights violations (such as access to justice and to lawyers for demonstrators), the authorities ought to have initiated investigations into these allegations in order to seek whether impediments to the fundamental and constitutional right⁴³ to access to justice and legal assistance, for instance, had occurred.

³⁷ ECtHR, *Fressoz and Roire v. France*[GC], No. 29183/95, Judgment of 21 January 1999, and ECtHR *Radio Twist, A.S. v. Slovakia*, No. 62202/00, Judgment of 19 March 2007

³⁸ ECtHR, *Guja v. Moldova*, No. 14277/04, Judgment of 12 February 2008

³⁹ ECtHR, *Jersild v. Denmark*, No. 15890/89, *Judgment of 23 September 1994*

⁴⁰ ECtHR, *Lingens v. Austria*, No. 9815/82, *Judgment of 8 July 1986*, § 46.

⁴¹ ECtHR, *Guja v. Moldova*, No. 14277/04, Judgment of 12 February 2008, § 77.

⁴² ECtHR, *Castells v. Spain*, No. 11798/85, Judgment of 23 April 1992, § 46.

⁴³ Article 62 of the Constitution of Belarus

VIII. Conclusions

113. As the Venice Commission stated in its opinion on a Warning directed by the Ministry of Justice to the Belarusian Association of Journalists⁴⁴, Belarus as a party to the ICCPR is under legally binding obligations to respect and protect fundamental civil and political rights such as freedom of expression (Article 19), freedom of association (Article 22) and all other rights laid down in the Covenant.

114. As a candidate country for membership of the Council of Europe and an associate member of the Venice Commission, the European Convention case-law is a relevant frame of reference to assess if the contested conduct by Belarus public authorities is in conformity with European human rights standards and the international human rights treaties that Belarus has ratified.⁴⁵

115. The rights to freedom of expression and of association are of paramount importance in any democratic society and any restriction of these must meet a strict test of justification.⁴⁶

116. By contesting the BHC communication to the Special Rapporteur and its content and by trying to interfere in the organisation and activities of the association, the Ministry of Justice's Warning has infringed the right of association and of expression of the BHC.

117. The Venice Commission considers that the grounds invoked to justify issuing the Warning directed at the BHC do not stem from a pressing social need in a democratic society. They are disproportionate and the reasons adduced are neither relevant nor sufficient.

118. Hence, in the opinion of the Venice Commission, the Warning of the Ministry of Justice constitutes a violation of Articles 19 and 22 of the ICCPR and 10 and 11 of the ECHR.

119. Moreover, the Venice Commission considers that the chilling effect of the Warning directed against the BHC, jeopardises not only the registered statute of the BHC but also affects the status of all human rights defenders in the Republic of Belarus. More generally, it puts an unlawful threat on public criticism and political debate on human rights.

120. The Venice Commission recalls that the international human rights obligations of the Republic of Belarus not only demand that the authorities respect the rights of dissident voices but also that they protect civil society organisations and their members in doing their duty of promoting universal human rights standards.

⁴⁴ CDL-AD(2010)053rev.

⁴⁵ CDL-AD (2010) 053rev.

⁴⁶ See CDL-AD (2010)053 rev, §105.