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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

BELARUS

OPINION

ON THE COMPATIBILITY WITH EUROPEAN STANDARDS OF CERTAIN CRIMINAL LAW PROVISIONS USED TO PROSECUTE PEACEFUL DEMONSTRATORS AND MEMBERS OF THE "COORDINATION COUNCIL"

Adopted by the Venice Commission at its 126th online Plenary Session (19-20 March 2021)

on the basis of comments by

Ms Claire BAZY MALAURIE (Member, France)
Ms Herdis KJERULF THORGEIRSDOTTIR (Member, Iceland)
Mr Martin KUIJER (Substitute Member, Netherlands)

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I. Introduction

1. By letter of 21 December 2020, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (PACE), on proposal of its Rapporteur on *"Human rights violations in Belarus require an international investigation",* Ms Alexandra Louis (France/ALDE), decided to ask the Venice Commission for an Opinion on the compatibility with European standards of certain criminal law provisions used to prosecute peaceful demonstrators and members of the Belarusian "Coordination Council".

2. The request asks the Venice Commission to analyse the following legal provisions (CDL-REF(2021)004):

1) Code of Administrative Infringements, Article 23:34 ("participation in an unauthorized mass event");
2) Law on Mass Events, Article 10 ("Procedure for organising or holding mass events");
3) Criminal Code, Articles 293 ("Mass riots"), 342 ("Preparation of actions which gravely violate public order") and 361 ("Calls to actions aimed at causing harm to the national security").

3. Ms Claire Bazy Malaurie, Ms Herdis Kjerulf Thorgeirsdottir and Mr Martin Kuijer acted as rapporteurs for this opinion.

4. Owing to the sanitary situation due to the Covid-19 pandemic, a visit to Minsk could not be organised. The Venice Commission sought to organise virtual meetings with the Belarusian authorities, however, despite its best efforts, these were declined. As a consequence, this opinion has been drafted on the basis of available information without the input that could have been obtained during the planned virtual meetings. The Belarusian authorities nonetheless submitted comments on 18 March 2021, which were taken into account in this opinion.

5. This opinion was prepared in reliance on the English translation of the above-mentioned provisions. The translation may not accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.

6. This opinion was drafted on the basis of comments by the rapporteurs and was examined by the Commission at the meeting of its sub-commission on fundamental rights. Following an exchange of views with Mr Nikita Belenchenko, Representative of Belarus to the Council of Europe, the opinion was adopted by the Venice Commission at its 126th online Plenary Session (19-20 March 2021).

II. Scope

7. The present opinion will focus on Article 23:34 of the Code of Administrative Infringements; Article 10 (as well as Article 9 on "Place and time of a mass event") of the Law on Mass Events and various provisions of the Criminal Code of Belarus, set out in document CDL-REF(2021)004.[1]

[1] Other provisions of the Criminal Code may also be of relevance. For example, Article 193-1 whereby unregistered associations cannot operate in Belarus. See CDL-AD(2011)036, *Opinion on the compatibility with universal human rights standards of Article 193-1 of the criminal code on the rights of non-registered associations of the Republic of Belarus*, paragraphs 114-115 "Criminalising the legitimate social mobilisation of freedom of association, activities of human rights defenders albeit members of un-registered associations and social protest or criticism of political authorities with fines or imprisonment, as foreseen by Article 193-1 of the Criminal Code, is incompatible with a democratic society in which persons have the right to express their opinion as individuals and in association with others. (…) Article 193-1 can serve the purpose of criminalising social protest and to legalise government response to social unrest."

8. The Venice Commission notes that it has already analysed the Law on Mass Events in its Joint Opinion with ODIHR, adopted in March 2012 (hereinafter the "2012 Joint Opinion").[2] In that opinion, the Law was criticised for failing to comply with the general principles on the right for peaceful assembly and in practice with the OSCE/ODIHR – Venice Commission Guidelines on Freedom of Peaceful Assembly. The main essence of that analysis can be found in paragraphs 38-42:

> *"The Law on Mass Events is characterized by a detailed overregulation of the procedural aspects of holding assemblies. The Law creates a complicated procedure of compliance with a rigid and difficult authorization procedure, while at the same time leaving administrative authorities with a very wide discretion on how to apply the Law. This procedure does not reflect the positive obligation of the State to ensure and facilitate the exercise of freedom of peaceful assembly and freedom of expression. (…) In particular, the definitions and scope of protection, the prohibition of spontaneous and simultaneous assemblies, as well as counter-demonstrations, the requirement of citizenship and other restrictions in the organisation or in the participations of a mass event, the wide discretion offered to authorities, the unlimited surveillance, the blanket restrictions and the liability of organisers and participants as foreseen in the Law do not meet international standards. (…) This Law does not refer to obligations or liabilities of the state or law enforcement bodies and does not elaborate sufficiently on the possibility of judicial review of appeals that may be filed against an administrative decision to ban or restrict an assembly. (…) The Law contains a number of restrictions on time and place of assemblies that are tantamount to blanket prohibitions."*

9. The Venice Commission was informed by the Belarusian authorities that a number of changes had been made to this Law since the adoption of the 2012 Joint Opinion.[3] As it is, however, not clear whether these changes took the Venice Commission's recommendations into account, the recommendations made in the 2012 Joint Opinion will be referred to in the present opinion, where appropriate, and the key recommendations will be repeated in the conclusions of the present opinion.

10. The present opinion therefore provides the Venice Commission with an opportunity to offer a wider analysis of the freedom of assembly by reviewing relevant provisions of the Code of Administrative Infringements and the Criminal Code of Belarus.

11. Another relevant document that was brought to the Venice Commission's attention is the Constitutional Court of Belarus' *constitutional and legal position for the protection of the constitutional order* of 25 August 2020 (hereinafter the "Position Paper").[4] In the light of the possible consequences of this "Position Paper", it has been joined as a reference for comments to the present opinion.

III. Analysis

A. Factual context

12. The Venice Commission is not a fact-finding body and, as such, relies on the information it receives from the State authorities concerned and civil society. For the present opinion, the Belarusian authorities[5] were given the opportunity to provide information regarding the demonstrations (and the state response to these), following the presidential elections in the summer of 2020, however the comments from the Belarusian authorities were received by the

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[2] CDL-AD(2012)006, *Joint Opinion on the Law on mass events of the Republic of Belarus*.
[3] Amended by laws of 12 December 2013, No. 84-3, of 10 January 2015, No. 242-3, of 20 April 2016, No. 358-3 and of 17 July 2018, No. 125-3.
[4] http://www.kc.gov.by/document-67563
[5] Compare CDL-AD(2019)010, *Montenegro – Opinion on the draft Law on freedom of religion or beliefs and legal status of religious communities*, paragraph 12.

Venice Commission at a very late stage of the drafting process and unfortunately do not address the sequence of events. The Venice Commission therefore had to rely on information received from different sources with respect to these events. This information showed coherence and the Venice Commission will therefore proceed on the assumption that there may be agreement on the following timeline of events.

13. On 9 August 2020, presidential elections were held in Belarus. The electoral process could not be observed by an OSCE/ODIHR election observation mission due to the Belarusian authorities' failure to issue a timely invitation. According to the authorities, the incumbent president, Mr Alexander Lukashenko, was re-elected to a sixth consecutive term in office crediting him with 80% of the vote and the Central Election Commission of Belarus announced him as the winner. Part of the international community rejects the results of these elections, as they were considered to be conducted in flagrant violation of all internationally recognised standards.[6]

14. Following the announcement of the election results, opposition candidate Ms Sviatlana Tsikhanouskaya called on Mr Alexander Lukashenko to start negotiations. A "Coordination Council" was established to provide a temporary institutional partner for a national dialogue process aimed at organising new elections that would be held according to international standards and under ODIHR election observation. A series of peaceful protests were held expressing a desire for democratic change and the respect of fundamental freedoms and human rights.

15. The Belarusian authorities reacted to these protests with an extensive use of force and many protesters, human rights defenders and members of the said "Coordination Council" were arrested. Increasing numbers of demonstrators have been charged under various articles of the Criminal Code, which sometimes entail heavy prison sentences.[7] The United Nations High Commissioner for Human Rights stated: *"Overall, in the context of the elections, over 900 people have reportedly been treated as suspects in criminal cases. Besides protesters, they include opposition presidential candidates, supporters of the opposition, journalists, bloggers, lawyers, and human rights defenders. Many remain in detention."*[8]

16. On 12 August 2020, following these mass arrests, a statement was made by the President of the Venice Commission urging "*the authorities of Belarus to respect international standards applicable to elections, releasing national observers and demonstrators and allowing the unhindered exercise of the freedoms of assembly, association and expression, in the interest of the Belarus people and of the stability of the country.*"[9]

17. A statement was also made by the Council of Europe Commissioner for Human Rights on 21 September 2020, that "(…) *Belarus is not a member state of the Council of Europe, but like any other country it should not overlook the fact that it is bound by international human rights law and obligations, and it bears full responsibility for human rights violations, especially when committed systematically and on a large scale. The prohibition of torture and ill-treatment is absolute and peremptory in nature and imposes a number of specific obligations on all states, including Belarus. Regrettably, numerous sources, including human rights defenders, medical records and witness statements, indicate that Belarusian law enforcement officials have systematically and deliberately subjected hundreds of individuals to ill-treatment while in detention, which is sometimes unacknowledged or incommunicado. In many cases the ill-*

[6] See for example the position of the European Council and the European Parliament (Resolution of 17 September 2020 on the situation in Belarus, 2020/2779(RSP)). A similar position was taken by the United States. Other States, such as Russia, China, and Turkey congratulated Mr Lukashenko.
[7] See, for example, the statement by Michelle Bachelet, United Nations High Commissioner for Human Rights on 4 December 2020.
[8] https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=26564&LangID=E
[9] https://www.venice.coe.int/webforms/events/default.aspx?id=2973

treatment was reported to be of such a severe nature that it would amount to torture in various forms. There have been reports of beatings resulting in broken bones, electric shocks, sexual violence and rape. Journalists, civil society activists and human rights defenders have been prevented from carrying out their work, often being subjected to physical attacks, arbitrary arrests, detention and judicial harassment by the Belarusian authorities. Their legitimate civic space has also been restricted, including through internet blocking. This must stop immediately. (…)"[10]

18. In addition, the United Nations Human Rights Council adopted a Resolution at its 45th session (14 September-7 October 2020) in which it: "*Calls upon the Belarusian authorities to cease using excessive force against peaceful demonstrators, including torture and other cruel, inhuman or degrading treatment or punishment and enforced disappearance, and to stop carrying out arbitrary arrests and detentions on political grounds, and urges the Belarusian authorities to immediately release all political prisoners, journalists, human rights defenders, members of strike committees, students and those detained in the lead-up to, during and after the presidential election for exercising their human rights and fundamental freedoms."* [11]

B. Relevant Human Rights standards and general remarks on the relevant domestic legislation

19. The 2012 Joint Opinion sets out the relevant human rights standards with respect to freedom of assembly and freedom of expression that are binding on the Republic of Belarus. Notably Article 21 of the International Covenant on Civil and Political Rights (the "ICCPR" entered into force for Belarus in 1973), which guarantees the right to peaceful assembly. Although Belarus is not a member of the Council of Europe, it is a candidate country for membership of the Council of Europe as well as an associate member of the Venice Commission, therefore the 2012 Joint Opinion also refers to Article 10 (freedom of expression) and Article 11 (freedom of assembly and association) of the European Convention on Human Rights (hereinafter, the "ECHR") and to the case law of the European Court of Human Rights (hereinafter, the "ECtHR"), as being relevant to Belarus. This opinion will therefore refer to the interpretative guidance offered by the ECtHR when applying relevant provisions of the ECHR. At the same time, the Venice Commission acknowledges that these standards are not legally binding on Belarus.

20. The 2012 Joint Opinion also referred to the relevant non-binding international instruments that are applicable to Belarus on the basis of its political commitments as a participating State of the OSCE – notably the Joint OSCE/ODIHR – Venice Commission Guidelines on the freedom of peaceful assembly (hereinafter, the "Guidelines"), which have been updated in a third edition[12] in 2020. The latter *inter alia* stress that the term "peaceful" should be interpreted to include conduct that may annoy or give offence to individuals or groups opposed to the ideas or claims that the assembly is seeking to promote.[13]

21. Rights and freedoms often carry with them duties and responsibilities and under the ECHR, the exercise of the rights to freedom of expression (Article 10) and to assembly and association (Article 11), as such, may be subject to restrictions. In this respect, both provisions use the same wording: these rights 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 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.

22. The Constitution of Belarus uses similar wording to that of the ECHR in its Article 23: *"Restriction of personal rights and liberties shall be permitted only in the instances specified in*

[10] https://www.coe.int/en/web/commissioner/-/human-rights-violations-in-belarus-must-stop-immediately
[11] https://undocs.org/A/HRC/45/L.1
[12] CDL-AD(2019)017, *Joint Guidelines on freedom of peaceful assembly* (3rd edition).
[13] Ibid., paragraphs 46-51.

law, in the interest of national security, public order, the protection of the morals and health of the population as well as rights and liberties of other persons. No one may enjoy advantages and privileges that are contrary to the law."

23. Two articles of the Constitution are particularly relevant for specific rights in mass events, notably Article 35: the freedom to hold assemblies, rallies, street marches, demonstrations and pickets that do not disturb law and order or violate the rights of other citizens of the Republic of Belarus, shall be guaranteed by the State. The procedure for conducting these events shall be determined by the law; and in the first part of Article 33: everyone is guaranteed freedom of thought and belief and freedom of expression.

24. With respect to the exercise of the freedom of assembly and restrictions, the provisions in the Criminal Code of Belarus, such as Article 293 (Mass disturbances), Article 361 (Calls for acts intended to harm the national security of the Republic of Belarus), Article 363 (Resisting staff of internal affairs authorities or other persons upholding public order) and Article 364 (Violence or the threat of violence against staff of internal affairs authorities) are not uncommon in criminal codes (or similar laws) throughout Europe.[14]

25. Article 293 of the Criminal Code refers to demonstrations of a *violent* character ('physical violence, pogroms, arson, destruction of property or armed resistance'). Violent acts – whether or not they are committed during a protest or demonstration – are ordinarily criminalised, either in more generic provisions of a criminal code (dealing, among other things, with assault and grievous bodily harm, destruction and damage to property, incitement to commit a criminal offence, etc.) or in a more specific provision dealing with demonstrations.[15] It is equally normal to penalise public calls to violently overthrow the constitutional order of a country or to commit acts intended to harm the national security of a country (Article 361 of the Criminal Code), to penalise a person for intentionally failing to comply with a lawful order by a police officer (Article 363 of the Criminal Code), and to penalise a person who uses violence or threatens to use violence against an officer (Article 364 of the Criminal Code).

26. When it comes to the use of force by law enforcement, reference can be made to a body of international law derived from both customary rules and general principles of law called the *law on law enforcement*.[16] This combines notably the 1979 United Nations Code of Conduct for Law Enforcement Officials and the 1990 United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials which are referred to in the case law of the European Court of Human Rights and the Inter-American Court of Human Rights. In governing the use of force in law enforcement, this *law on law enforcement* refers to three principles: necessity, proportionality and precaution, which are general principles of law and hence binding on all states: *"Necessity and proportionality set limits on how and when force may be used lawfully during policing actions. Law enforcement officials must comply with both principles: failure to respect either principle will usually mean that a victim's human rights have been violated by the*

[14] *Código Penal* [Penal Code] Article 513, B.O.E., Nov. 24, 1995 (Spain); Public Order Act 1986, Police Reform and Social Responsibility Act 2011 (UK); *Code de la sécurité intérieure* (France); *Regio Decreto 18 giugno 1931*, n. 773, *Testo unico delle leggi di pubblica sicurezza* (Italy); *Regeringsformen* [RF] [Constitution] ch. 2:1 item 3, ch. 2:4, ch. 2:6 (Sweden).

[15] The Netherlands' Criminal Code, for example, has specific criminal provisions. However, they deal with the mirror image. According to Article 143 CC any person who by an act of violence or by threat of violence prevents a lawful public meeting or demonstration from taking place shall be punishable. Equally punishable is the person who intentionally disturbs a lawful demonstration (Article 144 of the Criminal Code).

[16] 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; 1979 Code of Conduct for Law Enforcement officials; see also Academy In-Brief No. 6 (Academy of International Humanitarian Law and Human Rights) *Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council*, Geneva, November 2016.

state. In contrast, the principle of precaution applies upstream; it requires states to ensure that law enforcement operations are planned and conducted so as to minimize the risk of injury."[17]

27. Therefore, in the context of the events in Belarus, much depends on how the above-mentioned domestic provisions are implemented in practice and how they are interpreted by the domestic courts. For instance, how is the notion of '*armed resistance to representatives of public authority'* in Article 293 of the Criminal Code interpreted? Is resistance shown by demonstrators who have locked arms in a "sit in" sufficient to meet the requirement? How is a '*public call to seize state power'* in Article 361 of the Criminal Code interpreted by domestic courts when faced with a person who has taken part in demonstrations against the 'victory' of the incumbent President, is *culpa* / intent required for the purposes of Article 363 of the Criminal Code? This seems to give rise to some concern, as will be seen below.

C. Responsibility of the organisers

28. Article 293 and Article 342 of the Criminal Code[18] criminalise organisers of a demonstration if, during that demonstration, certain actions are carried out or certain results occur.

29. Organisers of and participants in assemblies (protests, demonstrations) are expected to comply with the legal requirements for holding such events, and they may be held accountable for their own unlawful conduct, including the incitement of others. If, in exceptional circumstances, organisers are held accountable for damage or injuries for which they were not directly responsible, it must be limited to cases in which evidence shows that the organisers could reasonably have foreseen and prevented the damage or injuries.[19]

30. Hence, such criminal responsibility should be applied with caution. In this respect, inspiration may be drawn from the case law of the ECtHR, which held the following in the Case of *Imrek v. Turkey* (10 November 2020, appl. no. 45975/12):

> *"36. The Court notes that the reasoning adopted by the Assize Court does not contain a sufficient explanation as to why the person concerned, as a member of the organising committee for the demonstration in question, should have had primary responsibility for putting a stop to the disputed acts committed by the demonstrators, having regard, in particular, to the duties and responsibilities of the Government Commissioner and the law-enforcement agencies in that connection, which the Assize Court itself had itself acknowledged, and to whether or not the latter needed a request from the organising committee to put an end to the*

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[17] See Academy In-Brief No. 6 (Academy of International Humanitarian Law and Human Rights) *Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council*, Geneva, November 2016, p.6.

[18] **Article 293. Mass disturbances**

1. The organisation of mass disturbances accompanied by physical violence, pogroms, arson, destruction of property or armed resistance to representatives of public authority, – shall be punishable by imprisonment of between five and 15 years.

2. Participation in mass disturbances entailing the direct committing of the acts listed in paragraph 1 of the present article, – shall be punishable by deprivation of liberty of between three and eight years.

3. The training or other preparation of individuals for participation in mass disturbances which are accompanied by the committing of the acts listed in paragraph 1 of the present article, and also the funding of or provision of other material support for such activity – shall be punishable by detention or deprivation of liberty for up to 3 years.

Article 342. Organisation and preparation of acts seriously disrupting public order, or active participation in them

1. The organisation of group acts seriously disrupting public order and associated with flagrant disobedience of the lawful requests of representatives of authority or causing disruption to the work of transport services, companies, institutions or organisations, or active participation in such acts, if there are no constituent elements of a more serious crime – shall be punishable by a fine, or detention, or supervised release for up to three years, or deprivation of liberty for the same period.

2. The training or other preparation of individuals for participation in group acts seriously disrupting public order, and also the funding of or provision of other material support for such activity, if there are no constituent elements of a more serious crime – shall be punishable by detention or deprivation of liberty for up to two years.

[19] CCPR/C/GC/37, paragraph 65.

demonstration if they considered that it had turned into an unlawful demonstration. The Court points out in this connection that the organisers of demonstrations cannot be held criminally liable where they do not participate directly in the acts in question, do not encourage them or are not lenient towards the unlawful conduct. It is for the organisers to assess whether the demonstrators' actions constitute reprehensible excesses. However, the organisers cannot be held responsible for the actions of others if they have not taken part in them either explicitly through active and direct participation or implicitly, for example by refraining from intervening by issuing warnings or orders to stop chanting illegal slogans. The organisers of an illegal demonstration can therefore be exempted from criminal responsibility by their peace-making behaviour (Mesut Yıldız and others v. Turkey, no. 8157/10, § 34, 18 July 2017) [our translation]."

31. The Law on Mass Events also refers to the responsibility of organisers of a demonstration on account of acts imputable to participants: an organiser needs *to ensure compliance with the conditions and procedure for holding the mass event*.

32. Under the Guidelines, however:

"50. The use of violence by a small number of participants in an assembly (including the use of language inciting hatred, violence or discrimination) does not automatically turn an otherwise peaceful assembly into a non-peaceful assembly. Moreover, "the possibility of extremists with violent intentions who are not members of the organising group joining a demonstration cannot as such take away [the right to freedom of peaceful assembly]" from those who remain peaceful. Instead, international standards provide that even if there is a real risk of an assembly resulting in disorder as a result of developments outside the control of those organising it, this by itself does not remove it from the scope of Article 11(1) ECHR. Furthermore, as stated by the European Court of Human Rights, "an individual does not cease to enjoy the right to freedom of peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour."64 Isolated incidents of sporadic violence, even if committed by participants in the course of a demonstration, are by themselves insufficient to justify extensive restrictions on or even dissolutions of assemblies and their peaceful participants.65 Violence calls instead for a measured and graduated response that fully respects the doctrine of proportionality (see paragraphs 47 and 156)."

D. Criminalisation of non-violent demonstrations

33. Article 342 of the Criminal Code criminalises group behaviour of a *non-violent* character. The (serious) disruption of public order, including the disruption of the work of transport services, companies, institutions or organisations, is an almost inevitable consequence of a mass demonstration. If participation in such a large-scale demonstration remains peaceful, such participation is firmly protected by human rights standards. The mere fact that the demonstration causes inconvenience to the public does not suffice to criminalise the participation of a person in such an event.[20]

34. In the Case of *Oya Ataman v. Turkey,* (5 December 2006, appl. no. 74552/01)[21] the ECtHR stated the following:

"(…) States must not only safeguard the right to assemble peacefully but also refrain from applying unreasonable indirect restrictions upon that right. (…) [The Court] notes, however, that it is not contrary to the spirit of Article 11 if, for reasons of public order and national security,

[20] CDL-AD(2019)017, *Joint Guidelines on Freedom of Peaceful Assembly (3rd edition)*, paragraph 48.
[21] See, paragraphs 35-44.

a priori, a High Contracting Party requires that the holding of meetings be subject to authorisation and regulates the activities of associations. (…) In principle, regulations of this nature should not represent a hidden obstacle to the freedom of peaceful assembly as it is protected by the Convention. It goes without saying that any demonstration in a public place may cause a certain level of disruption to ordinary life and encounter hostility; this being so, it is important that associations and others organising demonstrations, as actors in the democratic process, respect the rules governing that process by complying with the regulations in force. (…) [The Court] points out that an unlawful situation does not justify an infringement of freedom of assembly (…) [T]there is no evidence to suggest that the [demonstrators] represented a danger to public order, apart from possibly disrupting traffic. In the Court's view, where demonstrators do not engage in acts of violence it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance. Accordingly, the Court considers that in the instant case the police's forceful intervention was disproportionate and was not necessary for the prevention of disorder within the meaning of the second paragraph of Article 11 of the Convention."

35. Similarly – and most recently, the ECtHR has found a violation in the Case of *Laguna Guzman v. Spain* (6 October 2020, appl. no. 41462/17), in which the police had forcefully dispersed a spontaneous – and thus conducted without prior notification to the authorities – and peaceful gathering. The Court also found a violation in the Case of *Berkman v. Russia* (1 December 2020, appl. no. 46712/15)[22]: *"given that the applicant's conduct was clearly of non-violent nature, the Court considers that the reasons relied upon by the domestic authorities for the arrest were insufficient to justify that the applicant was prevented from continuing to participate in the event."*

36. Given the factual context of the Belarusian situation, another Turkish judgment is also of relevance. In the Case of *Süleyman Çelebi a.o. v. Turkey* (24 May 2016, appl. nos. 37273/10 a.o.), the ECtHR found violations under Article 11 *and* Article 46 of the ECHR due to the complete lack of tolerance which the authorities had shown towards the demonstrators by interfering – in a violent fashion – with the exercise of their freedom of peaceful assembly. Such behaviour by the authorities was liable to make members of the public fearful of participating in demonstrations and thus discourage them from exercising their rights under Article 11 of the ECHR. Compare this case with that of *Éva Molnár v. Hungary* (7 October 2008, appl. no. 10346/05), in which the Court found no violation of Article 11 of the ECHR because the police had shown the necessary tolerance towards the demonstration in that it broke up the demonstration without using force after several hours during which the flow of traffic had been severely hampered as the demonstrators had blocked *inter alia* a main bridge in central Budapest.[23]

37. It is also difficult to see the added value of Article 342 of the Criminal Code, since the prohibition laid down in Article 363 of the Criminal Code (Resisting staff of internal affairs authorities or other persons upholding public order), *which* also criminalises *"flagrant disobedience of lawful requests of representatives of authority,"* might be considered sufficient.

38. As regards the Code of Administrative Infringements, one could infer from Article 23:34 that whenever a mass event was banned or restricted, even if no violence from the crowd occurred, people (simply) participating could be arrested and then detained for a long period of time, without any judicial process. Such mass arrests would be considered arbitrary under international human rights law and contrary to the presumption of innocence.

[22] See paragraph 61.
[23] See also "*Mass protests - Guide on the case-law of the European Court on Human Rights,"* prepared under the authority of the Jurisconsult.

39. In addition, as the Guidelines set out, it is crucial that*: "220. (…) States should ensure that protesters are not detained simply for expressing disagreement with police actions during an assembly."*

40. In several cases, an administrative deliberation was initiated for displaying red-white flags, which are the symbols of the opposition – or other protest symbols on the windows of apartment buildings. Such actions were qualified under Article 23:34 as "single picket" and also as a violation of Article 10 of the Law on Mass Events.

41. Displaying flags is probably the most peaceful token one can display in protest and enjoys full protection under Article 21 of the ICCPR. The United Nations Human Rights Committee has, in its General Comment on the fundamental freedom of assembly, stated that displaying objects that look like weapons or wearing helmets or gas masks does not deprive protesters of their right to freedom of assembly or render the assembly non-peaceful.[24]

E. Sentencing

42. Sentencing practices vary greatly between States and differences between States may exist as to the length of sentences which are imposed, even for similar offences. In principle, matters of appropriate sentencing largely fall outside the scope of the ECHR. However, the ECtHR has accepted that the imposition of a *"grossly disproportionate sentence"* could amount to a violation of the ECHR. It also emphasised that gross disproportionality is *"a strict test and it will only be on rare and unique occasions that the test will be met".*[25]

43. In more generic terms, the ECtHR has also stated that *"peaceful and non-violent forms of expression should not be made subject to the threat of imposition of a custodial sentence"*[26] and – even more generic – that *"a peaceful demonstration should not, in principle, be made subject to the threat of a penal sanction."* [27]

44. In this regard, the Guidelines provide, in paragraph 36, that:

> *"**Proportionality of penalties.** Penalties imposed for conduct occurring in the context of an assembly must be necessary and proportionate, since unnecessary or disproportionately harsh sanctions for behaviour during assemblies could inhibit the holding of such events and have a chilling effect that may prevent participants from attending. Such sanctions may constitute an indirect violation of the freedom of peaceful assembly. Offences such as the failure to provide advance notice of an assembly or the failure to comply with route, time and place restrictions imposed on an assembly should not be punishable with prison sentences, or heavy fines."*

45. In this respect, administrative fines under Article 23:24 of the Code of Administrative Infringements appear to be severe[28] and as not complying with the requirements of necessity and proportionality.[29] Detention is a "normal" penalty in this law. Administrative detention can last up to 25 days.[30]

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[24] CCPR/C/GC/37, paragraph 20.
[25] *Willcox and Hurford v. the United Kingdom,* appl. nos. 43759/10 and 43771/12 (8 January 2013), paragraph 74.
[26] *Murat Vural v. Turkey,* appl. no. 9540/07 (21 October 2014), paragraph 66.
[27] *Akgöl and Göl v. Turkey*, appl. nos. 28495/06 and 28516/06 (17 May 2011), paragraph 43.
[28] As from 23 February 2021, individual fines can vary from between 580 to 1450 BYN and according to the National Statistical Committee of the Republic of Belarus, the average gross wage is 1474.6 BYN (December 2020).
[29] In this respect see *Azizov and Novruzlu v. Azerbaijan*, appl. nos. 65583/13 and 70106/13 (18 February 2021).
[30] The Code of Administrative Infringements establishes that administrative detention shall last up to 15 days, but the period of detention may be extended to 25 days for disobedience to law enforcement.

46. Article 293 of the Criminal Code is the equivalent (from a criminal law perspective) of the provision in the Code of Administrative Infringements. It refers to organising or participating in "mass disturbances", provides for deprivation of liberty of between five to 15 years in the first case and three to eight years, in the second.

47. Other cases, which may be related to mass events are subject to penalties that always include deprivation of liberty. See Article 342 of the Criminal Code that provides: organisation and preparation of acts seriously disrupting public order, or active participation in them; Article 363 of the Criminal Code that refers to: resisting staff of internal affairs authorities or other persons upholding public order and Article 364 of the Criminal Code, which refers to: violence or threat of violence against staff of internal affairs authorities.

48. In Article 341 of the Criminal Code, contrary to other provisions in the Criminal Code, the (maximum) penalty is not mentioned (it just mentions 'community service, or a fine, or detention'). This should be clarified, keeping in mind that if the penalty is of extreme severity, it may fall foul of international standards.[31] The Belarusian authorities, in their comments, informed the Venice Commission that the maximum penalties are set out in Articles 49, 50 and 54 of the Criminal Code. Article 50 sets out that the maximum fine that may be imposed is around 9350 euros.

49. Many of these articles can be invoked by the Belarusian authorities to arrest people taking part in mass events and which can result in long prison sentences. For example, the reference to *"acts seriously disrupting public order"* does not require the use of violence, and a loose interpretation of the various restrictions under Article 9 of the Law on Mass Events could lead to regular arrests during demonstrations. It could be used, for instance, in the case of a peaceful demonstration which has turned violent in some parts as a result of a confrontation with police and law enforcement authorities. This type of confrontation happens in many countries during demonstrations and can be the result of a provocation or simple non-compliance with a dispersal order, which leads to the use of force.

50. In this respect, the Guidelines provide the following:

> *"220: The UN Human Rights Committee has stated that '[a]rrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the Covenant is arbitrary, including [in cases involving] freedom of assembly. Even short periods of detention will directly affect participants' right to assemble, their liberty of movement (Article 12 ICCPR and Article 2 of Protocol 4, ECHR), and may amount to a deprivation of liberty under Article 9 ICCPR and Article 5 ECHR (the right to liberty and security of person). Detention should thus be used only if there is a pressing need to prevent the commission of serious criminal offences and where an arrest is absolutely necessary (e.g. due to violent behaviour). States should ensure that protesters are not detained simply for expressing disagreement with police actions during an assembly. The UN Human Rights Committee has stated that "[a]rrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the Covenant is arbitrary, including [in cases involving] freedom of assembly"."*

51. The ECtHR reviewed the necessity of convictions in relation to unauthorised assemblies in the Case of *Obote v. Russia* (19 November 2019, appl. no. 58954/09) where the Court held that when finding the applicant guilty of an administrative offence, the domestic courts did not assess the level of disturbance the event had caused, if any. The Court considered that the domestic

[31] See for example the Case of *Murat Vural v. Turkey*, appl. no. 9540/07 (21 October 2014), paragraphs 66-67: "The Court is aware that Atatürk, founder of the Republic of Turkey, is an iconic figure in modern Turkey (…) and considers that the Parliament chose to criminalise certain conduct which it must have considered would be insulting to Atatürk's memory and damaging to the sentiments of Turkish society. (…) [T]he applicant's acts involved a physical attack on property, the Court does not consider that the acts were of a gravity justifying a custodial sentence as provided for by the Law on Offences against Atatürk. (…) It considers that no reasoning can be sufficient to justify the imposition of such a severe punishment for the actions in question."

judicial bodies in the course of the administrative offence proceedings did not strike a balance by giving preponderant weight to the formal unlawfulness of the presumed static demonstration.

52. Administrative detention means the arrest and detention of individuals by the State without trial, usually *for security reasons* – to combat terrorism or rebellion, to control illegal immigration, or to otherwise protect the ruling regime. To the extent that State parties impose security detention (i.e. *administrative detention* or *internment*) not in contemplation of prosecution on a criminal charge – the United Nations Human Rights Committee considers that such detention presents severe risks of arbitrary deprivation of liberty. If such imprisonment, for instance, results from contempt of court without an adequate explanation and without independent procedural safeguards, it is arbitrary.[32]

F. Requirement of prior authorisation

53. With respect to Article 23:24 of the Code of Administrative Infringements,[33] the most important conclusion seems to be that spontaneous demonstrations – even of a peaceful nature – are as such prohibited because non-compliance with the *"established procedure for holding assemblies, rallies, marches, demonstrations, pickets and other mass events"* is an administrative offence, which may be punished by the imposition of administrative detention.

54. The ICCPR and the ECHR both impose a positive obligation on state authorities to facilitate the holding of mass events. States are allowed, in principle, to require that the holding of public meetings is notified to the authorities in advance and subject to prior authorisation.[34] Lack of notification however does not absolve the authorities from the obligation, within their abilities, to facilitate the assembly and to protect the participants.

55. In this respect, the Guidelines set out in paragraph 76 that:

> *"Freedom of peaceful assembly is recognized as a fundamental right in a democratic society and should be enjoyed, as far as possible, without regulation. This protective principle should*

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[32] *Fernando* v. *Sri Lanka*, Communication no. 1189/2003, paragraph 9.2; *Dissanakye* v. *Sri Lanka*, Communication no. 1373/2005, paragraph 8.3. See General Comment on Article 9.

[33] ***Article 23.34. Infringement of the procedure for organising or holding mass events***

1. An infringement of the established procedure for holding assemblies, rallies, marches, demonstrations, pickets and other mass events committed by a participant in such events as well as public calls for the organisation or holding of assemblies, rallies, marches, demonstrations, pickets and other mass events in breach of the established procedure for organising or holding them committed by a participant in such events or another person, if there are no constituent elements of a crime in these acts, – shall incur a caution or a fine of up to thirty reference units, or administrative detention.

2. An infringement of the established procedure for organising or holding assemblies, rallies, marches, demonstrations, pickets and other mass events or public calls for the organisation or holding of assemblies, rallies, marches, demonstrations, pickets and other mass events in breach of the established procedure for organising or holding them, if there are no constituent elements of a crime in these acts – if committed by an organiser of such an event shall incur a fine of between twenty and forty reference units or administrative detention, or if the offender is a legal person – a fine of between twenty and one hundred reference units.

3. Acts provided for in paragraph 1 of the present article which are repeat infringements committed within one year after the imposing of an administrative penalty for the same infringements, – shall incur a fine of between twenty and fifty reference units or administrative detention.

3[1]. Acts provided for in paragraph 2 of the present article which are repeat infringements committed within one year after the imposing of an administrative penalty for the same infringements, – shall incur a fine of between twenty and fifty reference units or administrative detention, or if the offender is a legal person – a fine of between twenty and two hundred reference units.

4. Acts provided for in paragraph 1 of the present article which are committed in return for remuneration, – shall incur a fine of between thirty and fifty reference units or administrative detention.

5. Acts provided for in paragraph 2 of the present article which are accompanied by remuneration for participation in an assembly, rally, march, demonstration or picket, – shall incur a fine of between forty and fifty reference units or administrative detention, or if the offender is a legal person – a fine of between two hundred and fifty and five hundred reference units.

[34] *Kudrevičius a.o. v. Lithuania,* appl. no. 37553/05 (15 October 2015), paragraphs 147-149.

be reflected in national constitutions and in relevant legislation and should be interpreted broadly by all state bodies. As a consequence, the relevant public authorities should remove all unnecessary legal and practical obstacles to the right to freedom of peaceful assembly. In particular, the organization and conduct of assemblies should not be subject to burdensome bureaucratic requirements (…). Moreover, the presumption in favour of (peaceful) assemblies also includes an obligation of tolerance and restraint towards peaceful assemblies in situations where relevant procedures and formalities have not been followed (…)."

56. This latter element is important because it clearly indicates that the prohibition of spontaneous peaceful demonstrations is contrary to European standards.[35] See also the Case of *Bukta v. Hungary* (17 July 2007, appl. no. 25691/04, paragraph 36):

"In the Court's view, in special circumstances when an immediate response, in the form of a demonstration, to a political event might be justified, a decision to disband the ensuing, peaceful assembly solely because of the absence of the requisite prior notice, without any illegal conduct by the participants, amounts to a disproportionate restriction on freedom of peaceful assembly."

57. As regards Article 10 of the Law on Mass Events, the reference to the prohibition to hold *'more than one mass event in the same place or on the same route'* seems to mean that, *de facto,* a counterdemonstration is, as a rule, prohibited. That appears to be contrary to international standards.[36] The Guidelines provide in paragraph 22, that:

"Simultaneous assemblies. *Where prior notification is submitted for two or more assemblies at the same place and time, simultaneous events should be facilitated where possible. Simply prohibiting an assembly in the same place and at the same time as an already notified or planned public assembly, in cases where both can reasonably be accommodated, is likely to amount to a disproportionate and possibly discriminatory response. As such, a 'first come, first served' rule must not be implemented in a way that enables some assembly organizers to 'block-book' particular locations to the exclusion of other groups;"*

58. The core message in the 2012 Joint Opinion was that the Law on Mass Events overregulates demonstrations. The most striking examples of overregulation are to be found in other provisions than Article 10 of the Law – for instance in Article 9, under which so many sites (with corresponding peripheral zones) are excluded from holding a mass event that it leaves serious doubt as to whether there are any geographical areas left in a city centre of a medium-sized city in Belarus to hold such events. The more detailed the bans are, the more the freedom is restricted, and the more likely it is for law-enforcement officials to find a basis for intervention. The various distances regarding various categories of buildings listed in Article 9, for example, could easily be mismeasured when walking in the street.

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[35] *Bukta and others v. Hungary*, appl. no. 25691/04 (17 July 2007), paragraph 36; *Navalnyy and Yashin v. Russia,* appl. no. 76204/11 (4 December 2014), paragraph 63.

[36] *Platform Ärzte für das Leben v. Austria,* appl. no. 10126/82 (21 June 1988): the Court speaks of the '*right to counter-demonstrate'* in paragraph 32:*"*A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate. Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11 (art. 11). Like Article 8 (art. 8), Article 11 (art. 11) sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be (see, mutatis mutandis, the X and Y v. the Netherlands judgment of 26 March 1985, Series A no. 91, p. 11, § 23)."

59. In the 2012 Joint Opinion, the Venice Commission already noted in paragraph 92 that "*General restrictions on the place, time and manner of holding assemblies are far too restrictive and for the most part do not meet the test of the principle of proportionality, the state's duty to protect peaceful assembly or the presumption in favour of holding assemblies. The text should be reviewed in order to allow for more flexibility and a case by case examination of the situation of a certain assembly, according to the proportionality principle."*[37]

G. Vague and overlapping notions

60. Overlapping notions and vagueness can be due to the translation of the provisions, however, they still need to be addressed if the issue really does lie in the terminology used or if provisions really do overlap.

61. As regards overlapping notions, for instance, Article 341 of the Criminal Code applies to the situation in which a person participated in a demonstration and destroyed or damaged property. However, this situation is already punishable under Article 293 of the Criminal Code. There appears to be a significant overlap in the scope of application of both Article 341 and Article 293 of the Criminal Code and this should be clarified.

62. As regards the vagueness of notions, Article 368 and Article 370 of the Criminal Code, respectively, on insulting the President of the Republic of Belarus and on the desecration of state symbols, give rise to concern due to their vague scope. In the *Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey,*[38] the Venice Commission analysed similar provisions in the Turkish Criminal Code and concluded that those provisions had been *"applied too widely, penalising conduct protected under the ECHR, in particular its Article 10 and the related case-law as well as conduct protected under Article 19 ICCPR".* Similar concerns may apply here.

63. With reference to Article 368 of the Criminal Code on insulting the President of the Republic of Belarus, the Venice Commission commented in the above-mentioned opinion for Turkey that the European consensus indicated that *"States should either decriminalise defamation of the Head of State or limit this offence to the most serious forms of verbal attacks against them, at the same time restricting the range of sanctions to those not involving imprisonment"*.[39]

64. Although such provisions are not uncommon in criminal codes, they should be tolerated only if they are applied restrictively and in accordance with human rights standards. However, if Article 368 of the Criminal Code is used systematically and excessively to prosecute peaceful demonstrators, the Venice Commission would recommend that it be repealed and to limit criminalisation to a general provision on insult (to be applied in accordance with human rights standards).

65. Article 370 of the Criminal Code criminalises the *desecration* of state symbols. In comparison to the Opinion for Turkey, Article 370 of the Criminal Code refers to specific state symbols (the emblem, the flag and the anthem). However, due to the lack of an explanatory memorandum to the Criminal Code and information on the application of Article 370 of the Criminal Code, it is difficult to determine whether the notion of 'desecration' is sufficiently specific to meet the requirements of predictability / foreseeability.

66. Concerns about the predictability of the application of both provisions are heightened in view of the harsh sanctions provided in both Article 368 and Article 370 of the Criminal Code.[40]

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[37] See also *Saska v. Hungary*, appl. no. 58050/08 (27 November 2012), paragraph 21.
[38] CDL-AD(2016)002.
[39] Ibid., paragraph 126 and see paragraphs 55-57 for the substantiation of this claim. The Turkish opinion also contains an elaborate analysis of case-law of the ECtHR under Article 10 of the ECHR.
[40] Ibid., see paragraph 86, which concerned a sanction of 'six months to two years' imprisonment.

67. A further concern is the very broad scope of the notion "*defilement of buildings or other facilities with contemptuous slogans or image"* in Article 341 of the Criminal Code, which raises a similar concern to that of Article 368 and Article 370 of the Criminal Code. When such provisions are applied too widely, they penalise conduct that is protected under international standards. But again, without the benefit of an explanatory memorandum and domestic case law, it is difficult to determine whether the notion of "defilement" is sufficiently specific to meet the requirements of predictability / foreseeability.

68. In the Law on Mass Events, the second paragraph of Article 10 provides for an explicit prohibition: *"The holding of mass events shall be prohibited if they pursue the aim of war propaganda or extremist activity."* The words "extremist activity" are defined in Article 1 of the Law of the Republic of Belarus on Counteraction to Extremism of 4 January 2007. [41]

69. In this context, it is important to underline what the Guidelines provide in paragraph 151, notably that:

> *"Restrictions in the context of combating terrorism and violent extremism should be interpreted narrowly. Domestic legislation designed to counter 'terrorism' or 'violent extremism' must not impose any limitations on fundamental rights and freedoms, including the right to freedom of peaceful assembly, that are not strictly necessary for the protection of national security and the rights and freedoms of others. Any such legislation should therefore clearly define the term 'terrorism' (or associated terms such as 'extremism') so as not to include a wide range of activities (e.g. the organisation of or participation in assemblies). […]"*

H. Expression of ideas contesting the established order by non-violent means

70. Article 361 of the Criminal Code refers to *"public calls to (…) violently overthrow the constitutional order".* Most member States of the Venice Commission have a provision in their ordinary laws, often criminal codes, that deals with the offence of overthrowing the constitutional order of the country (or similar offences, e.g. sedition, high treason). However, the exact meaning of what constitutes a *violent overthrow of the constitutional order* within the framework of Article 361 of the Belarusian Criminal Code remains unclear.[42]

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[41] According to Article 1 of this Law, extremism (extremist activity) is the activity of the citizens of the Republic of Belarus, foreign nationals or stateless persons or political parties, other public associations, religious and other organisations in planning, organising, preparing and performing acts aimed to:

- violently overthrow the constitutional order and (or) territorial integrity of the Republic of Belarus;
- seize or retain the state power in an unconstitutional manner;
- create an organisation for carrying out extremist activity, an extremist organisation, an extremist group;
- create an illegal armed formation;
- carry out terrorist activity;
- incite racial, national, religious or other social hostility or discord;
- organise and carry out mass disturbances, acts of hooliganism and vandalism based on racial, national, religious or other social hostility or discord, political or ideological hostility;
- propagate the exceptionality, superiority or inferiority of individuals on the basis of their social, racial, national, religious or linguistic background;
- rehabilitate Nazism, propagate or display in public, produce, distribute Nazi symbols or attributes, as well as keep in store or procure such symbols or attributes for distribution;
- distribute extremist materials, as well as produce, publish, keep in store or transport them for the purpose of distributing;
- hinder the lawful activities of state bodies including the Central Commission of the Republic of Belarus on elections and holding republican referenda, election commissions, referendum commissions or commissions on voting for recalling a deputy, as well as hinder the lawful activities of officials thereof using violence, threats of violence, fraud, bribery, as well as using violence or threats of violence against relatives of the named officials for the purpose of hindering their lawful activities or forcing them to change the nature of such activities or revenge for the performance of their official duties, etc.

[42] See CDL-AD(2020)005, Armenia - *Amicus curiae* brief relating to Article 300.1 of the Criminal Code, paragraphs 12 and 50: For instance in Canada, neither the Constitution nor the Criminal Code make it a specific offence to attempt to overthrow the "constitutional order" as such, but it is clear from the definitions of treasonable offences

71. In Belarus, following the presidential elections, the general motive behind the mass arrests, administrative detentions or even deprivation of liberty provided by the law enforcement authorities seems to have been that these mass events were a call to violently overthrow the constitutional order of Belarus and an address to foreign States intending to harm the national security of Belarus.

72. The question is whether *to overthrow the constitutional order* is the content of the message of the mass events. In this respect, the Guidelines provide that *"[t]he touchstone must ... be the existence of an imminent threat of violence".* Thus, calls for the violent overthrow of the constitutional order would be deemed anti-democratic and a sufficient ground for banning an assembly, whereas expressing an opinion that the constitutional order be changed through non-violent means would deserve protection extended by the law to free speech. In order for the law to be consistent with the OSCE/ODIHR-Venice Commission Guidelines, the text should include references to the "element of violence" requirement".

73. However, were the mass events violent and what is considered violent? This is a key question that, without the benefit of a proper analysis of the factual situation and domestic case law, is difficult to answer. It seems that demonstrators neither used physical violence nor made calls for violence towards institutions or individuals. A protest movement about a public decision cannot – in itself – be the ground for which criminal proceedings are brought.

74. Criticism of government policies or an expression of ideas contesting the established order by non-violent means is deserving of protection so long as it is not violent. This means that, even if physical confrontation with police forces occurs, the content of the message and the way the crowd demonstrated must be analysed before qualifying acts as violent. As the Venice Commission stated in its Report on the criminal liability for peaceful calls for radical constitutional change from the standpoint of the European Convention on Human Rights:

> "*In sum, when political debate ("calls for radical constitutional change") is concerned, there is a very strong presumption in favour of the freedom of expression."*[43]

> "*Moreover, as suggested by the Court's case-law under Article 11, the authorities should tolerate some forms of unlawful action when the freedom of expression is at stake. […] The Court recalled that "enforcement of rules governing public assemblies cannot become an end in itself", and that* "*the fact that the applicant breached a statutory prohibition by 'campaigning' for participation in a public event had not been duly approved is not sufficient in itself to justify an interference with her freedom of expression".*[44]

The fact that authorities should tolerate some forms of unlawful action is particularly relevant in the context of a country with a regulatory framework which overregulates the procedural aspects of holding assemblies.

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in the Criminal Code that "using force or violence for the purpose of overthrowing the government of Canada or a province" (see paragraph 46(2)(a) of the Criminal Code) would be tantamount to overthrowing the constitutional order in Canada. E.g. In the U.S: Title 18 U.S Code § 2384 - Seditious conspiracy: If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined under this title or imprisoned not more than twenty years, or both.

[43] CDL-AD(2020)028, *Report on the criminal liability for peaceful calls for radical constitutional change from the standpoint of the European Convention on Human Rights*, paragraph 24.

[44] Ibid., paragraph 45.

75. Another important issue is the stance the Constitutional Court of Belarus has taken in its constitutional and legal position for the protection of the constitutional order (the "Position Paper"), mentioned above. In this "Position Paper":

> *"The Constitutional Court points out that when exercising political rights citizens should take into account that according to Article 3(2) of the Constitution any actions to change the constitutional order and to achieve state power by violent methods, as well as by other violation of the laws of the Republic of Belarus are punishable by law.*
>
> *The Constitution does not allow the creation of public bodies or organisations with the right to revise the results of elections of the President of the Republic of Belarus.*
>
> *Creation of the Coordinating Council, which aims at revising the results of the presidential elections of the Republic of Belarus, in a way that is not stipulated either in the Constitution or in the electoral legislation, is unconstitutional."*

76. The Venice Commission would like to clarify that it has kindly received a note from the Constitutional Court regarding this "Position Paper", which does not however entirely elucidate the legal status of this "Position Paper" and refers only to a broad interpretation of the Constitutional Court's mandate.

77. In this "Position Paper", the Constitutional Court provides a more subtle motive for a serious legal denunciation: it refers to the electoral process, which was the subject of the mass events. It argues that the vote is *per se* a democratic institution, and that challenging the results of the election is the duty of electoral judges. Yet, the organisations at the origin of the call for demonstrations are not electoral judges. Hence, these organisations (namely the "Coordination Council") must be considered as trying to change "*the democratic constitutional system*" and "*seize state powers*". And this has led to a serious condemnation of the "Coordination Council" which, moreover, does not have a legal status under constitutional or legal provisions in Belarus.[45] According to its website, under its Rules of Procedure, the "Coordination Council" "*is the unified representative body of the Belarusian people. Creation of the Council was initiated by Sviatlana Tsikhanouskaya. The Council aims to organize the process of resolving the political crisis and ensure social cohesion, as well as to protect the sovereignty and independence of the Republic of Belarus. The Council operates in accordance with the fundamental principles of the Constitution of the Republic of Belarus. The Council does not aim to seize state power in an unconstitutional manner, nor does it call to organize and prepare actions that disrupt public order."*[46]

78. This condemnation of the "Coordination Council" has serious consequences, notably confirming the assessment of illegitimacy and furthermore the illegality of the mass events, especially with regard to the fact that the Constitutional Court did not raise the issue of violence in these mass events in the stance it took in its "Position Paper".

79. In this respect, the Venice Commission has received information from civil society in Belarus that the Constitutional Court's "Position Paper" is unfortunately being applied by the President of the Republic of Belarus as forming a basis for criminal accusations against members of the "Coordination Council" – and these have allegedly already been launched.[47]

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[45] See previous opinions about the difficulties for associations in Belarus: CDL-AD(2011)036, *Opinion on the compatibility with Universal Human Rights Standards of Article 193-1 of the Criminal Code on the Rights of non-registered associations of the Republic of Belarus*; CDL-AD(2012)006, *Joint opinion on the law on mass events of the Republic of Belarus.*

[46] https://rada.vision/en/rules

[47] New charges have been brought against Maria Kalesnikava, one of leading figures of the Council and Maxim Znak but both were previously charged under Article 361 of the Criminal Code of Belarus, calling for acts intended to harm the national security of the Republic of Belarus but now also of "conspiracy to seize power" and "creation of extremist

IV. Conclusions

80. The mass demonstrations that took place following the presidential elections in Belarus in August 2020 have resulted in mass arrests. The message of the participants in these demonstrations was – and continues to be – to denounce the irregularities that occurred in the presidential elections confirming the re-election of the former President by a majority of 80%.

81. In this context, the Venice Commission has been requested to analyse the relevant provisions of the Law on Mass Events along with the relevant provisions of the Criminal Code and the Code on Administrative Infringements.

82. When assessing the regulatory framework, the Venice Commission remains concerned about the overregulation of the procedural aspects of holding assemblies. Domestic law creates a complicated procedure of compliance with a rigid and difficult authorisation procedure, while at the same time leaving administrative authorities with a very wide margin of discretion for the application of the legislation in force. *In concreto*, this may mean that spontaneous peaceful demonstrations or counterdemonstrations are *de facto* prohibited. As regards the (application of) criminal law provisions, some of the main concerns of the Venice Commission are the criminalisation of *non-violent* demonstrators; the *application* of certain provisions due to the use of vague notions; the (criminal) responsibility of organisers of a demonstration on account of acts imputable to participants; and the severity (and unclarity) of the sentences enshrined in the Criminal Code.

83. In 2012, the Venice Commission had already analysed the Law on Mass Events in a Joint Opinion with ODIHR, in which this Law was criticised for not complying with general principles on the right to peaceful assembly and, in practice, with the Guidelines on Freedom of Peaceful Assembly. The Venice Commission notes that, as it is not clear whether its key recommendations made in the 2012 Joint Opinion were taken into account in the subsequent amendments made to the Law on Mass Events, these are repeated here as follows:

A. To include the key principle of a presumption in favour of holding assemblies, *inter alia* through abolishing the existing system of requiring a permit from States authorities for holding an assembly and replacing it with a system based on notification of an assembly;

B. To revise all provisions in the Law that amount to blanket prohibitions, including the provisions pertaining to time and location of peaceful assembly and to safeguard in the Law the possibility of holding spontaneous assemblies, simultaneous assemblies and counter-demonstrations;

C. To ensure that the definition of assemblies is clear and in accordance with international standards and does not work to the exclusion of certain types of assemblies;

D. To ensure that all persons can exercise their right to freedom of assembly, in Belarus. The Law should allow for the exercise of the right by nationals and non-nationals, and all categories of people, including juveniles and migrants; all these categories should enjoy the right to freedom of peaceful assembly not only as participants, but also as organisers.

E. To revise provisions restricting who may be an organiser of an assembly;

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formation and leadership of it," see https://rada.vision/en/new-charges-have-been-brought-against-maria-kalesnikava-and-maxim-znak

F. To amend the Law so that the organisation of large public assemblies is not limited only to registered organisations, which leads to the exclusion of unregistered associations or groups and individuals;

G. To remove the restrictions on assemblies gathering more than 1,000 persons and remove the unfettered discretion of authorities to limit or prohibit assemblies based on time, date, place, weather conditions etc.;

H. To remove unreasonable and burdensome obligations (and ensuing sanctions) on the organisers, in particular those which are the exclusive responsibility of the State-organisers should not be held liable for damage and violations inflicted by others; organisers should be exempted from liability for failure to perform their responsibilities, provided that they have made all reasonable efforts to do so, or for unlawful actions or misbehaviour of concrete participants or third persons;

I. To ensure that under the Law, every public space is seen as fit to host a public assembly; the prohibition of assemblies in the immediate vicinity of hazardous facilities may be limited only to those areas that are not accessible to the general public;

J. To bring the provisions concerning the termination of assemblies in line with the legality and proportionality principle, as well as the principle of necessity in a democratic society, and to ensure that the only allowable reasons for prohibition or termination of an assembly, which is a measure of last resort to be only considered when a less restrictive response would not meet the purpose of safeguarding other relevant interests, are the imminent threat of using violence or the use of violence, which turns the assembly from peaceful into a non-peaceful one;

K. To ensure that coercive measures are taken only against those individuals who violate public order, incite hatred or instigate violence, and not against the whole assembly;

L. To ensure that political parties, trade unions and other organisations are not threatened by dissolution solely for not meeting requirements of this Law.

84. The present opinion makes the following additional recommendations:

a) With respect to sentencing:
   - Peaceful demonstrations should not, in principle, be made subject to the threat of severe penal sanctions, such as imprisonment or heavy fines. These considerations apply to Article 23:24 of the Code of Administrative Infringements which provides for severe administrative fines and detention / deprivation of liberty.

b) With respect to overlapping provisions in the Criminal Code:
   - Article 293 (on mass disturbances) and Article 341 (on defilement of structures and destruction of property) both apply to the situation in which a person participated in a demonstration and destroyed or damaged property – this overlap should be clarified;
   - Article 342 (on the organisation and preparation of acts seriously disrupting public order, or active participation in them) and Article 363 (on resisting staff of internal affairs authorities or other persons upholding public order) both criminalise *"flagrant disobedience of lawful requests of representatives of authority"* – this should also be clarified.

c) With respect to vagueness in provisions:
   - Article 341 of the Criminal Code provides a very broad scope of the notion '*defilement of buildings or other facilities with contemptuous slogans or images*' which is of concern and should be clarified – when such provisions are applied too widely, they penalise the exercise of the freedom of expression;
   - Article 368 of the Criminal Code (on insulting the President of the Republic of Belarus) and Article 370 of the Criminal Code (on desecration of state symbols) are unproblematic if applied restrictively and in accordance with human rights standards. If notably Article 368 is used systematically and excessively to prosecute peaceful demonstrators, the Venice Commission would recommend that it be repealed and to limit criminalisation to a general provision on insult (to be applied in accordance with human rights standards). Concerns about the predictability of the application of both provisions are heightened in view of the harsh sanctions provided in both Articles.

d) With respect to the notion of violently overthrowing the constitutional order:
   - Article 361.1 of the Criminal Code regarding public calls to violently overthrow the constitutional order could be applied in a manner contrary to international human rights standards and should be revised and rendered more precise because political debate ("*calls for radical constitutional change")* carries a very strong presumption in favour of the freedom of expression.

85. Finally, it has come to the knowledge of the Venice Commission that both (1) a new version of the Code of Administrative Infringements, which increases liability for participation in unauthorised mass events, has entered into force on 1 March 2021 and (2) a draft law on extremism is being prepared in Belarus. As both (1) and (2) may have serious bearings on the freedom of assembly, the Venice Commission remains at the disposal of the Belarusian authorities to engage in a dialogue to address these laws and their implementation with respect to the exercise of the freedom of assembly.