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(VENICE COMMISSION)

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

**Adopted by the Venice Commission
at its 88th Plenary Session
Venice (14-15 October 2011)**

on the basis of comments by

**Ms Herdis THORGEIRSDOTTIR (Member, Iceland)
Mr Pieter VAN DIJK (Member, the Netherlands)**

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I. Introduction

1. By letter dated 8 June 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 Article 193-1 of the Criminal Code of Belarus on the rights of non-registered associations in Belarus.

2. The Venice Commission appointed Mr van Dijk and Ms Thorgeirsdottir as rapporteurs. They worked on the basis of an English unofficial translation of the Article 193-1 of the Criminal Code of Belarus (CDL-REF (2011) 051) and presented their individual comments (CDL (2011) 060 and CDL (2011) 078) respectively.

3. The present Opinion was drawn up on the basis of the rapporteurs' comments. It was discussed at the meeting of the sub-Commission on Fundamental Rights (Venice, 13 October 2011) and adopted at the 88th Plenary Session of the Commission (Venice, 14-15 October 2011).

Preliminary observations

4. The following Opinion intends to assess the compatibility of Article 193-1 of the Criminal Code of Belarus with "universal human rights standards" on the rights of non-registered associations in Belarus.

5. As this assessment touches upon the status of non-registered associations in Belarus, the present Opinion, in some aspects, gives a broader assessment of some of the relevant domestic legislation and practice and its compliance with international standards. However, it cannot be seen as providing a comprehensive analysis of the state of non-registered associations in Belarus .

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 Chairperson of the Political Affairs Committee are similar, *mutatis mutandis*, to the ones raised by two recent cases the Venice Commission dealt with.

8. The first concerned a Warning addressed by the Ministry of Justice to the Belarusian Association of Journalists (BAJ) on 13 January 2010, which led to an Opinion adopted by the Venice Commission at its 85th Plenary Session (CDL-AD (2010)053 rev).

9. The second Opinion, adopted at the Commission's 87th Plenary Session CDL-AD (2011)026, assessed the compatibility with universal human rights standards of the Warning addressed, on 12 January 2011, by the Ministry of Justice to the Belarus Helsinki Committee (hereinafter BHC).

10. The Venice Commission found the Republic of Belarus in both the above cases in breach of its legally binding obligations to respect and protect the fundamental civil and political rights of freedom of expression and freedom of association.

II. Background information

A. Introduction – Background of Article 193-1

11. A Presidential Decree from 26th January 1999 No. 2 “On Some Issues Concerning Political Parties, Trade Unions and Other Public Associations” established a special way of registering associations, which was stricter than the one that had been established in the corresponding laws. The Decree also obliged all public associations that had been registered before, to re-register in accordance with the new order. This resulted in a situation where hundreds of organizations did not manage to re-register and lost their registration.¹

12. Following the adoption of the Presidential Decree of 26 January 1999 No 2 all organizations not registered by the government were banned in Belarus. Later the ban was introduced to the Law “On Political Parties” and the Law “On public associations”, and administrative liability was established for the violation with a possible penalty of a fine or arrest for up to 15 days.

13. In the years 2003-2005 Belarus lived through a wave of forced liquidations of public associations by the courts. The majority of NGOs continued functioning regardless of the fact they were denied registration by the authorities, and regardless of the threat of criminal prosecution for non-registered activities. Some political parties were liquidated by a Supreme Court decision: in 2004 the Labour Party, in 2007 the Ecological Party of Greens “BEZ” and Women's Party “Nadzeya” [Hope].²

14. The general context with regard to NGOs's operation in Belarus is worth mentioning. The number of Belarusian NGOs losing their official registrations has since the introduction of the above mentioned Presidential Decree dramatically raised, and new organizations have had difficulties getting registered. HRC 'Viasna', the biggest human rights group in Belarus,³ was closed down by the authorities in 2003 along with other human rights organizations.⁴ The unregistered NGOs have had difficulties to re-register for reportedly ungrounded reasons, even against the opinion of international organizations in which Belarus holds membership. Thus, the HRC Viasna has not been able to regain its registration despite the view expressed on 24 June 2007 by the UN Human Rights Committee, which found the closure of this organization a violation of the Viasna members' right to freedom of association and called upon the Belarusian authorities to re-register the organization. This is only one of many examples in Belarus.⁵

B. Introduction and application of Article 193-1

15. On 15 December 2005, just before the Presidential elections, the Criminal Code of Belarus was amended with Article 193-1 criminalising the conduct of non-registered NGOs and envisaging punishment by a fine or imprisonment for up to two years for participation in the activities of non-registered political parties, other public associations, religious organizations or funds.⁶

¹ Solidarity with Democratic Belarus Information Office: Legal frameworks of activities of political parties and non-governmental organizations, p. 4. ul. Złota 61 lok.100 , Warszawa 00-819

² Solidarity with Democratic Belarus Information Office: Legal frameworks of activities of political parties and non-governmental organizations, p. 5. ul. Złota 61 lok.100 , Warszawa 00-819
<http://www.state.gov/g/drl/rls/hrrpt/2008/eur/119069.htm>

³ <http://www.frontlinedefenders.org/node/15340>

⁴ <http://humanrightshouse.org/Articles/11225.html>

⁵ <http://humanrightshouse.org/Articles/11225.html>

⁶ <http://www.hrw.org/en/node/87609>

⁶ Solidarity with Democratic Belarus Information Office: Legal frameworks of activities of political parties and non-governmental organizations, p. 5. ul. Złota 61 lok.100 , Warszawa 00-819

16. The situation with the prohibition of the activities of the non-registered associations significantly deteriorated with the introduction of the criminal liability under Article 193.1 of the Criminal Code. In 2006, six individuals were prosecuted on the basis of this provision.

17. In 2009, human rights defenders revealed that 17 individuals had been prosecuted on the basis of Article 193-1.⁷ There were also reports of this provision being used in many other cases by authorities to deter activists by threatening them with prosecution.⁸ In February 2011, Article 193-1 was for the first time evoked against persons exercising freedom of religion.⁹

18. In circumstances where the majority of non-governmental organizations in Belarus are working without registration, because it is practically very difficult for independent NGOs to obtain registration or re-registration after involuntary dissolution, Article 193-1 is in effect an impending threat for thousands of Belarusian citizens to be treated as criminals.¹⁰

C. Reactions to the introduction and the application of Article 193-1

19. From the point of view of the Belarusian authorities, Article 193-1 aims at strengthening responsibility for acts against a person and public security. The Embassy of the Republic of Belarus in the United States gave lengthy explanations in that sense, in a commentary published in 2007¹¹.

20. Nonetheless, the International community reacted vividly to the introduction of Article 193-1 of the Criminal Code.

21. On 10 December 2007, the Council of Europe Parliamentary Assembly's Committee on Legal Affairs and Human Rights published a report on the abuse of the criminal justice system in Belarus. The report pointed to the arbitrary application of the law criminalising legitimate, peaceful activities. It urged the Parliament of the Republic of Belarus to: repeal Law No 71-3 of 15 December 2005 (the so-called "anti-revolution law"), and in particular Article 193-1 of the Criminal Code criminalising activities of non-registered associations.¹²

22. In several Resolutions and Recommendations the Parliamentary Assembly has repeatedly urged the Belarusian authorities to repeal Article 193-1 of the Criminal Code.¹³¹⁴

23. The European Parliament adopted also several Resolutions that urged the Belarusian authorities to make the "necessary changes to the Belarus Criminal Code by abolishing Article 193-1¹⁵¹⁶¹⁷.

24. In September 2010, at the 15th session of the UN Human Rights Council, the final report of the Universal Period Review (UPR) regarding Belarus was approved. The government of Belarus rejected the recommendations made during the UPR session and, with regard to the

⁷ See list of names: <http://193.belngo.info/view.pl/english/practice>

⁸ <http://193.belngo.info/view.pl/english/practice>

⁹ Forum 18, May 19, 2011 <http://www.unhcr.org/refworld/docid/4dd61ade2.html>

¹⁰ <http://193.belngo.info/view.pl/english/introduction>

¹¹ http://www.usa.beembassy.org/eng/political/commentary_to_the_law

¹² http://assembly.coe.int/ASP/Doc/DocListingDetails_E.asp?DocID=12228

¹³ <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta09/ERES1671.htm>

¹⁴ <http://assembly.coe.int/Documents/WorkingDocs/Doc09/EDOC11939.pdf>

¹⁵ <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2008-0470&language=EN&ring=P6-RC-2008-0527>

¹⁶ <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2008-0470&language=EN&ring=P6-RC-2008-0527>

¹⁷ <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2009-0117&language=EN&ring=P7-RC-2009-0248>

abolition of Article 193-1, maintained that this provision aimed at precluding the activities of extremist groups.¹⁸

25. The Council of Europe Commissioner for Human Rights, Thomas Hammarberg, in a Human Rights Comment published on 25 May 2011, underlined that registration rules in Belarus were used as an instrument for repression, and stressed that the Presidential Decree from 1999 obliging NGOs to re-register had resulted in many of them being deleted from the official register, prevented from re-applying and subsequently closed down. This Decree also placed constraints on the activities of non-registered NGOs that continued to operate. Criminal liability was introduced for member activities, imposing sentences of up to two years imprisonment with the adoption of Article 193-1 of the Criminal Code, which according to the Commissioner for Human Rights, had become an instrument for exerting pressure and control over human rights actors.¹⁹

26. A campaign "STOP 193.1!" was launched in 2009 by Belarusian non-governmental organizations for the repeal of Article 193-1 of the Criminal Code on the basis that "it criminalizes any independent human rights initiative in Belarus and gives state officials the power to stop activities of human rights organizations at any time."²⁰

27. The mobilisation of Belarusian NGO'S has not decreased,²¹²²²³²⁴ although many of them have been closed for minor administrative irregularities, faced intimidation through warnings²⁵, prosecution²⁶ under Art.193.1²⁷, even imprisonment of prominent members, like Human Rights defender Ales Bialiatski, Chairman of HCR, Viasna. International NGO's have strengthened their support to their Belarusian peers and condemned the deterioration in the human rights situations in Belarus.²⁸²⁹³⁰

28. The Political Affairs Committee, taking into account "the present deplorable situation" of non-registered organisations in Belarus, decided to request the Venice Commission to provide an assessment of the compatibility with universal human rights standards of Article 193-1 of the Criminal Code vis-à-vis the rights of non-registered associations in Belarus³¹.

29. In view of the clampdown on human rights defenders in Belarus,³² the Commissioner of Human Rights of the Council of Europe has recalled the need for solidarity from all part of Europe, in a statement of 13 September 2011³³.

¹⁸ OSCE Review Conference Warsaw, 30 September – 8 October 2010. <http://www.osce.org/home/71646>

¹⁹ http://commissioner.cws.coe.int/tiki-view_blog.php?blogId=1&date_min=1304200800&date_max=1306879199

²⁰ <http://www.frontlinedefenders.org/node/15340>; <http://193.belngo.info/view.pl/english>,

²¹ <http://www.charter97.org/en/news/2010/1/19/25497/>

²² Open letter to President Alexander Lukashenko and General Prosecutor Grigory Vailevich on 22 February 2011 <http://www.civilrightsdefenders.org/en/news/11282/>

²³ NGO's letter to support the adoption of a UN Human Rights Council's resolution on the human rights situation in Belarus <http://hrwatch-by.org/en/ngos-letter-support-adoption-resolution-human-rights-situation-belarus-17th-session-un-human-rights>

²⁴ Statement of the Assembly of Pro-Democratic NGOs in Belarus, OSCE Review Conference Warsaw, 30 September – 8 October 2010. <http://www.osce.org/home/71646>

²⁵ <http://www.frontlinedefenders.org/node/15340>; <http://spring96.org/en/news/43869>

²⁶ <http://www.frontlinedefenders.org/node/15340>;

²⁷ <http://www.civilrightsdefenders.org/en/news/11250/>

²⁸ <http://www.civilrightsdefenders.org/en/news/11282/>

²⁹ <http://humanrightshouse.org/Articles/16823.html>

³⁰ <http://www.amnesty.ie/news/belarus-six-months-after-presidential-elections-clampdown-dissenting-voices-continues-unabated>

³¹ http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=6705&L=2

³² The Council of Europe Parliamentary Assembly (PACE) rapporteur on the situation in Belarus, Andres Herkel (Estonia, EPP/CD), has condemned the new wave of violence against peaceful protesters, journalists and human rights defenders in Belarus.

<https://wcd.coe.int/wcd/ViewDoc.jsp?id=1810897&Site=DC&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE>

III. Relevant constitutional provisions and relevant domestic legislation in relation to Article 193-1

A. Constitutional provisions

30. The Constitution of Belarus contains standard democratic provisions concerning the individual's rights and freedoms. It states in its very beginning that individuals' rights and freedoms are the supreme goal and value of the society³⁴ and that diversity of political institutions, ideologies and views are the basis of the democracy in Belarus.³⁵ Several Articles in Section II deal with individual rights which are the supreme goal of the State³⁶ and put a positive obligation on the State to guarantee these rights, such as, for instance, equality before the law and equal protection of one's rights³⁷, freedom of thought and belief³⁸, freedom of association to everyone³⁹, freedom to "form trade unions"⁴⁰ are foreseen. Strict constitutional conditions for restrictions of these rights are foreseen⁴¹. They refer, for instance, to Article 5 of the Constitution which prohibits the activities of public associations that aim to change the constitutional system by force or conduct propaganda of war, social, ethnic, religious and racial hatred.

31. With regard to the State obligations, 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 that are specified by the Constitution⁴² and by the State's international obligations⁴³. This implies that State bodies, officials and other persons who have been entrusted to exercise State powers shall, within their competence, take the necessary measures to implement and protect personal rights and freedoms⁴⁴ and bear responsibility for actions violating the rights and freedoms of the individual. The State guarantees to hold assemblies, rallies, street marches, demonstrations and pickets⁴⁵.

B. Other relevant domestic legislation

32. The main principles of creating an organization and arranging its activities are laid down in the Civic Code, whereas the detailed legal regulation of certain types of organizations can be found in special corresponding laws.

33. Thus, the activities of political parties are regulated by the Law of the Republic of Belarus "On Political Parties" adopted in 1994 (as amended in 2005); the activities of working unions - by the Law of the Republic of Belarus "On Trade Unions", adopted in 1992 (now it is applied with amendments); the activities of religious organizations by the Law of the Republic of Belarus "On the Freedom of Consciousness and on Religious Organizations" adopted in 1992 (now it is applied as amended in 2002, with further changes). The associations which cannot be defined as political parties, trade unions or religious organizations are defined as *public associations* and their activities are being regulated by the Law of the Republic of Belarus "On Public Associations" adopted in 1994 (as amended in 2005, with further changes).

³³ http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=178

³⁴ Articles 2 and 3

³⁵ Article 4

³⁶ Article 21

³⁷ Article 22

³⁸ Article 33

³⁹ Article 36

⁴⁰ Article 41

⁴¹ Article 23

⁴² Article 59

⁴³ Article 8

⁴⁴ Article 7

⁴⁵ Article 35

34. Some issues concerning public associations are regulated by Presidential acts (Decrees and Ordinances). Those acts apparently have greater legal force than laws and, in fact, sometimes change the rules set by laws. It seems to be the case *inter alia* for the Presidential Decree from 26th January 1999 No. 2 "On Some Issues Concerning Political Parties, Trade Unions and Other Public Associations" that established a special way of registering associations (see §11 above).⁴⁶

35. Other Presidential Acts, as well as regulatory acts adopted by Government, regulate certain aspects of creating an organization (such as paying a state fee for registration, preparing financial reports, taxation, receiving financial help, etc.). Among others, there is a document of much importance, Decree No 48 of the Ministry of Justice from 30th August 2005 which provides for samples of documents and guidelines regarding submission of application forms for registration of public associations, political parties, trade unions, their territorial structures and unions.

C. The Law on Public Associations

36. The Law on Public Associations (hereafter PAA) No. 3252-XII of October 4, 1994 (as amended in 2005 and in 2010), 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 the joint exercise of civil, social, cultural and other rights."⁴⁷ It foresees that citizens have the right to establish, on their own initiative, public associations and to join and operate within public associations⁴⁸. Associations must carry out their activities in accordance with Belarusian legal order and their own constituent instruments.⁴⁹

37. Restrictions on the establishment and operation of public associations are provided in Article 7 of the PAA, which stipulates that operation of non-registered public associations, unions, in the territory of the Republic of Belarus is prohibited.

38. Chapter II deals with the establishment and operation of public associations and gives lengthy descriptions of required conditions. Chapter III deals in great details with state registration of public associations' conditions, changes and/or additions into the statutes of public associations, reorganization and liquidation of public associations.

39. In addition, Article 16 covers the procedure of state registration and provides *inter alia* that activities of unregistered associations are prohibited.

40. Chapter IV deals with the rights of public associations after registration and provides that they shall carry out activities aimed at achieving their statutory purposes.

41. Chapter VI covers the responsibilities of the association. Article 27 and Article 28 deal with the warning procedure against an association, in the case of violation of the Constitution, the Law on PAA, other acts of legislation and/or constituent documents. The warning can lead to the suspension of activities of the association for one to six months and eventually to the liquidation procedure, provided in Article 29.

42. According to Article 30, public associations may join international public association.

⁴⁶ <http://belngo.info/view.pl/eng/art22>

⁴⁷ Article 1 PAA

⁴⁸ Article 2 PAA

⁴⁹ Article 5 PAA

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

43. The Republic of Belarus is a party to the International Covenant on Civil and Political Rights (hereinafter ICCPR) and the First Optional Protocol thereto.

44. According to Article 2 of the ICCPR, a general obligation is imposed on States Parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction⁵⁰. Pursuant to the principle articulated in Article 26 of the Vienna Convention on the Law of Treaties, States Parties are required to give effect to the obligations under the Covenant in good faith.

45. The obligations of the ICCPR in general and Article 2 in particular are accordingly binding on the Republic of Belarus and on all branches of government (executive, legislative and judicial) as well as on other public or governmental authorities, at whatever level, national, regional or local – that are in a position to engage the responsibility of the Republic of Belarus. The executive branch that usually represents the State internationally, may not point to the fact that an action incompatible with the provisions of the ICCPR was carried out by another branch of government as means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility.⁵¹ This understanding flows directly from the principle contained in Article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

46. The legal obligation that Belarus has as party to the ICCPR is not only to respect, protect and fulfil the human rights laid down therein, but also to promote these human rights as in this case the right to freedom of association. This legal obligation is both negative and positive in nature.

47. As the Venice Commission has stated in another context, the obligation to respect means that the State must refrain from interfering with or curtailing the enjoyment of human rights⁵². 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.

48. The requirement under Article 2 (2) of the ICCPR to take steps to give effect to the rights therein is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.⁵³

49. Hence, the Republic of Belarus must take the necessary steps to give effect to the ICCPRs rights in the domestic order. It follows that, although the right to freedom of association is protected under Article 36 of the Belarusian Constitution, the Belarusian State is required - after ratifying the ICCPR - to introduce those changes to domestic laws and practices that are necessary to ensure their conformity with the ICCPR. Where there are inconsistencies between domestic law and the ICCPR. Article 2 of the latter requires that the domestic law or practice be changed to meet the standards imposed by the ICCPRs substantive guarantees.

⁵⁰ See Human Rights Committee in its General Comment No. 31 [80] on the Nature of the General Legal Obligation Imposed on State Parties to the International Covenant on Civil and Political Rights, <http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.GC.33.pdf>.

⁵¹ CCPR/C/21/Rev.1/Add. 13 Human Rights Committee General Comment No. 31 [80] Adopted on 29 March 2004 (2187th meeting), para. 4

⁵² See Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan, CDL-AD (2011) 035, § 66.

⁵³ CCPR/C/21/Rev.1/Add. 13 Human Rights Committee General Comment No. 31 [80] Adopted on 29 March 2004 (2187th meeting), para. 14

50. The beneficiaries of the rights under the ICCPR are individuals, but they may enjoy their rights in community with others. The right of freedom of association is one of those rights under the ICCPR that is enjoyed in community with others. The Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (General Assembly resolution 53/144 (A/RES/53/144), 8 March 1999) can also be regarded as a frame of reference, although non binding.

51. Additionally, the Venice Commission points out that, although the Republic of Belarus is not – yet - a party to the European Convention for the Protection of Human Rights and Fundamental freedoms (ECHR), the latter's standards are also relevant for assessing the conformity of Article 193-1 of the Criminal Code with human rights standards, since Belarus wishes to become a member of the Council of Europe and, if admitted, will have to ratify the ECHR. Hence, the relevant provisions of the ECHR are also taken into account in the present opinion.

52. Consequently, for the present opinion, the human rights obligations laid down in the ECHR and the ICCPR are the most pertinent.

53. The Republic of Belarus, which ratified the ICCPR on 12 November 1973, is 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. The same obligation follows for the States parties to the ECHR from Article 1 in conjunction with Article 14 of the ECHR.

54. The Republic of Belarus is also 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)). The same obligation is laid down in Article 13 of the ECHR.

V. Assessment of Article 193-1 in light of international human rights standards regarding freedom of association

55. 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.

56. 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.”

57. 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.

58. 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.⁵⁴

59. As Belarus is a candidate country for membership of the Council of Europe and an associate member of the Venice Commission, the case-law with relation to the European Convention is also a relevant frame of reference to assess whether the conduct by public authorities is in conformity with universal human rights standards and the international human rights treaties that Belarus has ratified.⁵⁵

60. 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. “

61. 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 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.⁵⁶

62. Freedom of association grants protection against arbitrary interference by the State, for whatever reason and for whatever purpose and it is an indispensable right for the existence and functioning of democracy.

63. No restrictions may be placed on the exercise of the right 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.⁵⁷

64. Confronting Article 193-1 with the above principles of freedom of association implies to distinct several components of this right.

⁵⁴ Cf., CCPR communication no. 1296/2004, Aleksander Belyatsky et al. V. Belarus, views of 24 July 2007

⁵⁵ Cf., Opinion on the compatibility with universal human rights standards of an official warning addressed by the Ministry of Justice of Belarus to the Belarusian Association of Journalists, CDL-AD (2010)053 rev); CDL(2011)037)

⁵⁶ See, e.g., with respect to trade unions, ECtHR, *National Union of Belgian Police v. Belgium*, no. 4464/70, Judgment of 27 October 1975, para. 39

⁵⁷ ECtHR, *Gozelik and Others v. Poland*, no. 44158/98, Judgment of 17 February 2004

A. Article 193-1 in light of the right to enter and form an association

65. It lies at the heart of the freedom of association that an individual or group of individuals may freely establish an association, determine its organization and lawful purposes, and put these purposes into practice by performing those activities that are instrumental to its functions.

66. Freedom of association entails both the "positive" right to enter and form an association and the negative right not to be compelled to join an association that has been established pursuant to civil law.⁵⁸ The "negative" freedom of association has been dealt with in many cases before the European Court of Human Rights.

67. There are in fact two fundamentals underpinning the principle of freedom of association – that is the personal autonomy where the individual has a right to join or not to join (the negative freedom) and the freedom of natural persons and legal entities to collaborate on a voluntary basis within an organizational context without government intervention, in order to realise a mutual goal.⁵⁹

68. The "negative" right of freedom of association implies that no one can be forced to form and join an association.

69. The Venice Commissions considers that by criminalizing the participation of an individual in non-registered association, the existence of Article 193-1 constitutes a form of coercion incompatible with the voluntary nature of this right. Just like individuals, associations as legal persons have the rights to freedom of association and all other universally and regionally guaranteed rights and freedoms applicable to them.⁶⁰

70. The positive aspect of freedom of association implies the right to form and join an association.

71. The right to form an association is an inherent part of the right set forth in Article 11 ECHR. The ability to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning. In *Gorzelik and Others v. Poland* the ECtHR held as follows: "The most important aspect of the right to freedom of association is that citizens should be able to create a legal entity in order to act collectively in a field of mutual interest. Without this, that right would have no meaning".⁶¹

72. The way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned. Certainly States have a right to assure that an association's aim and activities are in conformity with the rules laid down in legislation, but they must do so in a manner compatible with their obligations under the Convention and subject to review by the Convention institutions.⁶²

⁵⁸ See *Sigurður A. Sigurjónsson v. Iceland*, no. 16130/90, Judgment of 30 June 1993, para. 35

⁵⁹ Cf. European Commission of Human Rights, 6 July 1977, Dec. Adm. Com. Ap. 6094/73, D & R 9, p. 5(7).
http://www.icnl.org/knowledge/ijnl/vol3iss1/art_6.htm

⁶⁰ *Aslef v. the United Kingdom*, see discussion:
<http://www.unitedcampaign.org.uk/files/briefings/IERASLEFbrief.pdf>

⁶¹ ECtHR, *Gorzelik and Others v. Poland*, no. 44158/98, Judgment of 17 February 2004, para. 55

⁶² ECtHR, *Koretsky and Others v. Ukraine*, no. 40269/02, Judgment 3 April 2008; ECtHR, *Sidiropoulos and Others v. Greece*, Judgment of 10 July 1998; ECtHR, *The United Macedonian Organisation Ilinden and Others v. Bulgaria*, no. 59491/00, Judgment of 19 January 2006, para. 57; ECtHR, *The Moscow Branch of the Salvation Army v. Russia*, no. 72881/01, para. 59; ECtHR, *Ramazanov and Others v. Azerbaijan*, no. 44363/02, Judgment of 1 February 2007, para 54

73. It must be recalled, that a refusal by the domestic authorities to grant legal entity status to an association of individuals amounts to an interference with the exercise of the right to freedom of association.^{63 64}

74. Since the registration process frames the positive right to form and join an association in practice, it has to be described and analysed briefly.

B. Article 193-1 in light of freedom of association and the right of NGOs to legal entity

75. It lies at the heart of the freedom of association that an individual or group of individuals may freely establish an association, determine its organization and lawful purposes, and put these purposes into practice by performing those activities that are instrumental to its functions.

76. The Venice Commission is of the opinion that domestic law may require some kind of registration of associations, and that failure to register may have certain consequences for the legal status and legal capacity of the association involved⁶⁵.

77. However, the Venice Commission recalls that such a legal requirement may not be an essential condition for the existence of an association, as that might enable the domestic authorities to control the essence of the exercise of the freedom of association.

78. In general, associations are regulated in domestic law as is the case in the Law on Public Associations in Belarus. That regulation may, however, not be too restrictive in its conditions.

79. The right to freedom of association implies the positive obligation on the part of the State to enable associations, in conditions not at variance with the international standard concerned, to strive for the protection of their members' interests.⁶⁶ This also implies that national law must enable legal personality for associations, or at least sufficient legal status for them to be able to stand up effectively for the interests of their members.

80. Therefore, requirements in domestic law must be compatible with the obligation of the State to protect freedom of association.⁶⁷ The requirement that interference must be prescribed by domestic law also refers to the quality of law in question.⁶⁸ For domestic law to meet this requirement, it must afford a measure of legal protection against arbitrary interferences by public authorities. In matters affecting fundamental rights it would be contrary to the principles of democratic society for a legal discretion granted to the executive to be expressed in terms of an unfettered power.⁶⁹

81. Hence, a refusal by the domestic authorities to grant legal entity status of an association of individuals amounts to an interference with the exercise of the right to freedom of association.⁷⁰ Any restriction of the right to freedom of association must according to Article 11.2 of the ECHR be prescribed by law and it is required that the rule containing the limitation be general in its

⁶³ ECtHR, *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 52, judgement of 17 February 2004; ECtHR, *Sidiropoulos*, cited above, para. 31; and ECtHR, *APEH Üldözötteinek Szövetsége and Others v. Hungary* (dec.), no. 32367/96, Judgment of 31 August 1999

⁶⁴ See Opinion on the legal status of religious communities in Turkey, CDL-AD (2010)005, §55.

⁶⁵ See Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan, CDL-AD (2011) 035, §56.

⁶⁶ ECtHR, *National Union of Belgian Police v. Belgium*, no. 4464/70, Judgment of 27 October 1975, para. 39

⁶⁷ ECtHR, *Gorzelik; Sidiropoulos and Others v. Greece*, no. 57/1997/841/1047, Judgment of 10 July 1998

⁶⁸ ECtHR, *Maestri v. Italy* [no. 39748/98, Judgment of 17 February 2004, para. 30

⁶⁹ ECtHR, *Koretskyy and Others v. Ukraine*, no. 40269/02, Judgment of 3 April 2008, para.47

⁷⁰ ECtHR, *Gorzelik and Others v. Poland* [GC], no. 44158/98, Judgement of 17 February 2004, para. 52; ECtHR, *Sidiropoulos*, cited above, para. 31; and ECtHR, *APEH Üldözötteinek Szövetsége and Others v. Hungary*, no. 32367/96, Judgment of 31 August 1999

effect, that it be sufficiently known and the extent of the limitation be sufficiently clear.⁷¹ A restriction that is too general in nature is not permissible due to the principle of proportionality.⁷² The restriction must furthermore pursue a legitimate aim and be necessary in a democratic society.⁷³

82. In this respect, without entering into a depth analysis of the applicable Belarusian legislation⁷⁴, it is nevertheless noticeable that the relevant legislative acts in Belarus establish a high and strict framework for creating an organisation. It appears moreover from several sources that in practice the legal requirements (as the minimum of 50 founders, the physical address of an office in a non-residential building) and cumbersome processes currently leading in Belarus lead to a significant number of registration denial or of registration licence revoked⁷⁵. The OSCE's Rapporteur in his 28 May 2011 report on Belarus⁷⁶ cites numerous examples where NGOs are denied registration on vague grounds, particularly concerning NGOs dealing with human rights⁷⁷.

83. In light of the above, the Venice Commission considers that Belarusian legislation creates difficult conditions for the establishment of public associations and a complicated procedure of registration, with the possibility of arbitrary denial of registration.

84. In addition, the dissolution procedure foreseen by Belarusian legislation⁷⁸ introduces an additional difficulty, if not a threat with regard to the legal status of an association.

85. The European Court of Human Rights has dealt with several cases relating to problems with NGO registration and dissolution. In a recent case⁷⁹ against Azerbaijan⁸⁰ the European Court of Human Rights stated that: "A mere failure to respect certain legal requirements or internal management of non-governmental organisations cannot be considered such serious misconduct as to warrant outright dissolution. [. . .] The immediate and permanent dissolution of the Association constituted a drastic measure to the legitimate aim pursued. Greater flexibility in choosing a more proportionate sanction could be achieved by introducing in the domestic law less radical alternative sanctions, such as a fine or withdrawal of tax benefits."⁸¹

⁷¹ See, e.g., ECtRH, *Sunday Times v. UK*, no. 6538/74, Judgment of 26 April 1979, para. 49; ECtHR, *Silver et al. v. UK*, no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Judgment of 25 March 1983, para. 87-88; ECtHR, *Malone v. UK*, no. 8691/79, Judgment of 2 August 1984, para. 66; ECtHR *Groppera Radio AG et al. v. Switzerland*, no. 10890/84, Judgment of 28 March 1990, para. 68; ECtHR, *Autronic AG v. Switzerland*, no. 12726/87, Judgment of 22 May 1990, para. 57.

⁷² See discussion of Wino J.M. van Veen, Negative Freedom of Association: Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in *The International Journal of Not-for-Profit Law*, Vol. 3, Issue 1, September 2000.

⁷³ See, among many authorities, ECtHR, *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, Judgment of 29 April 1999, para 104.

⁷⁴ For a general description of the registration process and practice, see CDL(2011)078 pp.19-19.

⁷⁵ OSCE Rapporteur's Report on Belarus (Emmanuel Decaux), 28 May 2011 citing several recent examples of NGOs that have been denied registration. See also: <http://belngo.info/view.pl/eng/art22>.

⁷⁶ OSCE Rapporteur's Report on Belarus (Emmanuel Decaux), 28 May 2011 citing several recent examples of NGOs that have been denied registration. See also: <http://belngo.info/view.pl/eng/art22>.

⁷⁷ Cf., Human Rights Defense Center Viasna, the Assembly of Pro-Democratic NGOs of Belarus, youth public association Young Social Democrats, youth public association Modes, youth association Youth Christian-Social

⁷⁸ For a general description of the dissolution process and practice, see CDL(2011)078 pp.19-21.

⁷⁹ ECtHR, *Tebieti Mühafize Cemiyeti and Isravilov v. Azerbaijan*, no. 37083/03, Judgment of 8 October 2009

⁸⁰ Where the legislation provides that if an NGO is notified more than twice in one year for violations, the Ministry of Justice may apply to the court for the dissolution of the said association ; See also opinion CDL-AD (2011) 035 on the compatibility with Human rights standards of the legislation on non-governmental association of the Republic of Azerbaijan.

⁸¹ See also discussion by Mahammad Guluzade and Natalia Bourjaily, "The NGO Law: Azerbaijan loses another case in the European court" in *The International Journal of Not-for-Profit Law*, Volume 12, Issue 3, May 2010 (http://www.icnl.org/knowledge/ijnl/vol12iss3/art_2.htm#_ftn17)

86. The Committee of Ministers of the Council of Europe has recommended in this respect that the termination of a legal person of an NGO (dissolution) should only be decided on the basis of serious misconduct.⁸²

87. The Venice Commission cannot but recall that a decision that serves as the basis for a court's decision to dissolve an association must meet the requirements of being prescribed by law and pursue a legitimate aim and be necessary in a democratic society. A warning preceding dissolution based on a broad interpretation of vague legal provisions does in itself constitute a violation.⁸³ A dissolution that does not pursue a pressing social need cannot be deemed necessary in a democratic society.⁸⁴

88. There must be convincing and compelling reasons justifying the dissolution and/or temporary forfeiture of the right to freedom of association. Such interference must meet a pressing social need and be "proportionate to the aims pursued."⁸⁵

89. The Venice Commission, moreover, cannot but reiterate the chilling effect of the warnings directed by the Ministry of Justice at human rights defenders, be they members of an NGO, journalists or defence lawyers.⁸⁶ In the Commission's view, their speech and conduct will be restrained by fear of further penalization.

90. Each pervasive obstacles to obtain or regain registration renders the existence of NGOs all the more vulnerable since they can be dissolved on disputable, even arbitrary grounds and denied re-registration. For example, the dissolution of the Human Rights Center 'Viasna' by the Supreme Court of Belarus in October 2003 was considered a violation of the freedom of association provision under the ICCPR by the United Nations Human Rights Committee. HRC 'Viasna' has repeatedly tried to re-register the association in the eight years since without results⁸⁷.

91. When such conditions are combined with the legislation that provides criminal liability for activities on behalf of non-registered organisations, it is difficult not to conclude that Article 19-1 is a potential tool to deter civic activists and that authorities have a wide latitude to interfere with the fundamental right of freedom of association, and furthermore freedom of thought, opinion and expression.⁸⁸

92. Moreover, the Venice Commission recalls that the mere fact that an association does not fulfil all the elements of the legal regulation concerned does not mean that it is not protected by the internationally guaranteed freedom of association. In *Chassagnou and Others v. France* the ECtHR emphasized the autonomous meaning of "association": "The term "association" (...)

⁸² CM/Rec(2007)14 - Recommendation of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe (Adopted by the Committee of Ministers on 10 October 2007 at the 1006th meeting of the Ministers' Deputies).

⁸³ ECtHR, *Koretskyy and Others v. Ukraine*, no. 40269/02, no. 107, Judgment of 3 July 2008

⁸⁴ ECtHR, *Koretskyy and Others v. Ukraine*, no. 40269/02, no. 107, Judgment of 3 July 2008

⁸⁵ ECtHR, *Refah Partisi (The Welfare Party) and Others v. Turkey [Grand Chamber]*, nos. 41340/98, 41343/98 and 41344/98, Judgment of 13 February 2003

⁸⁶ See opinion (CDL-AD (2010)053 rev on the warning against BAJ and opinion Opinion on the the compatibility with universal human rights standards of the Warning addressed by the Ministry of Justice of Belarus to the Belarusian Helsinki Committee; see also CDL- AD (2011)026.

⁸⁷ The dissolution of the Human Rights Center 'Viasna' by the Supreme Court of Belarus in October 2003 was considered a violation of the freedom of association provision under the ICCPR by the United Nations Human Rights Committee. HRC 'Viasna' has repeatedly tried to re-register the association in the eight years since without results, <http://www.civilrightsdefenders.org/en/news/11282/>.

⁸⁸ On 4 August 2011, Ales Bialiatski was arrested and put in detention under Article 243, part 2 of the Criminal Code of the Republic of Belarus, "concealment of profits on an especially large scale". This provision envisages up to 7 years of imprisonment. HRC "Viasna" has appealed to the international community to apply pressure to release Ales Bialiatski and "other prisoners of conscience". <http://spring96.org/en/news/44957>.

possesses an autonomous meaning; the classification in national law has only relative value and constitutes no more than a starting-point."⁸⁹

93. The principles and protection laid down in the ICCPR and the ECHR consequently apply also to non-registered NGO'S. This implies that, as the recognition of the association as a legal entity is an inherent part of the freedom of association, the refusal of registration is also fully covered by the scope of Article 22 of the ICCPR and Article 11 of the ECHR.

94. Hence, in the opinion of the Venice Commission, penalizing actions connected with the organization or management of an association on the sole ground that the association concerned has not passed the state registration, as Article 193-1 of the Criminal Code does, does not meet the strict criteria provided for under Article 22.2 ICCPR and 11.2 ECHR.

95. Criminalizing human rights activities as does Article 193-1 in cases where members of unregistered associations are supporting human rights work, cannot be regarded otherwise than as going against the underpinning values of the international human rights regime and in breach of the objectives of civil and political rights protected under the ICCPR and ECHR.

96. In conclusion, the Venice Commission considers that the mere fact that an association has not passed state registration may not be a ground for penalizing actions connected with such an association. This would make the activities of a non-registered association in fact impossible and, consequently, restrict the right to freedom of association in its essence.

97. Apart, perhaps, of very serious circumstances, a penal sanction in its broad formulation in Article 193-1 of the Penal Code, and especially a sanction of the gravity as laid down there, cannot be said to be necessary for the protection of any of the public interests or the rights of others mentioned in Article 22 of the ICCPR and Article 11 of the ECHR in the form of a "pressing social need", let alone that such a general penalization could be held to be proportionate with any of those interests or rights.⁹⁰

C. Article 193-1 in light of freedom association and freedom of expression

98. Arbitrary denial and discriminatory practices in denying an organization registration also touch upon the relationship between the enjoyment of freedom of association and freedom of expression and their interdependence. The former right may be seriously affected by the extent to which the latter freedom is guaranteed.

99. As the Venice Commission has recently stated, freedom of association is an essential prerequisite for other fundamental freedoms⁹¹.

100. The protection of personal opinions guaranteed by Articles 18 and 19 of the ICCPR and Articles 9 and 10 of the ECHR is one of the purposes of the guarantee of freedom of association. Such protection can only be effectively secured through the guarantee of both the positive and the negative right to freedom of association.⁹²

⁸⁹ ECtHR, *Chassagnou and Others v. France*, nos 25088/94 ; no. 28331/95 and 28443/95, Judgment of 29 April 1999, para. 100.

⁹⁰ ECtHR, *Koretskyy and Others v. Ukraine*, no. 40269/02, no. 107, Judgment of 3 July 2008

⁹¹ See Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan , CDL-AD (2011)035, § 45;

⁹² ECtHR, *Chassagnou and Others v. France*, nos. 25088/94, 28331/95 and 28443/95, § 103; ECtHR, III and *Young, James and Webster. V. the United Kingdom*, no. 7601/76; 7806/77, Judgment of 13 August 1981, para 57; ECtHR, *Sigurður A. Sigurjónsson v. Iceland*, no. 16130/90, Judgment of 30 June 1993, para.37

101. As the Venice Commission has recently emphasized, freedom of association without freedom of expression amounts to little if anything⁹³. The exercise of freedom of association by workers, students, and human rights defenders in society has always been at the heart of the struggle for democracy and human rights around the world, and it remains at the heart of society once democracy has been achieved.

102. The right to freedom of association is intertwined with the right to freedom of thought, conscience, religion, opinion and expression. It is impossible to defend individual rights if citizens are unable to organize around common needs and interests and speak up for them publicly.

103. Therefore, the freedom of expression of an association cannot be subject to the direction of public authorities,⁹⁴ unless in accordance with permissible restrictions ascribed by law and necessary in a democratic society for narrowly and clearly defined purposes. Only indisputable imperatives can justify interference with the enjoyment of freedom of association under the European Convention.⁹⁵

104. The Venice Commission reiterates as it has in its previous opinion on Belarus that political speech enjoys the highest protection of any kind of expression in ECHR jurisprudence.⁹⁶ The speech of human rights defenders falls under the category of political speech, which need not only be verbal communication but expressive conduct as well. A clear understanding of the significance of political speech is found in a United States Supreme Court decision in 1948 stating: "Controversial speech may serve its highest democratic purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger".⁹⁷

105. Criminalising the legitimate social mobilisation of freedom of association and social protest or criticism of political authorities with fines or imprisonment, subject to 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.

106. The UN Human Rights Committee in its General Comment No. 34 (July 2011) on freedom of opinion and expression states that it is incompatible with paragraph 1 of Article 19 of the ICCPR (freedom to hold an opinion) to criminalise the holding of an opinion. "The harassment, intimidation or stigmatisation of a person, including arrest, detention, trial or imprisonment for reasons of opinions they may hold, constitutes a violation of Article 19, paragraph 1. Any form of effort to coerce the holding or not holding of any opinion is prohibited."⁹⁸

107. In this regard, Article 193-1 poses a serious threat to the right to freedom of association and to freedom of opinion and of expression, not least during times when human rights associations are trying to assist those whose fundamental rights are being threatened.⁹⁹ A member of a non-registered association who takes part in offering legal assistance to victims of human rights violations or speaks up on their behalf may be punished under Article 193-1 with a fine or two years of imprisonment.

⁹³ See Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan, CDL-AD (2011) 035, § 84;

⁹⁴ CM/Rec(2007)14 - Recommendation of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe (*Adopted by the Committee of Ministers on 10 October 2007 at the 1006th meeting of the Ministers' Deputies*).

⁹⁵ ECtHR *Chassagnou et al. v. France*, Judgment of 29 April 1999, Appl. nos. 25088/94, 28331/95 and 28443/95, para 113

⁹⁶ Herdis Thorgeirsdottir, *Journalism Worthy of the Name: Freedom within the Press and the Affirmative Side of Article 10 of the ECHR* (Brill 2005).

⁹⁷ Cf., US Supreme Court Justice William Douglas in *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1948).

⁹⁸ UN Human Rights Committee, One Hundred and second session, Geneva, 11-29 July 2011.

⁹⁹ <http://spring96.org/en/news/44052>

108. The Venice Commission holds that, merely by its existence, Article 193-1 has a chilling effect on the activities of NGOs, its members and its leaders. It is intimidating for social mobilisation and civic activism on the forum of NGOs and may thus obstruct the work of human rights defenders.

109. The Venice Commission holds that Article 193-1 penetrates the thoughts and attitudes of activists even without being put into effect. And when put into effect, the Venice Commission considers that the restriction is so severe that it not only restricts freedom of association but also freedom of opinion and expression to a unjustifiable degree.

VI. Conclusions

110. Belarus as a party to the ICCPR is under legally binding obligations to respect and protect fundamental rights such as freedom of expression (Article 19), freedom of association (Article 22) and all other rights laid down in the Covenant.

111. As a candidate country for membership of the Council of Europe and an associate member of the Venice Commission, the ECHR 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.¹⁰⁰

112. The rights to freedom of association and freedom of expression are of paramount importance in any democratic society and any restriction of these must meet a strict test of justification.¹⁰¹

113. In the opinion of the Venice Commission, penalizing actions connected with the organization or management of an association on the sole ground that the association concerned has not passed the state registration, as Article 193-1 of the Criminal Code does, does not meet the strict criteria provided for under Articles 22.2 I and 19.2 CCPR and 11.2 and 10.2 ECHR. This would make the activities of a non-registered association in fact impossible and, consequently, restrict the right to freedom of association in its essence.

114. 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.

115. Taking into account the deteriorating situation of human rights defenders in Belarus, particularly in recent months, along with the evolution of the legal framework in Belarus with regard to NGOs in the last decade, the adoption of Article 193-1 can serve the purpose of criminalising social protest and to legalise government response to social unrest. An arbitrary use of the existing legal framework to criminalise civil society efforts in trying to have an impact on its own conditions and future is unacceptable from the standpoint of democratic principles and human rights.

¹⁰⁰ See Opinion on the compatibility with universal human rights standards of an official warning addressed by the Ministry of Justice of Belarus to the Belarusian Association of Journalists, CDL-AD (2010) 053rev; Opinion on the compatibility with universal human rights standards of the Warning addressed by the Ministry of Justice of Belarus to the Belarusian Helsinki Committee, CDL-AD(2011)026.

¹⁰¹ See Opinion on the compatibility with universal human rights standards of an official warning addressed by the Ministry of Justice of Belarus to the Belarusian Association of Journalists, CDL-AD (2010)053 rev, §105; Opinion on the compatibility with universal human rights standards of the Warning addressed by the Ministry of Justice of Belarus to the Belarusian Helsinki Committee, CDL-AD(2011)026.

116. The Venice Commission reiterates that the Republic of Belarus, as a Party to the ICCPR, is obliged to take steps to give effect to the fundamental rights it has undertaken to ensure to all individuals within its territory. This requirement is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.¹⁰² It also reiterates that the case-law relating to the ECHR constitutes a relevant frame of reference for the contents and scope of that obligation.

117. The Venice Commission reiterates its readiness to assist Belarusian authorities as hitherto in matters concerning human rights.

¹⁰² CCPR/C/21/Rev.1/Add. 13 Human Rights Committee General Comment No. 31 [80], Adopted on 29 March 2004 (2187th meeting), para. 14