



Strasbourg, 9 June 2011

Opinion No. 616 / 2011

CDL(2011)051*
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

**ON THE WARNING ADDRESSED TO
THE BELARUSIAN HELSINKI COMMITTEE
BY THE MINISTRY OF JUSTICE**

OF BELARUS

by

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I. Introduction

1. The Chairperson of the Political Affairs Committee of the Parliamentary Assembly of the Council of Europe has requested that the Venice Commission assess the compatibility with universal human rights standards of the warning addressed by the Ministry of Justice of Belarus to the Belarusian Helsinki Committee.
2. Belarus is not a member of the Council of Europe, and at present it does not meet the requirements for membership. One consequence is that its citizens cannot benefit from support from the Council's mechanisms in support of human rights, democracy and rule of law as do citizens of the Council of Europe's Member States.
3. Belarus is however a candidate country for membership of the Council of Europe and an associate member of the Venice Commission and the European Convention jurisprudence is hence a relevant frame of reference to assess if the contested conduct by public authorities is in conformity with these human rights standards as well as the international human rights treaties that Belarus has ratified.¹
4. In many respects the issues raised by the request from the Chair of the Political Affairs Committee are similar, *mutatis mutandis*, to the ones raised by the request concerning the warning addressed by the Ministry of Justice to the Belarusian Association of Journalists (adopted at its 85th Plenary Session (CDL-AD(2010)053rev) In light of the grave situation of many human rights defenders in Belarus the assessment of this Warning may have relevance not only for the Belarusian Helsinki Committee and its members, but more generally for other defenders of human rights in the country. For that reason the present opinion gives a more general assessment of the problem and relevant national legislation and its compliance with international standards.

II. Background information

5. The Belarusian Helsinki Committee (BHC hereinafter), the only human rights organisation that still remains registered in Belarus,² sent a communication to the United Nations Special Rapporteur (Special Rapporteur hereinafter) on the Independence of Judges and Lawyers on January 11th 2011 detailing intimidation faced by lawyers of opposition leaders and others arrested after a large demonstration to protest against Mr Lukashenko's victory in disputed elections on 19 December, 2010 in Minsk. (See below III. Issues, section A).
6. The Ministry of Justice in the Republic of Belarus subsequently issued a Warning to the Belarusian Helsinki Committee on January 12th 2011 maintaining that the communication was "an attempt to discredit the Republic of Belarus in the eyes of the international community". (See below III. Issues, section B).
7. The Supreme Court of Belarus dismissed an appeal from the BHC on 12 March 2011 (see below III. Issues, section C).
8. In the months that followed the election the Parliamentary Assembly of the Council of Europe asserted that the crackdown continued in a more targeted way.³ At least 30 political opposition members, including three presidential candidates, remained in custody facing riot charges and if convicted they face up to 15 years of imprisonment. The authorities have not allowed the detainees to have private, confidential access to their lawyers. Some lawyers

¹ Cf., CDL-AD(2010)053rev.

² <http://charter97.org/en/news/2011/3/9/36612/>

³ Parliamentary Assembly Council of Europe, Doc. 12494, 25 January 2011.

have spoken up and tried to draw the attention of the civil society and the media to these facts. The Ministry of Justice asked the Minsk City Bar Association to revoke licenses of several defense lawyers working on these cases after they voiced concerns about the well being or detention conditions of their clients.⁴ Recent information reveals that the State is increasingly interfering and suppressing activities of lawyers. Six lawyers have been disbarred since December 2010.

9. A new report on the harassment of lawyers in Belarus was submitted to the Special Rapporteur on 18 February 2011⁵ and again on 4 March 2011 from Belarusian human rights groups.⁶ The senders asked the Special Rapporteur to respond to their e-mail as soon as possible and take all possible actions within the framework of her mandate. In cases where the alleged violations are time-sensitive in terms of involving loss of life, life-threatening situations or either imminent ongoing damage of very grave nature to victims, the Special Rapporteur will send an urgent appeal to the Government concerned. As a general rule, both urgent appeals and letters of allegation remain confidential until published in the report of the Special Rapporteur to the Human Rights Council.⁷

10. According to a letter of 21 February 2011 from several international human rights organizations to the permanent representatives of all member states of the UN Human Rights Council,⁸ most of those arrested during the mass demonstration against the election outcome were not allowed to contact their families or a lawyer. No less than 700 were arrested. Human Rights Watch research in Belarus has corroborated these findings.⁹ Several of those arrested have now been brought to court and have faced unsubstantiated charges and have received extreme sentences.¹⁰

11. Recent information reveals that presidential candidate Andrei Sannikov, who was ill-treated, has now been sentenced to five years of hard labour for having protested against election fraud. Others who stood trial with him got between three and a half years in prison.¹¹

12. There have been numerous reported cases of intensified restrictions of general activities of human rights defenders and activists. They have been harassed and repeatedly questioned by law-enforcement officers. Private homes of leading members have been searched, warnings issued against individuals and organisations, and computers and data storage devices confiscated.¹² The offices of the only nationally registered human rights defence organisation, the BHC has been searched and the workplace of the Human Rights Centre "Viasna", and the offices of independent media have been searched. Because carrying out work for unregistered organizations is unlawful, many NGO activists are vulnerable for criminal prosecution for their work.¹³ The Ministry of Justice has requested

⁴ <http://www.civilrightsdefenders.org/downloads/110222BelarusletterforHRC1.pdf>

⁵ <http://prava-by.info/en/archives/1983>

⁶ <http://spring96.org/en/news/41620>

⁷ A/HRC/11/41/Add.1, 19 May 2009 – Report of the Special Rapporteur on the Independence of judges and lawyers contains descriptions of inhuman treatment of prisoners in Belarus who did not have access to a lawyer during any stage of the criminal process including during the trial. See page 30.

⁸ The Human Rights Council is an inter-governmental body within the UN system made up of 47 States responsible for strengthening the promotion and protection of human rights around the globe. The Council was created by the General Assembly on 15 March 2006 with the main purpose of addressing situations of human rights violations and make recommendations on them. On 18 June 2007, the Human Rights Council adopted Resolution 5/1 by which a new complaint procedure was established to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances.

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

¹⁰ Council of Europe Commissioner for Human Rights, Ref. CommHR 001 (2011), 25.05.2011.

¹¹ Council of Europe Commissioner for Human Rights, Ref. CommHR 001 (2011), 25.05.2011. See also: <http://www.unhcr.org/refworld/docid/4dd61ade2.html>

¹² Parliamentary Assembly Council of Europe, Doc. 12494, 25 January 2011.

¹³ http://www.hrw.org/en/node/97152/section/7#_ftn89

that two independent newspapers should be closed and individual members of the journalists' association and other media professionals have received official warnings from both the Belarus KGB and the Prosecutor's office.¹⁴

13. The Warning is a deterrent for the BHC as if the Ministry of Justice issues another warning for the same offence, the association can be liquidated.¹⁵ A Presidential decree from 1999 obliging non-governmental organisations to re-register has resulted in many of them being deleted from the official register as they were prevented from re-applying and subsequently closed down.¹⁶ According to the Parliamentary Assembly Council of Europe's report on the state of human rights and democracy in Europe there were attempts in 2006 to close down the BHC.¹⁷ In 2007 the EU called upon Belarusian authorities to immediately cease their campaign of harassment against an independent civil society, in breach of their OSCE and other international commitments, and urged them to reconsider an eviction order served on the Belarusian Helsinki Committee.¹⁸

III. Issues

A. The BHC statement to the Special Rapporteur that gave cause to the Warning

14. The BHC sent a statement in English by email to the Special Rapporteur of the United Nations on the Independence of Judges and Lawyers on 12 January 2011 that gave cause to the warning.¹⁹

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

16. In the statement the BHC said arrested persons were not allowed to meet their advocates in private while the Minsk City Department of the Interior prohibited advocates from disseminating any information that might challenge "secrecy of investigation" and threatened to bring those who do not abide [by the prohibition] to criminal responsibility. The statement revealed that the Ministry of Justice disseminated information on 29 December 2010 holding advocates responsible for abusing their rights.

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

¹⁴ Council of Europe Commissioner for Human Rights, Ref. CommHR 001 (2011), 25.05.2011.

¹⁵ Cf., The Law on Public Associations, No. 3254-XII of October 4, 1999 with later amendments (Article 29). See also: http://www.nytimes.com/2011/01/14/world/europe/14belarus.html?_r=1

¹⁶ Council of Europe Commissioner for Human Rights, Ref. CommHR 001 (2011), 25.05.2011.

¹⁷ Doc 11202, 28 March 2007, Report Committee on Legal Affairs and Human Rights.

¹⁸ http://www.delvie.ec.europa.eu/en/eu_osce/eu_statements/2007/JanMay/EU%20statement%20on%20the%20Belarus%20Helsinki%20Committee.pdf (accessed 22 May 2011).

¹⁹ See also: http://www.nytimes.com/2011/01/14/world/europe/14belarus.html?_r=1

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

B. The Warning of the Ministry of Justice of Belarus to the BHC

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

20. The Warning stated that the said communication contained unsubstantiated allegations of falsifications said to have taken place during the presidential elections; a tendentious account of arrests brought by the prosecution service against organiser of the riots on 19 December 2010 and that there was no truth in claims that lawyers providing legal assistance to persons accused of organising or taking part in protests were intimidated.

21. The Ministry of Justice accused the BHC of violating the Information Act in Belarus by disseminating inaccurate information discrediting the law enforcement agencies and judicial bodies of the Republic of Belarus; furthermore for infringing the Civil Code of Belarus for not having the name of the organisation correct in the heading of the document.

22. In light of the alleged infringements of the Law of the Republic of Belarus "On Public Associations" and the Law of the Republic of Belarus "On Information, Informatisation and Protection of Information" as well as of the statutes of the BHC, the Ministry of Justice ordered:

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

C. The Supreme Court’s dismissal of BHC’s complaint

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

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

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

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

26. The Supreme Court decided to reject the BHC's claim for satisfaction.

27. The decision came in force immediately after its announcement and is not subject to appeal in cassation.

28. BHC challenged the decision of the Supreme Court before the President of the Supreme Court. The President delivered its decision on ***[and**** confirmed the Supreme Court's decision.]

IV. The Belarus Helsinki Committee

29. In many European countries there exist non-profit organizations called Helsinki Committees, devoted to human rights and presumably named after the Helsinki Accords, the Final act of the Conference on Security and Co-operation in Europe held in Helsinki, Finland in 1975. The Belarusian Helsinki Committee (BHC) was established in 1995 and it is the sole remaining, independent human rights group in Belarus.²⁰ The BHC is a member of the International Helsinki Federation, which has consultative status both with the United Nations and the Organization for Security and Cooperation in Europe.²¹

30. The Charter of the BHC was adopted at its founding meeting 11 October 1995. Amendments and additions to the Charter (the Charter in a new wording) was registered by the Ministry of Justice of the Republic of Belarus on 23 January 2006.²² According to its Charter the "National Human Rights Public Association 'Belarusian Helsinki Committee'" is a self-supporting, independent, non-commercial human rights public association, which acts

²⁰ [Belarus: Threat to Close Lone Human Rights Group](http://en.wikipedia.org/wiki/Belarus_Helsinki_Committee#cite_note-0)". *Human Rights Watch*. 2007-01-31. Retrieved 2007-07-09.
http://www.delvie.ec.europa.eu/en/eu_osce/eu_statements/2007/Jan-May/EU%20statement%20on%20the%20Belarus%20Helsinki%20Committee.pdf

²¹ <http://humanrightshouse.org/Articles/8679.html>

²² No. 26 Registration Certificate No. 00529.

on the basis of self-ruling and unites citizens of the Republic of Belarus on the basis of community interests. In its activities, it is independent from governmental and economic entities, and political and public organizations. Relationships with those entities and organisations are based on partnership, dialogue and cooperation.

31. The aim of the BHC is to defend in Belarus the human rights as guaranteed by the Constitution of the Republic of Belarus, the current legislation, and as declared by the Helsinki Agreements and other international treaties on human rights, and informing the broad public about the situation with human rights in Belarus and the world.

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

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

V. Constitutional provisions and relevant domestic legislation in relation to the Warning

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

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

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

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

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

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

40. Article 34 guarantees citizens of Belarus the right to receive, store and disseminate complete, reliable and timely information on the activities of State bodies and public associations, on political, economic, cultural and international life, and on the state of the environment. State bodies, public associations and officials shall afford citizens of the

Republic of Belarus an opportunity to familiarise themselves with information that affects their rights and legitimate interests. The use of information may be restricted by legislation with the purpose to safeguard the honour, dignity, personal and family life of citizens and the full implementation of their rights.

41. Article 36 of the Constitution states that “everyone is entitled to freedom of association”.

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

43. Access to justice is guaranteed under Article 60 which provides that everyone shall be guaranteed protection of his rights and freedoms by a competent, independent and impartial court within the time limits specified by law. In order to protect their rights, freedoms, honour and dignity in accordance with law, citizens shall be entitled to claim, through courts, both property damage and financial compensation for moral injury.

44. Article 61 provides that everyone shall have the right in accordance with the international legal acts ratified by the Republic of Belarus to appeal to international organizations to defend his rights and freedoms, provided available domestic legal remedies have been exhausted.

45. Article 62 of the Constitution guarantees the right to legal assistance. The chief function of the legal profession, in accordance with article 62 as also stated in article 2 of the Legal Profession Act, No. 2406 of 1993, is to provide qualified legal assistance to individuals and legal entities in the defense of their rights, freedoms and legitimate interests. Article 4 of the Legal Profession Act provides that everyone has the right to apply to a lawyer of his or her own choosing. Obstruction to rendering legal assistance is prohibited.

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

A. The Law on Public Associations

47. The Warning issued to the BHC contests the legal base of the operation of the BHC which according to Article 5 of the Law on Public Associations No. 3252-XII of October 4, 1994 amended as of January 4, 2010 hereinafter PAA) shall carry out their activities in accordance with the Constitution of the Republic of Belarus, the Act and other legislative enactments and on the basis of their own constituent instruments.

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

49. According to Article 2 of the PAA, citizens of the Republic of Belarus have the right to establish, on their own initiative, public associations and to join and operate within public associations. According to Article 5 public associations, are to be established and operated in accordance with the Constitution of the Republic of Belarus, the present law, and other acts of legislation on the basis of their constituent documents. According to Article 11, legal persons cannot be members of public associations. The rights of public associations are

listed in Chapter 2 and Chapter 4 of the PAA. According to Article 20, public associations have the right to create their own mass media and carry out publishing activity in the order established by law. According to Article 30, public associations may join international public associations.

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

51. According to Article 28 of the PAA the activities of a public association which receives an official warning may be suspended for the term of one to six months by the decision of a court upon an application of the Ministry of Justice if the public association fails to adhere to the order within one month. The suspension of the activity of international and republican public associations is carried out on the decision of the Supreme Court of the Republic of Belarus upon application of the Ministry of Justice.

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

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

B. The law on information

54. The Ministry of Justice accused the BHC of violating laws governing NGOs and the media by distributing false information that does not correspond to reality. The Warning refers to Article 4 of the Media Act No. 427-Z of July 17, 2008 regarding basic principles of mass media activities which entail **truthfulness of information**; mass media shall disseminate information which corresponds to reality; information may not contradict the requirements of the legislation of the Republic of Belarus.

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

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

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

57. Belarus is a party to the International Covenant on Civil and Political Rights and the first Optional Protocol thereto, the International Covenant on Economic, Social and Cultural

Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on All Forms of Discrimination against Women and the Optional Protocol thereto, and the Convention on the Rights of the Child. Belarus has assumed obligations and duties under international law by ratifying these treaties.

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

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

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

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

62. Moreover, the Republic of Belarus is under the obligation to ensure that any person whose rights or freedoms recognized under the ICCPR have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity (Article 2 (3))

63. Under ECHR case law which is also of relevance here, the prime characteristic of positive obligations is that they in practice require national authorities to take the necessary measures to safeguard a right,²³ or more specifically, to adopt reasonable and suitable measures to protect the rights of the individual.²⁴ Such measures may be judicial but they may also be practical. According to ECHR case law which applies both to negative and positive obligations, "hindrance in fact can contravene the Convention just like legal impediment".²⁵

VII. The BHC's communication in light of the freedom of expression

64. The main cause of the Warning directed at the BHC was the content of the information that the association sent to the UN Special Rapporteur which the Ministry of Justice claimed contained unsubstantiated and false information.

65. The importance of freedom of information as a fundamental right is beyond question, the right to impart and receive information is entailed in the right to freedom of expression which

²³ *Hokkanen v. Finland*, 24 August 1994.

²⁴ *López Ostra v. Spain*, 9 December 1994.

²⁵ *Airey v. Ireland*, 11 September 1979.

“constitutes one of the essential foundations of a democratic society”.²⁶ In the very first session in 1946, the UN General Assembly adopted Resolution 59(1) stating that “Freedom of information is a fundamental human right and . . . the touchstone of all the freedoms to which the United Nations is consecrated”.²⁷

66. Freedom of expression and information is very important in the case of NGOs with the collective exercise of freedom of expression by people coming together in public associations. In ECHR jurisprudence the connection between freedom of expression and freedom of association is highlighted in many cases. The European Court of Human Rights has stated that there can be no democracy without pluralism, tolerance and broadmindedness and for that reason freedom of expression is also applicable to unpopular ideas and information that “offend, shock and disturb”.²⁸

67. The jurisprudence of the European Court of Human Rights is relevant to interpreting and applying Article 19 of the ICCPR to assess the minimum standards as laid down in the international human rights instruments binding the Republic of Belarus. Article 19 of the ICCPR provides that:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

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

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

69. According to Article 19 of the ICCPR no restrictions may be placed on the exercise of the rights unless provided by law and are necessary for the respect of the rights or

²⁶ Lingens v. Austria, paragraph 41.

²⁷ See Herdís Thorgeirsdóttir, *Journalism Worthy of the Name: Freedom within the Press and the Affirmative Side of Article 10 of the European Convention on Human Rights*, Martinus Nijhoff Publishers, 2005.

²⁸ *Freedom and Democracy Party (ÖZDEP) v. Turkey*, 8 December, 1999; *Lingens v. Austria*, paragraph 41.

reputations of others; for the protection of national security or of public order, or of public health or morals. Under Article 10 interference with freedom of expression, is permissible only if it is prescribed by law and pursues a legitimate aim. The impugned measure must also be "necessary in a democratic society" in order to fulfill that aim.

70. The Warning constitutes an interference with the right to freedom of expression of the BHC, including the association's right to impart information of all kinds, regardless of frontiers, in writing as it did through any media of its choice.

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

72. The interference was justified as the communication was regarded as defamatory of the authorities in Belarus as "inaccurate information was disseminated, *discrediting the law enforcement agencies and judicial bodies of the Republic of Belarus*".²⁹ An amendment of the Criminal Code in 2005, Article 369-1 Discrediting the Republic of Belarus, makes it subject to punishment of up to six months of detention or two years of imprisonment to discredit Belarus the authorities of Belarus by disseminating false information of the political [. . .] situation of Belarus

73. The most obvious role for NGOs dedicated to the protection of human rights is supplying information on the implementation of human rights treaties. The BHC as a defender of human rights has an essential watchdog role and its activities when imparting information should be protected in the same way as the press.³⁰ The BHC must be able to exercise its freedom of expression to attain the objectives of calling attention to what goes wrong. The protection of human rights in any society is not effective unless those defending them can contribute to the public and political debate.

74. The Committee of Ministers of the Council of Europe in a declaration on the freedom of political debate in 2004 reaffirmed the pre-eminent importance of freedom of expression and information for guaranteeing the right of the public to be informed on matters of public concern and to exercise public scrutiny over public and political affairs, as well as for ensuring accountability and transparency of political bodies and public authorities, which are necessary in a democratic society, without prejudice to the domestic rules of member states concerning the status and liability of public officials.³¹

75. The BHC sent the communication stating that the whole advocate community in Belarus was being harassed by the Ministry of Justice and that lawyers were facing an immediate risk having their licenses suspended if they came to the aid of those arrested. The content of the communication concerned a subject vital to the general interest of the people in Belarus. It touched upon the fundamental rights of freedom of expression, of association and access to justice about which the BHC was entitled to impart information. The communication is

²⁹ The current Criminal Code of the Republic of Belarus of 15.12.2007, No. 71-3 contains severe provisions regarding defamation and insult at Articles 188, 189, 367, 368 and 369, came into force in January 2005 – (http://spring96.org/files/book/doklad_en.pdf). See also Article 19 comment: <http://www.article19.org/pdfs/analysis/belarus-defamation-provisions.pdf>

³⁰ Társaság a Szabadságjogokért v. Hungary

³¹ Council of Europe Committee of Ministers Declaration on freedom of political debate in the media, adopted by the Committee of Ministers at the end 872nd meeting of the Ministers' Deputies.

clearly political speech, which under European Convention jurisprudence enjoys the highest protection of any kind of expression.³²

76. Authorities may interfere with the right to disseminate information (Art. 19 (3) ICCPR and Art. 10 (2) ECHR) to protect the reputation of others, which is expressly protected as part of the right to privacy (Art. 17 (1) ICCPR and Art. 8 (1) ECHR)³³ – but not to protect the reputation of the authorities themselves as the contribution of NGOs to the public debate is an essential aspect of democratic society.

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

78. Authorities are expected to tolerate greater criticism to counteract the abuse of power.³⁵ The European Court of Human Rights has reiterated that there is little scope under Article 10 (2) of the ECHR for restrictions on debate on questions of public interest.³⁶ In a democratic system the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The public interest in particular information can sometimes be so strong as to override even a legally imposed duties.³⁷

79. Had the BHC gone too far in its statement to the Special Rapporteur stressing its point such exaggeration is tolerated when much is at stake.³⁸ The content of the communication did not contain any strong language. It was not offensive or insulting and the subject matter was clearly one of public interest. If the BHC comments were not “objective” or “complete” – they were still with factual basis. The assertion that lawyers in Belarus are being intimidated by authorities is a value-judgment based on facts. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof. As the European Court of Human Rights has stated in this regard: “A requirement of proof with regard to value-judgments infringes the freedom of opinion itself, which is a fundamental part of the right to freedom of expression”.³⁹

80. It is doubtful that the BHC was intentionally trying to damage the reputation of authorities on the international forum given the background history of the difficult conditions surrounding the activities and conduct of NGOs and individuals trying to defend human rights. The BHC’s intention was to inform the UN Rapporteur to defend the rights of suspects and those arrested rather than do discredit authorities.⁴⁰ The Constitution of Belarus prohibits opposition to the rendering of legal assistance (Article 62). Article 61 of section II also provides everyone with the right, in accordance with the international instruments ratified by the Republic of Belarus, to appeal to international organizations to protect their rights and freedoms, provided that all available domestic means of legal defense have been

³² Herdís Thorgeirsdóttir, Journalism Worthy of the Name

³³ Cf., Manfred Nowak, p. 353

³⁴ Ambei Ligabo, Report of the Special Rapporteur on the Promotion and Protection of the Right to freedom of opinion and expression, February 28, 2008. See: <http://www.icnl.org/knowledge/globaltrends/globaltrends1-3.pdf>

³⁵ Para 42 Lingens

³⁶ Sürek v. Turkey (no. 1) [GC], no. 26682/95, § 61, ECHR 1999-IV

³⁷ Fressoz and Roire v. France[GC], no. 29183/95, ECHR 1999-I; and Radio Twist, A.S. v. Slovakia, no. 62202/00, ECHR2006-

³⁸ Case law; Jersild

³⁹ Lingens v. Austria, para. 46.

⁴⁰ See Stoll v. Switzerland (application No. 69698/01, Grand Chamber judgment of 10 December 2007) reasoning of Grand Chamber with regard to intent of publishing information

exhausted. Belarus acceded to the Optional Protocol to the International Covenant on Civil and Political Rights, with effect as of 30 December 1992

81. It is furthermore doubtful that the information sent to the UN Special Rapporteur caused damage to the interests of authorities. The BHC pointed to a previous observation by the UN Special Rapporteur in his fact finding mission to Belarus in 2000 when he concluded that there “is excessive executive control of the legal profession” in Belarus, “particularly by the Ministry of Justice. Such control undermines the core values of an independent legal profession and the Basic Principles on the Role of Lawyers. Such control leads to abuses, resulting in allegations of harassment, intimidation and interference by the executive.⁴¹ Several advocates whom the Special Rapporteur met during the mission alleged that they had been given warnings by their bar association because they had asserted that their client was not guilty, or had challenged the legality of the court proceedings.⁴²

82. As the BHC reasoned in its appeal to the Supreme Court of Belarus the Mandate of the Special Rapporteur, adopted on 18 June 2008 at the 28th sitting of the Human Rights Council of the United Nations vests the Rapporteur with the right “to inquire into any substantial allegations transmitted to him or her and to report his or her conclusions and recommendations thereon.⁴³

83. In view of the nature of the duties and responsibilities of the BHC the scope that the State has in interfering with its right to impart information on alleged violations of fundamental rights is very limited.⁴⁴ The motive of the action of the BHC of reporting to the UN Special Rapporteur is also a determining factor when evaluating the protection it enjoys – even if there had been inaccurate details regarding content or form of communication. It is important to establish that with the contested communication the BHC acted in good faith and in the belief that it was in the public interest to report on the alleged human rights breaches taking place in Belarus.⁴⁵

84. Authorities in Belarus contested the authenticity of the information that the BHC sent to the UN Special Rapporteur. It is open to them to react appropriately and without excess to what they perceive as defamatory accusations devoid of foundation or formulated in bad faith.⁴⁶

85. Furthermore instead of reprimanding the NGO coming up with these serious claims – the authorities assuming responsibility under the Constitution to create the conditions for the citizens of Belarus in accordance with their rights and freedoms - could have initiated an investigation into these allegations to see for themselves if there had been impediments to the fundamental right to access to justice. The UN has urged all Government to cooperate with and assist the Special Rapporteur in the performance of his or her tasks, to provide all information and to respond to communications transmitted to them by the Special Rapporteur without undue delay.⁴⁷

86. Interfering with the rights of the BHC must be directed to a legitimate aim and the authorities have not adequately shown that they are genuinely seeking to achieve one or more of the objectives in the qualifying paragraphs relevant to freedom of expression.

⁴¹ E/CN.4/2001/65/Add.1, 8 February 2001.

⁴² E/CN.4/2001/65/Add.1, paragraph 77, page 22.

⁴³ Human Rights Council Resolution 8/6. Mandate of the Special Rapporteur on the independence of judges and lawyers.

⁴⁴ Guja v. Moldova, no. 14277/04,

⁴⁵ Guja v. Moldova, § 77.

⁴⁶ See Castells v. Spain, judgment of 23 April 1992, Series A no. 236, § 46.

⁴⁷ Human Rights Council Resolution 8/6. Mandate of the Special Rapporteur on the independence of judges and lawyers.

87. The Warning directed at the BHC for the statement it sent to the Special Rapporteur will hamper the contribution of this last remaining human rights association in Belarus to act as a human rights watchdog.⁴⁸ The chilling effect of the Ministry of Justice's Warning is beyond question. It will not only affect the BHC's ability to attend to its mission to advocate human rights, have an impact on public opinion and challenge government policy. It will have a chilling effect on public criticism in general and on the contribution of other human rights defenders (journalists, lawyers and politicians) or anyone trying to describe the real situation.⁴⁹

88. The grounds invoked to justify issuing the Warning directed at the BHC do not appear to stem from a pressing social need in a democratic society; they seem disproportionate and the reasons adduced are not relevant or sufficient.

VIII. The Warning in light of freedom of association

89. An independent ground for the application of liability measures against the BHC was the way the name of the association was spelled in the heading and main body of the document which was sent in an email to the UN Special Rapporteur (the first part of the name showing the legal/organisational form of the legal entity had been omitted) and only the internationally recognized abbreviation of the BHC was used.

90. The Warning is not as drastic as direct dissolution. The BHC is however now faced with the threat that its license can be revoked if it receives another warning for the same offence within a year.

91. As the Venice Commission has emphasized freedom of association does not only entail the right to form and register an association but also includes those rights and freedoms that are of vital importance for an association to fulfill its aims.⁵⁰

92. As a civil right and political right freedom of association grants protection against arbitrary interference by the State, for whatever reason and for whatever purpose as it is an indispensable right for the existence and functioning of democracy, because championing for human rights as in the case of the BHC is most effectively done in community with others.

93. The right to freedom of association for the protection on ones interests is guaranteed under Article 22 of the ICCPR which states:

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

⁴⁸ Cf., *Jersild v. Denmark*, 23 September 1994 (application no. 15890/1989).

⁴⁹ Cf., *Herdís Thorgeirsdóttir, Journalism Worthy of the Name*, supra.

⁵⁰ CDL-AD(2010)053rev, paragraph 45.

apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

94. As the Venice Commission emphasized in its previous opinion on the Warning directed against the Belarusian Association of Journalists: The protection afforded by Article 22 of the ICCPR, to which Belarus is a party, extends to all organisational and operational activities of an association.⁵¹ Referring to the UN Human Rights Committee views interpreting Article 22: 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.

The reference to the notion of “democratic society” indicates, in the opinion of the Human Rights Committee, that the existence and operation of associations, including those which peacefully promote ideas not necessarily favorably received by the government or the majority of the population, is a cornerstone of a democratic society.⁵²

95. The above approach is essentially the same as that of Article 11 of the ECHR which provides that no restrictions may be placed on the exercise of the rights of associations to protect their rights other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, the protection of public health or morals or the protection of the rights and freedoms of others.

96. Article 11 of the ECHR states:

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.

97. The European Court of Human Rights has stated: “The right guaranteed by Article 11 would be largely theoretical and illusory if it were limited to the founding of an association since the national authorities could immediately disband the association without having to comply with the Convention, It follows that the protection afforded by Article 11 lasts for an association’s entire life [...]”⁵³

98. The exceptions set out in Article 11, paragraph 2 of the ECHR are to be construed strictly as only convincing and compelling reasons can justify restrictions on freedom of association.⁵⁴ The European Court of Human Rights has on numerous occasions affirmed “the direct relationship between democracy, pluralism and the freedom of association”, thus

⁵¹ CDL-AD(2010)053rev, paragraph 45

⁵² CDL-AD(2010)053rev, paragraph 45

⁵³ United Communist Party of Turkey and Others v. Turkey, no. 19392/92, paragraph 33, ECHR 1998.

⁵⁴ Sidiropoulos v. Greece, judgment of 10 July 1998, paragraph 40.

justifying the limited margin of appreciation enjoyed by states and its rigorous supervision of all restrictions placed on this freedom.⁵⁵

99. The Warning is directed at an almost insignificant mistake by the BHC accusing it of omitting the legal/organizational form from the heading of the statement sent by the BHC to the Special Rapporteur. The Warning is a serious hurdle for the continued activities of the BHC as if provides the basis for the liquidation of the association. It receives another warning within a year it can be dissolved.

100. The European Court of Human Rights has dealt with several cases relating to problems with NGO registration. In a recent case⁵⁶ against Azerbaijan where the legislation like the one in Belarus provides that if an NGO is notified more than twice in a one year for violations, the Ministry of Justice may apply to court for the dissolution of the said association, 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.[. . .]"⁵⁷

101. The Warning could lead to the closing of the BHC, which has operated in Belarus for 15 years. It is hence a drastic measure on the basis of conduct which cannot be considered such serious misconduct. Such excessive executive interference in the operation of the freedom of an association is not acceptable.

102. Basing the Warning on a broad interpretation of vague legal provisions constitutes in itself a violation according to ECHR jurisprudence.⁵⁸

103. Belarusian authorities have dual obligations in line with their international human rights commitments. They must refrain from placing undue, unnecessary and disproportionate restrictions on the exercise of freedom of association and at the same time to actively promote and protect the rights of the BHC.

104. The reasons invoked by the authorities regarding the use of the heading of the BHCs name in the statement were hence not relevant or sufficient for interfering in this manner and they did not pursue a pressing social need.

IX. Conclusions

105. As the Venice Commission stated in its opinion on a warning directed by the Ministry of Justice to the Belarusian Association of Journalists⁵⁹ Belarus as a party to the ICCPR has binding legal obligations to respect and protect fundamental civil and political rights such as freedom of expression (Article 19), freedom of association (Article 22) and all other rights in the Covenant.

106. As a candidate country for membership of the Council of Europe and an associate member of the Venice Commission the European Convention jurisprudence is a relevant frame of reference to assess if the contested conduct by public authorities is in conformity

⁵⁵ Gorzelik and Others v. Poland, judgment of 17 February 2004. See also: United Communist Party of Turkey and Others v. Turkey, judgment of 30 January 1998, paragraph 4.

⁵⁶ *Tebieti Mühafize Cemiyeti and Isravidov v. Azerbaijan*, 8 October 2009, application no. 37083/03.

⁵⁷ *Tebieti Mühafize Cemiyeti and Isravidov v. Azerbaijan*, 8 October 2009, application no. 37083/03.

⁵⁸ *Koretsky and Others v. Ukraine*, no. 40269/02, no. 107, judgment of 3 April 2008. The Court in this case found legislation that regulated the registration of an organization too vague to be sufficiently "foreseeable" and had granted an exceptionally wide margin of discretion to authorities to decide whether a particular association could be registered.

⁵⁹ CDL-AD(2010)053rev.

with these human rights standards as well as the international human rights treaties that Belarus has ratified.⁶⁰

107. Belarusian authorities must in accordance with their international obligations take all necessary measures to ensure the protection by the competent authorities of everyone within their jurisdiction against violence, threats, intimidation, retaliation or any other arbitrary action threatening the rights that the State shall protect, both under its own Constitution and on the basis of its international obligations.

108. The chilling effect of the Warning directed against the BHC does not only mean that its registration could be in jeopardy, it may and most likely will affect other human rights defenders in the Republic of Belarus.

109. The international human rights obligations of Belarus not only demand that authorities respect the rights of dissident voices but also protect them in doing their duty of promoting universal human rights standards.

⁶⁰ CDL-AD(2010)053rev.