



Strasbourg, 22 September 2011

**Opinion no. 633 / 2011**

**CDL(2011)078\***  
Engl. only

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

**COMMENTS**

**ON THE COMPATIBILITY  
WITH UNIVERSAL HUMAN RIGHTS STANDARDS  
OF ARTICLE 193-1 OF THE CRIMINAL CODE  
VIS-À-VIS THE RIGHTS OF NON-REGISTERED ASSOCIATIONS**

**OF THE REPUBLIC OF BELARUS**

**by**

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**Opinion on the compatibility with universal human rights standards of Article 193-1 of the Criminal Code of Belarus vis-à-vis the rights of non-registered associations in this country.**

**I. Request**

The President of the Political Affairs Committee of the Parliamentary Assembly of the Council of Europe requested on 6 June 2011 that the Venice Commission assess the compatibility with universal human rights standards of Article 193-1 of the Criminal Code of Belarus vis-à-vis the rights of non registered associations in Belarus.

**The content of Article 193-1 of the Criminal Code of the Republic of Belarus reads:**

**Article 193-1. Illegal organization of activities of a public association, religious organization or foundation or participation in those activities.**

*The organization of activities or participation in the activities of a political party, other public association, religious organization or foundation in respect of which a decision of the public authority on its liquidation or suspension of its activities has entered into legal force, as well as the organization of and participation in the activities of political parties, other public associations, religious organizations or foundations which has not obtained state registration -- punishable by fine or arrest for up to 6 months, or imprisonment for a term not exceeding 2 years.*

*(1.) By participating in the activities of political parties, other public associations, religious organizations or foundations in this article there are meant actions aimed at achieving the objectives of referred associations, organizations or foundations, including those identified in the organizations' statutory and other documents.*

*(2.) This article shall not apply to the organization of activities or participation in those of political parties, other public associations, religious organizations or foundations in respect of which a decision of the public authority on their suspension has entered into force, in case when these activities are aimed at elimination of the violations that had given rise to suspension of activities, or at the organization of or participation in the activities of political parties, other public associations, religious organizations or a foundations which finally obtained state registration.*

*(3.) A person who voluntarily terminates his/her activities, punishable under this article, and informs government bodies about this decision, shall be exempt from criminal liability if he/she has not committed other crime. This provision does not apply to persons who have committed similar acts in 2 years following the voluntary termination of activities, punishable under this article.<sup>1</sup>*

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<sup>1</sup> <http://193.belngo.info/view.pl/english/content>

## II. Background to this request

The Venice Commission has dealt with the situation of human rights defenders in Belarus in two recent cases since 2010; 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); the second opinion (adopted at its 87th Plenary Session CDL(2011)037) assessed the compatibility with universal human rights standards of the Warning addressed by the Ministry of Justice to the Belarus Helsinki Committee (hereinafter BHC). The Warning was issued after the BHC sent a communication to the United Nations Special Rapporteur on the Independence of judges and lawyers regarding the human rights situation in Belarus. In the wake of Presidential elections in December 2010 there were mass protests in Minsk where about 700 persons were arrested and detained without having access to legal council. Defense lawyers had been threatened and some lost their license to practice. The Warning of the Ministry of Justice stated that the BHC communication was “an attempt to discredit the Republic of Belarus in the eyes of the international community”.<sup>2</sup>

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.

The Venice Commission reiterated the chilling effect of the Warnings directed by the Ministry of Justice at human rights defenders, be they members of an NGO, journalists or defense lawyers – so that their speech and conduct will be suppressed by fear of further penalization at the interests of their fundamental rights.

The BHC is the oldest human rights group in Belarus. The Ministry of Justice issued the second Warning to the BHC this year on 31 May 2011, allegedly because of “continuous violations of tax legislation”.<sup>3</sup> The authorities demand that the BHC paid more than 205 million rubles (approximately €28,713) in fines and taxes because of grants received in 2002-2003 from the European Union's Technical Aid to the Commonwealth of Independent States (TACIS), a project which was launched in 1991 to provide grant-financed technical assistance to 12 Eastern European countries, among them Belarus with the aim of enhancing the economic and political transition process in these countries.<sup>4</sup> According to Front Line, an international foundation for the protection of human rights defenders, the memorandum, agreed by both the EU and Belarus in 1994, clearly states that funding provided by TACIS is exempt from tax.<sup>5</sup>

The issue of tax evasion based on the TACIS funding was first raised in January 2004 when a criminal case was opened against BHC. In June 2004 the Minsk Economic Court ruled in

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<sup>2</sup> In December 2005, a law was adopted increasing penalties for “discrediting the Republic of Belarus”, which covers the provision of “false information” to a foreign state or international organisation. This law was applied in relation to the Warning directed at the BCH last January because of its’ communication to the Special Rapporteur and is likely to discourage NGOs from communicating with UN Special Procedures. Cf., CDL (2011)037, p. 15 and [http://ec.europa.eu/world/enp/pdf/country/enpi\\_csp\\_nip\\_belarus\\_en.pdf](http://ec.europa.eu/world/enp/pdf/country/enpi_csp_nip_belarus_en.pdf)

<sup>3</sup> <http://spring96.org/en/news/43869>

<sup>4</sup> [http://www.euroresources.org/fileadmin/user\\_upload/PDF\\_country\\_and\\_Programme\\_profiles/ec4.pdf](http://www.euroresources.org/fileadmin/user_upload/PDF_country_and_Programme_profiles/ec4.pdf)

<sup>5</sup> <http://humanrightsdefenders.org/node/15336>; No information on the tax policy or such agreements on the website of this project: <http://ec.europa.eu/research/nis/en/eu-nis.html> (accessed 26 July 2011). See also: [http://eeas.europa.eu/delegations/belarus/eu\\_belarus/political\\_relations/index\\_en.htm](http://eeas.europa.eu/delegations/belarus/eu_belarus/political_relations/index_en.htm); [http://ec.europa.eu/world/enp/pdf/country/enpi\\_csp\\_nip\\_belarus\\_en.pdf](http://ec.europa.eu/world/enp/pdf/country/enpi_csp_nip_belarus_en.pdf). See also: <http://www.amnesty.ie/news/belarus-six-months-after-presidential-elections-clampdown-dissenting-voices-continues-unabated>

favour of BHC. However, in December 2005, on the eve of a presidential election,<sup>6</sup> which BHC was preparing to observe, the Supreme Economic Court of Belarus reconsidered the previous verdict and ordered BHC to pay the tax due and a fine for delayed payment. Property of BHC was confiscated, its bank account was closed and a demand for the closure of BHC was lodged.<sup>7</sup> In February 2009 the Ministry of Justice overturned the demand for closure but did not repeal the accusation of tax evasion. It was believed that this accusation was left pending as a means to close BHC at any moment.<sup>8</sup>

The Supreme Court of Belarus has dismissed the complaints lodged by the BHC appealing both Warnings this year; in a decision on 12 March 2011 and on 28 July 2011.<sup>9</sup>

The Venice Commission, in its opinion on the previous Warning directed against the BHC expressed its concern that this only remaining registered human rights association allowed to operate in Belarus, now faces the threat of being liquidated. According to the law on **NGOs** in Belarus (Articles 28 and 29) the activities of an organisation that receives such a Warning can be suspended for one up to six months by a court decision. If an organisation is found guilty of violation of laws within one year of the warning it can be officially closed down. This is when Article 193-1 comes into play as subject to that provision it is illegal for an association to carry out its activities if it has been liquidated. An unregistered association which carries on with its work is subject to a punishment by fine or arrest for up to six months or imprisonment for a term not exceeding two years.

## A. Introduction of Article 193-1 and commentary

A Presidential Decree from 26<sup>th</sup> 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 (which resulted in the situation where hundreds of organizations did not manage to re-register and lost their registration).<sup>10</sup>

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.<sup>11</sup>

In the years 2003-2005 Belarus lived through a wave of forced liquidations of public associations by the courts. Grounds for liquidations were often not based on the law, or

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<sup>6</sup> The March 2006 Belarusian elections were marked by serious violations of election campaign rights of the registered candidates other than the incumbent. During the months preceding the election, the ongoing pressure exerted upon NGOs, dissident political actors and the media increased. Peaceful protests by the opposition following the election were put down and opposition leaders arrested. An OSCE report on the election, in which official results put Mr Lukashenko at over 82% of the vote, referred to “serious violations of election standards”. The European Union called the Presidential elections in Belarus “fundamentally flawed”. See: <http://www.osce.org/odihr/elections/belarus/19395>; [http://ec.europa.eu/world/enp/pdf/country/enpi\\_csp\\_nip\\_belarus\\_en.pdf](http://ec.europa.eu/world/enp/pdf/country/enpi_csp_nip_belarus_en.pdf) Country Strategy Paper (CSP) for Belarus covers the period 2007-2013, and is accompanied by the National Indicative Programme (NIP) for the period 2007-2011

<sup>7</sup> [http://ec.europa.eu/world/enp/pdf/country/enpi\\_csp\\_nip\\_belarus\\_en.pdf](http://ec.europa.eu/world/enp/pdf/country/enpi_csp_nip_belarus_en.pdf) Country Strategy Paper (CSP) for Belarus covers the period 2007-2013, and is accompanied by the National Indicative Programme (NIP) for the period 2007-2011

<sup>8</sup> <http://humanrightsdefenders.org/about/frontline>

<sup>9</sup> Radio Free Europe report; <http://spring96.org/en/news/44868>

<sup>10</sup> 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**

<sup>11</sup> 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**

quoted minor and petty violations of secondary regulations (for instance, of rules regarding filling in paper application forms). Back then 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 the Supreme Court decision: in 2004 the Labour Party, in 2007 the Ecological Party of Greens "BEZ" and Women's Party "Nadzeya" [Hope].<sup>12</sup>

In 2005 the situation with the prohibition of the activities of the non-registered associations significantly deteriorated with the introduction of the criminal liability. On 15 December 2005 the Criminal Code of Belarus was amended with Article 193-1 criminalising the conduct of unregistered NGOs 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.<sup>13</sup>

In a commentary to the Law of the Republic of Belarus "On introduction of changes and amendments to several legislative acts of the Republic of Belarus on the issue of strengthening responsibility for acts against a person and public security", the Embassy of the Republic of Belarus in United States submitted explanations in 2007 *inter alia*:

- Part 1, Article 193 of the Criminal Code as amended by the Law corresponds to the provision contained in Part 3, Article 16 of the Constitution of the Republic of Belarus, which states that activities of religious organisations are prohibited if such activities impede the execution by citizens, their state, public and family duties.
- The obligatory requirement for the criminal responsibility to occur is that the activity of a political party, other public association, or a religious organisation is associated with violence against citizens or with causing them physical injuries, or with infringement of rights, freedoms and lawful interests of citizens
- New Article 193-1 contains the provisions that supplement article 193 of the Criminal Code; that according to the laws on political parties and NGOs these are subject to mandatory state registration and activities of non-registered associations is prohibited in the territory of Belarus and according to these laws the activity of non-registered political parties and NGOs on the territory of Belarus is prohibited. These laws also provide for the terms and procedure of suspending, prohibiting and liquidating of such public associations.
- The purpose of the new article is to stop activities of political parties, public associations, religious organisations and foundations which are subject to liquidation (suspension of activity) in accordance with a decision of an authorized state body, as well as that of organisations that have not been re-registered in line with the existing procedure.
- Article 193-1 of the Criminal Code sets responsibility for failing to implement a decision of the court or another state authority, which has prohibited or suspended activity of a political party, other public association, a religious sect or a foundation, or for continuing their activities in spite of the denial of their registration.

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<sup>12</sup> 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>

<sup>13</sup> 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**

- That this legislation is an effective mechanisms to counter challenges and threats at an early stage and in a pre-emptive way . . . suppressing crimes at the stage of preparation . . .<sup>14</sup>

## **B. Impact of Article 193-1: A legal justification for political repression?<sup>15</sup>**

Article 193-1 was implemented just before the Presidential elections in 2006 and that year six individuals were prosecuted on the basis of this provision. In 2009 human rights defenders revealed that 17 individuals had been prosecuted on the basis of Article 193-1.<sup>16</sup> There were also reports of this provision being used in many other cases by authorities to deter activists by threatening them with prosecution.<sup>17</sup> In February 2011 Article 193-1 was for the first time evoked against persons exercising freedom of religion.<sup>18</sup>

In recent years, many Belarusian NGOs lost their official registrations, and new organizations have had difficulties getting registered. HRC 'Viasna', the biggest human rights group in Belarus<sup>19</sup> was closed down by the authorities in 2003 along with other human rights organizations.<sup>20</sup> The unregistered NGOs have had difficulties to re-register for 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.<sup>21</sup>

The CoE Parliamentary Assembly Committee on Legal Affairs and Human Rights published a report on the abuse of the criminal justice system in Belarus on 10 December 2007, pointing 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 (so-called "anti-revolution law"), and in particular Article 193-1 of the Criminal Code criminalising activities of non-registered associations.<sup>22</sup>

On 15 April 2008, in its resolution 16062, the CoE Parliamentary Assembly reiterated the position of the UN Human Rights Committee concerning the closure of HRC 'Viasna' and urged the Belarusian authorities to "repeal (...) Article 193-1 of the Criminal Code, criminalising activities of non-registered associations". On 9 October 2008, the European Parliament adopted a Resolution that urged the Belarusian authorities to make the "necessary changes to the Belarus Criminal Code by abolishing Article 193-1.

The 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

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<sup>14</sup> [http://www.usa.belembassy.org/eng/political/commentary\\_to\\_the\\_law](http://www.usa.belembassy.org/eng/political/commentary_to_the_law)

<sup>15</sup> <http://193.belngo.info/view.pl/english/introduction>

<sup>16</sup> See list of names: <http://193.belngo.info/view.pl/english/practice>

<sup>17</sup> <http://193.belngo.info/view.pl/english/practice>

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

<sup>19</sup> <http://www.frontlinedefenders.org/node/15340>

<sup>20</sup> <http://humanrightshouse.org/Articles/11225.html>

<sup>21</sup> <http://humanrightshouse.org/Articles/11225.html>:

<http://www.hrw.org/en/node/87609>

<sup>22</sup> Parliamentary Assembly Council of Europe Doc. 11464, 10 December 2007. Rapporteur. Christos Pourgourides.



criminalizes any independent human rights initiative in Belarus and gives state officials the power to stop activities of human rights organizations at any time.”<sup>23</sup>

In May 2010 the UN Human Rights Council reviewed the implementation of the international obligations on human rights in the Universal Periodic Review (UPR). In September 2010 at the 15th session of the UN Human Rights Council the final report of the UPR regarding Belarus was approved. The government of Belarus rejected the recommendations made during the UPR session as unacceptable. With regard to the abolition of Article 193-1 it maintained that this provision aimed at precluding the activities of extremist groups.<sup>24</sup>

In a statement of the Assembly of Pro-Democratic NGOs in Belarus the government's explanation was contested as untrue and distorting the essence of Article 193-1 of the Criminal Code as it contained other articles dealing with extremist groups and their activities, including Article 193. The statement pointed out that Article 193-1 “punishes members of public, political and religious organizations for performing activities on behalf of unregistered organizations, *regardless of the nature of those activities*. This can be confirmed by the materials from trial cases launched under Article 193-1: according to those, the accused were condemned not for performing activities on behalf of organizations, but solely on the basis of the fact that they belonged to those particular organizations.”<sup>25</sup>

On December 27 2010 human rights activists in Minsk tried to enter the building of the Parliament with demands to annul Article 193-1 of the Criminal Code of Belarus. Policemen blocked their way but one activist managed to enter the House of Government and she left a petition there.<sup>26</sup>

Many NGOs have been closed down for minor administrative irregularities. In some cases, closure of NGOs has been followed by intimidation of prominent members. On 14 February 2011, human rights defender Ales Bialiatski, the chairman of HRC 'Viasna',<sup>27</sup> received a warning from the General Prosecutor based on the fact that HRC 'Viasna' is not registered with the Ministry of Justice.

On 3 June 2011, the Tsentralny district court of Minsk confirmed the Warning issued by the Prosecutor's Office against Ales Bialiatski which can lead to his prosecution. Civil rights defenders stated in an open letter to President Alexander Lukashenko and the General Prosecutor Grigory Vasilevich in February 2011 that the Warning is an unacceptable measure aiming to silence Ales Bialiatski, HRC 'Viasna' and other human rights defenders in Belarus.<sup>28</sup>

On August 5th 2011 Ales Bialiatski was arrested and put into detention evoking alarm among human rights organisations and the European Parliament. The official charges against Bialiatski relate to tax evasion, but it is suspected his arrest stems from his work as an activist.<sup>29</sup> Several international organisations in the field of human rights sent a joint letter to the Belarusian Prosecutor General of the City of Minsk on 11 August 2011 to urge that Ales Bialatski be released from custody on his own recognizance pending the investigation against him that Ales Bialatski's arrest appears to stem from the use of his personal bank account in Lithuania to support human rights work in Belarus. “We note, though, that

<sup>23</sup> <http://www.frontlinedefenders.org/node/15340>; <http://193.belngo.info/view.pl/english>

<sup>24</sup> OSCE Review Conference Warsaw, 30 September – 8 October 2010. <http://www.osce.org/home/71646>

<sup>25</sup> OSCE Review Conference Warsaw, 30 September – 8 October 2010. <http://www.osce.org/home/71646>

<sup>26</sup> <http://www.charter97.org/en/news/2010/1/19/25497/>

<sup>27</sup> <http://www.frontlinedefenders.org/node/15340>

<sup>28</sup> Open letter to President Alexander Lukashenko and General Prosecutor Grigory Vailevich on 22 February 2011 <http://www.civilrightsdefenders.org/en/news/11282/>

<sup>29</sup> <http://www.dw-world.de/dw/article/0,,15298637,00.html>



Belarusian authorities have refused to register on a national level all but one of the independent human rights organisations in the country. As a result, unregistered groups like Viasna cannot open a bank account in the organization's name in Belarus or meet terms set out in financial regulations".<sup>30</sup>

In a Human Rights Comment published on May 25<sup>th</sup>, the Council of Europe Commissioner for Human Rights, Thomas Hammarberg underlined that registration rules in Belarus were used as an instrument for repression, stating that the Presidential Decree from 1999 obliging NGOs to re-register had resulted in many of them being deleted from the official register – they were 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 in the words of the Commissioner for Human Rights had become an instrument for exerting pressure and control over human rights actors.<sup>31</sup>

Several international NGOs signed a letter on May 30<sup>th</sup> 2011 to support the adoption of a resolution on the human rights situation in Belarus at the 17<sup>th</sup> session of the UN Human Rights Council (HRC). These NGOs stated that the HRC could not remain silent in the face of ongoing human rights violations happening in Belarus. An HCR resolution would be instrumental in raising international pressure on the Government of Belarus to end the ongoing crackdown and commit to urgently needed human rights reforms by inter alia bringing regulations on freedom of assembly in compliance with OSCE, ODIHR and Venice Commission Guidelines of freedom of assemblies. Furthermore, Belarusian authorities should lift all unjustified restrictions placed on NGOs and civil society by initiating legislation to **repeal article 193-1** of the Criminal Code which imposes criminal penalties for participating in unregistered organizations.<sup>32</sup>

Amnesty International declares that "the last six months have seen an unprecedented deterioration in the human rights situation in Belarus. Key opposition figures have been detained, ill-treated and convicted in unfair trials. Critical NGOs, civil society activists and journalists have faced harassment".<sup>33</sup>

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 to treat thousands of Belarusian citizens as criminals.<sup>34</sup>

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<sup>30</sup> <http://humanrightshouse.org/Articles/16823.html>

<sup>31</sup> <http://hrwatch-by.org/en/human-rights-defenders-belarus-are-severely-persecuted-statement-thomas-hammarberg-council-europe-co> 2011-05-26

<sup>32</sup> <http://hrwatch-by.org/en/ngos-letter-support-adoption-resolution-human-rights-situation-belarus-17th-session-un-human-rights>

<sup>33</sup> <http://www.amnesty.ie/news/belarus-six-months-after-presidential-elections-clampdown-dissenting-voices-continues-unabated>

<sup>34</sup> <http://193.belngo.info/view.pl/english/introduction>

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

#### **A. Constitution of the Republic of Belarus**

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.

Article 4 provides that democracy in the Republic of Belarus shall be exercised on the basis of diversity of political institutions, ideologies and views.

Article 5 of the Constitution 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.

Article 7 of the Constitution provides that the State and all the bodies and officials thereof shall operate within the confines of the Constitution. Legal enactments or specific provisions thereof which are deemed under procedure to be contrary to the provisions of the Constitution shall have no legal force.

Article 8 stipulates that the Republic of Belarus shall recognize the supremacy of the universally acknowledged principles of international law and ensure that its laws comply with such principles.

Section II of the Constitution deals with individual rights. It puts a positive obligation on the State to guarantee the rights and freedoms of the citizens of Belarus that are enshrined in the Constitution and laws, and specified by the State's international obligations.

Article 21 provides that safeguarding the rights and freedom of citizens of the Republic of Belarus shall be the supreme goal of the State.

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

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.

Article 33 guarantees everyone freedom of thoughts and beliefs and their free expression. No one shall be forced to express one's beliefs or to deny them.

Article 35 provides for the State guarantee to hold assemblies, rallies, street marches, demonstrations and pickets that do not disturb law and order or violate the rights of other citizens. The procedure for conducting the above events shall be determined by law.

**Article 36** proclaims that every person has the right for association. A certain category of state officials (judges, employees of the Procurator's Office, the staff of bodies of internal affairs, the State Supervisory Committee and security bodies, as well as servicemen) may not be members of political parties or other public associations that pursue political goals.

Article 41 provides for the rights of citizens to "form trade unions".

Article 59 provides that the State is under the obligation to take all measures at its disposal to create the domestic and international order necessary for the exercise in full of the rights and liberties of the citizens of the Republic of Belarus that are specified in the Constitution. State bodies, officials and other persons who have been entrusted to exercise state functions shall take necessary measures to implement and safeguard the rights and liberties of the individual. These bodies and persons shall be held responsible for actions violating the rights and liberties of an individual.

## **B. Other relevant domestic legislation**

The main principles of creating an organization and arranging its activities are established by the Civic Code, whereas the detailed legal regulation of certain types of organizations can be found in special corresponding laws. Thus, the activities of political parties are regulated by the law of the Republic of Belarus “On Political Parties” adopted in 1994 (now it is applied as amended in 2005); the activities of working unions—by the law of the Republic of Belarus “On Trade Unions” (adopted in 1992, now 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, now it is applied as amended in 2005, with further changes).

Some issues concerning public associations are regulated by Presidential acts (Decrees and Ordinances). Those acts apparently have greater legal force than laws and, therefore, sometimes change the rules set by laws. Thus, Presidential Decree from 26<sup>th</sup> 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 (which resulted in the situation when hundreds of organizations did not manage to re-register and lost their registration).<sup>35</sup>

Other Presidential Acts, as well as regulatory acts adopted by Government regulate certain questions concerning the mechanism 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 a much importance, the Decree No 48 of the Ministry of Justice from 30<sup>th</sup> 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.

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<sup>35</sup> <http://belngo.info/view.pl/eng/art22>

### **C. The Law on Public Associations**

Once relatively progressive, the Law on Public Associations No. 3252-XII of October 4, 1994, following revisions in 1999 and 2005 has substantially limited NGO activities.<sup>36</sup>

Article 1 of the Law on Public Associations No. 3252-XII of October 4, 1994, amended as of January 4, 2010 (hereinafter PAA) defines a public association as "a voluntary association of citizens associated, in the order established by the legislation, on the basis of common interests for the joint exercise of civil, social, cultural and other rights."

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, amended public associations shall carry out their activities in accordance with the Constitution of the Republic of Belarus, the Act and other legislative enactments and on the basis of their own constituent instruments.

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.

Article 7 provides for restriction on the establishment and operation of public associations; unions aimed at violent change of the constitutional system or involved in the propagation of war, social, national, religious and racial hostility are prohibited. Operation of non-registered public associations in the territory of the Republic of Belarus is prohibited.

Chapter II deals with the establishment and operation of public associations.

Chapter III of the law deals with state registration of public associations; changes and/or additions introduced into the statutes of public associations, reorganization and liquidation of public associations.

Article 15 deals with postponement of state registration, refusal of state registration of a public association taken by the appropriate registering body in connection with the violation of established procedure of creation of public association [ . . . ] if the violation has removable nature.

Article 16 covering the procedure of state registration provides inter alia that activities of unregistered associations are prohibited.

Article 19 deals with the procedure of reorganization and liquidation of a public association, which if involuntary is based on the decision of a court in cases provided by Article 29 of the present law.

Chapter V deals with rights of public associations after registration, inter alia to carry out activities aimed at achieving their statutory purposes.

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<sup>36</sup> The draft reform of the Law in early 2010 conducted under the banner of "liberalization" has not come into effect yet. The Solidarity with Democratic Belarus Information Office in its report on the NGO legal framework says that an unofficial draft of the new NGO law does not meet the expectations for example of enabling NGOs to register an association in the place of residence of the founder. The accountability of NGOs to the government agencies becomes more complex and advanced; the concept of "conflict of interest" in the work of NGOs is introduced. Ex-founders of public organizations closed following the decision of a court are banned from founding new associations.

Chapter VI deals with the responsibility of public associations.

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

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

Article 29 provides that a public association is liquidated on decision of the court in the case of carrying out extremist activities; violation of the law or of its constituent documents within a year after delivery of a written caution; if, at the state registration of the public association, founders committed violation of the present Law and (or) other acts of legislation that have irremovable nature; if numerical strength and composition of the public association do not correspond to the requirements of part four of article 8 of the present Law; non-elimination, within the term specified by the decision of the court, of violations which have given ground for the suspension of activity of the public association. The public association can be liquidated on the decision of the court for a single violation of legislation on the mass events in the cases provided by the legislative acts, as well as for the violation by public association, its organizational structure of the requirements established by the legislation for the use of foreign grants. The liquidation 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. The liquidation of local public association is carried out on the decision of Regional, Minsk City Court at the location of governing body of this public association upon application of Department of Justice of regional, Minsk city executive committee.

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

#### **IV. Legal obligations imposed on the Republic of Belarus**

The Belarus Republic is a party to the International Covenant on Civil and Political Rights and the First Optional Protocol thereto<sup>37</sup>, 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.

The 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

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<sup>37</sup> <http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.GC.33.pdf>

and Political Rights (ICCPR hereinafter)<sup>38</sup> states that 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 jurisdiction. 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.

The obligations of the Covenant in general and article 2 in particular are accordingly binding on the Republic of Belarus and all branches of government (executive, legislative and judicial) and 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 Covenant 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.<sup>39</sup> 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’.

The legal obligation that Belarus has as party to the ICCPR is not only to protect but also to promote as in this case the right to freedom of association. This legal obligation is both negative and positive in nature. Accordingly, authorities in Belarus must refrain from violation of the right to freedom of association and any restrictions thereof must be permissible under the provision protecting that right (Article 22 of the ICCPR). Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of this and other Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.

The beneficiaries of the rights under the ICCPR are individuals. The right of freedom of association is one of those rights under the ICCPR that is enjoyed in community with others. According to the Human Rights Committee; the fact that the competence of the HR Committee to receive and consider communications is restricted to those submitted by or on behalf of individuals (article 1 of the Optional Protocol) does not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights.

According to the HR Committee General Comment on the States Parties’ positive obligations under the Covenant, 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 make such changes to domestic laws and practices as are necessary to ensure their conformity with the ICCPR. Where there are inconsistencies between domestic law and the ICCPR, its article 2 requires that the domestic law or practice be changed to meet the standards imposed by the ICCPRs substantive guarantees.

It is required of the Republic of Belarus as State Party to the ICCPR (Art. 2 (2)) to take steps to give effect to the ICCPR rights. 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

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<sup>38</sup> CCPR/C/21/Rev.1/Add. 13 Human Rights Committee General Comment No. 31 [80]Adopted on 29 March 2004 (2187th meeting)

<sup>39</sup> CCPR/C/21/Rev.1/Add. 13 Human Rights Committee General Comment No. 31 [80]Adopted on 29 March 2004 (2187th meeting), para. 4.



comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.<sup>40</sup>

In addition,, the Venice Commission points out that, although the republic of Belarus is not yet a party to the ECHR, its standards are relevant for assessing its conduct in relation to fundamental rights since Belarus wishes to become a member of the Council of Europe and, if admitted, will have to ratify the European Convention on Human Rights (ECHR). Under the European Convention, states have an obligation to secure to everyone within their jurisdiction the civil and political rights in the Convention.

## **V. Assessment in light of international human rights standards regarding freedom of association**

Freedom of association is one of the basic civil and political rights as laid down both in Article 22 of the ICCPR and Article 11 of the ECHR.

Article 22 of the ICCPR, which is legally binding for the Republic of Belarus reads:

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 (order 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."

Belarus is 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 with these human rights standards and the international human rights treaties that Belarus has ratified.<sup>41</sup>

Article 11 of the ECHR reads:

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

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<sup>40</sup> CCPR/C/21/Rev.1/Add. 13 Human Rights Committee General Comment No. 31 [80]Adopted on 29 March 2004 (2187th meeting), para. 14.

<sup>41</sup> Cf., Opinion No. 573/2010; CDL-AD (2010)053 rev); CDL(2011)037)

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.

Freedom of association in both the above mentioned instruments guarantees the freedom of natural persons and legal entities to collaborate on voluntary basis within the context of an association without public interference in order to realise a mutual goal.<sup>42</sup>

Freedom of association is an essential prerequisite for other fundamental freedoms.

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 and it is an indispensable right for the existence and functioning of democracy. No restrictions can be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society. The legitimate purposes for the right to freedom of association are national security, public safety, public order, protection of public health and morals or the protection of the rights and freedoms of others. There must furthermore be a pressing social need for restricting this fundamental right.

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.<sup>43</sup> The negative freedom of association has been dealt with in many cases before the European Court of Human Rights.

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.<sup>44</sup>

What is at stake in the case of Belarus is the positive right to form and join an association due to the cumbersome registration process and de facto impossible hurdles.

Furthermore it may be asserted that the negative right is also at stake given the existence of Article 193-1. The negative freedom of association implies that no one can be forced to form or join an association. Criminalizing the participation of an individual in non-registered association is 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 expression and all other universally and regionally guaranteed rights and freedoms applicable to them.<sup>45</sup>

The right to form an association is an inherent part of the right set forth in Article 11 of the Convention. 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. 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 satisfy themselves that an association's aim and activities are in conformity with the rules laid down in legislation,

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<sup>42</sup> Cf. European Commission of Human Rights, 6 July 1977, Dec, Adm. Com. Ap. 6094/73, D & R 9, p. 5(7)

<sup>43</sup> See Sigurður A. Sigurjónsson v. Iceland, 30 June 1993, § 35, Series A no. 264

<sup>44</sup> 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](http://www.icnl.org/knowledge/ijnl/vol3iss1/art_6.htm)

<sup>45</sup> Aslef v. the United Kingdom, see discussion: <http://www.unitedcampaign.org.uk/files/briefings/IERASLEFbrief.pdf>

but they must do so in a manner compatible with their obligations under the Convention and subject to review by the Convention institutions.<sup>46</sup>

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.<sup>47</sup> Hence 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 effect, that it be sufficiently known and the extent of the limitation by sufficiently clear.<sup>48</sup> A restriction that is too general in nature is not permissible due to the principle of proportionality.<sup>49</sup> The restriction must furthermore pursue a legitimate aim and be necessary in a democratic society.<sup>50</sup>

Before assessing the legitimacy of Article 193-1 which criminalizes the activities of unregistered associations in the context of international human rights standards it is necessary to assess the registration process enabling freedom of association in practice.

### A. Registration of NGOs in Belarus in light of human rights principles

To make it mandatory for an association to register need not in itself be a breach of right to freedom of association. Requirements in domestic law must be compatible with the obligation of the State to protect freedom of association.<sup>51</sup> The requirement that an interference is prescribed by domestic law also refers to the quality of law in question.<sup>52</sup> For domestic law to meet these requirements, 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.<sup>53</sup>

The legislative acts in Belarus in general establish a high criteria and strict framework for creating an organization. The Solidarity with Democratic Belarus information office states in its report on the legal framework of NGOs that as a rule, denial of registration of new NGOs in Belarus is very common and often politically motivated. The registration authority belongs to the Ministry of Justice but its decisions may be appealed to the court. According to the report courts would never find decisions regarding refusal of registration ungrounded and almost always take the side of the registration authority.<sup>54</sup>

The following are examples of the de facto hurdles to becoming a legal entity:

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<sup>46</sup> *Koretskyy and Others v. Ukraine*, application no. 40269/02, judgment 3 April 2008; *Sidiropoulos and Others v. Greece*, judgment of 10 July 1998, *Reports of Judgments and Decisions* 1998-IV, pp. 1614-15, § 40; *The United Macedonian Organisation Ilinden and Others v. Bulgaria*, no. 59491/00, § 57, 19 January 2006; *The Moscow Branch of the Salvation Army v. Russia*, no. 72881/01, § 59, ECHR 2006-...; and *Ramazanov and Others v. Azerbaijan*, no. 44363/02, § 54, 1 February 2007).

<sup>47</sup> *Gorzelić and Others v. Poland* [GC], no. 44158/98, § 52, 17 February 2004; *Sidiropoulos*, cited above, § 31; and *APEH Üldözötteinek Szövetsége and Others v. Hungary* (dec.), no. 32367/96, 31 August 1999

<sup>48</sup> See, e.g., *Sunday Times v. UK*, 26 April 1979, Series A, No. 30, 2 EHRR (1979-80), par. 49; *Silver et al. v. UK*, 25 March 1983, Series A, No. 61, 5 EHRR (1983), par. 87-88; *Malone v. UK*, 2 August 1984, Series A, No. 82, 7 EHRR (1985), par. 66; *Groppera Radio AG et al. v. Switzerland*, 28 March 1990, Series A, No. 173, 12 EHRR (1990), par. 68; *Autronic AG*, 22 May 1990, Series A, No. 178, 12 EHRR (1990), par. 57.

<sup>49</sup> 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.

<sup>50</sup> see, among many authorities, *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 104, ECHR 1999-III.

<sup>51</sup> *Gorzelić*; *Sidiropoulos and Others v. Greece* judgment of 10 July 1998, *Reports of Judgments and Decisions* 1998-IV, pp. 1614-15, § 40

<sup>52</sup> *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004-I.

<sup>53</sup> *Koretskyy and Others v. Ukraine*, application no. 40269/02, judgment 3 April 2008, § 47.

<sup>54</sup> Solidarity with Democratic Belarus information office report on the legal framework of political parties and NGOs in Belarus

Belarusian law divides public associations in three categories: international, republican and local. The first two categories of associations shall be registered in the Ministry of Justice and can work on the whole territory of the country. Article 8 of the Law on Public Associations requires that in order to create a republican association (e.g. an organization of a national level); there have to be no less than 50 founders (10 founders from each region and from Minsk city). This is an example of a de facto limit on the possibility of actually registering an association.<sup>55</sup>

Another serious obstacle with registering a new association is the obligation to provide a physical address of an office in a non-residential building. An applicant for registration cannot use his/her home address to start with. However, in order to be able to rent a private space – as it is required by the law – one must first have to be registered. This rule deviates from the generally accepted standards concerning regulation of NGOs in Belarus, commercial organizations are permitted to have their legal addresses in private apartments.<sup>56</sup>

This cumbersome process with de facto impossible registration hurdles grants an excessively wide scope to the Ministry of Justice reviews and approves all registration applications. The OSCE's Rapporteur on his 28 May 2011 report on Belarus cites numerous examples where NGOs are denied registration on vague grounds.<sup>57</sup>

The reasons for denying an organization registration are formulated vaguely in legislative acts affording authorities with the possibility of arbitrary registration denial (cf., Article 15 on the law of Public Associations).<sup>58</sup> Even the most insignificant mistakes in the registration documents can result in registration denial or that the license is revoked.

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

Restrictions and control over NGOs dealing with human rights is allegedly implemented de facto rather than de jure.<sup>59</sup> In practice it appears impossible to register an organization whose founders are not in favour of the current regime (as asserted by the organizations denied registration<sup>60</sup>). OSCE report lists examples of human rights members being put under pressure because of their opinions.<sup>61</sup> Thus, only in 2009 the following organizations received denial of registration: 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 Union" and others.

In this respect regard must be had to the fact that the protection of personal opinions guaranteed by Articles 9 and 10 of the Convention (Articles 18 and 19 of the ICCPR) is one

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<sup>55</sup> <http://belngo.info/view.pl/eng/art22>

<sup>56</sup> Solidarity with Democratic Belarus information office report on the legal framework of political parties and NGOs in Belarus

<sup>57</sup> 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>.

<sup>58</sup> The appropriate registering organ can suspend the registration of the public association for up to one month and give it opportunity to and give it opportunity to eliminate admitted violations in the case they are corrigible. However such suspension is not an obligation of the registering organ and can be applied arbitrarily.

<sup>59</sup> Solidarity with Democratic Belarus information office report on the legal framework of political parties and NGOs in Belarus

<sup>60</sup> 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 Union and others (<http://belngo.info/view.pl/eng/art22>)

<sup>61</sup> OSCE Rapporteur's Report on Belarus (Emmanuel Decaux), 28 May 2011; see also Solidarity with Democratic Belarus information office report on the legal framework of political parties and NGOs in Belarus

of the purposes of the guarantee of freedom of association, and that such protection can only be effectively secured through the guarantee of both the positive and the negative right to freedom of association.<sup>62</sup>

Freedom of association without freedom of expression amounts to little if anything. 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. 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.

The freedom of expression of an association cannot be subject to the direction of public authorities,<sup>63</sup> 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.<sup>64</sup>

All in all, Belarusian legislation creates difficult conditions for the establishment of public associations as well as it envisages a complicated procedure of registration with the possibility of arbitrary denial of registration.

The above practice means that authorities have a wide latitude in defining what constitutes a legal association. Such discretion leads to a result which is incompatible with the scope of freedom of association. The objective and purpose as emphasized in European Convention jurisprudence is to protect rights that are not theoretical or illusory but practical and effective.

It must therefore be concluded that the circumstances of the registration process in Belarus with regard to forming an association are in breach of the rights set forth in Article 11 of the ECHR and Article 22 of the ICCPR.

## **B. Dissolution of NGOs in light of human rights principles**

The European Court of Human Rights has dealt with several cases relating to problems with NGO registration and dissolution. In a recent case<sup>65</sup> against Azerbaijan where the legislation just 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. [. . .] 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

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<sup>62</sup> Chassagnou and Others v. France [GC], nos. 25088/94, 28331/95 and 28443/95, § 103, ECHR 1999-III; and Young, James and Webster, § 57, and Sigurður A. Sigurjónsson, § 37.

<sup>63</sup> 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*).

<sup>64</sup> Chassagnou et al. v. France, Judgment of 29 April 1999, Appl. nos. 25088/94, 28331/95 and 28443/95, para 113.

<sup>65</sup> Tebieti Mühafize Cemiyeti and Isravlilov v. Azerbaijan, 8 October 2009, application no. 37083/03.

achieved by introducing in the domestic law less radical alternative sanctions, such as a fine or withdrawal of tax benefits.<sup>66</sup>

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 on the basis of serious misconduct.<sup>67</sup>

The grounds for issuing a warning to a public association according to Article 27 of the Law on Public Associations are vague and unclear. If a warning that precedes the dissolution of an association is based on conduct that does not create danger to a democratic society there is no necessity to restrict an association in order to preserve democracy. An involuntary dissolution of an association based on a failure to respect legal requirements, even of technical nature like having an office in a non-residential building, is an impermissible restriction of the right to freedom of association.

The Belarusian law on public associations contains only one sanction, dissolution - for an association that violates that law or other acts of legislation. The issuance of more than two warnings in a year suffices for the launch of dissolution lawsuit before a domestic court.<sup>68</sup> There are no alternative sanctions.

A violation that serves as the basis for a court's decision to dissolve an association must meet the requirements of being prescribed by law; 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.<sup>69</sup> A dissolution that does not pursue a pressing social need cannot be deemed necessary in a democratic society.<sup>70</sup>

Article 5 of the Belarusian Constitution 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. Such prohibition is in accordance with Article 20 of the ICCPR (Prohibition of Incitement) which is *lex specialis* with regard to Article 19 of the ICCPR (Cf., UN Human Rights Committee General Comment No. 34/2011).<sup>71</sup>

Article 17 of the European Convention prohibits the abuse of rights stating that:

Nothing in this Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to any greater extent than is provided for in the Convention.

Article 17 can be used both an individual against the State and the State against an individual on the conditions under which an individual might be found guilty of an abuse of rights. It is clear that the State is entitled to safeguard itself against the threat of undemocratic, destructive forces or totalitarianism. In this respect Convention jurisprudence confirmed the right of Germany to ban the German Communist Party which was justified

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<sup>66</sup> 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](http://www.icnl.org/knowledge/ijnl/vol12iss3/art_2.htm#_ftn17))

<sup>67</sup> 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).

<sup>68</sup> [http://www.icnl.org/knowledge/ijnl/vol12iss3/art\\_2.htm](http://www.icnl.org/knowledge/ijnl/vol12iss3/art_2.htm)

<sup>69</sup> *Koretskyy and Others v. Ukraine*, no. 40269/02, no. 107

<sup>70</sup> Cf., *Koretskyy and Others v. Ukraine*, no. 40269/02, no. 107

<sup>71</sup> UN Human Rights Committee, One Hundred and second session, Geneva, 11-29 July 2011.



under reference to Article 17.<sup>72</sup> It has also been observed in relation to the European Court of Human Rights case law on the dissolution of Islamist parties by order of the Turkish State stating that: "It seems that there is now a European consensus that an Islamic party advocating the introduction of Shari'a law is incompatible with the European Convention on Human Rights and hence with the conception of European democracy."<sup>73</sup>

There must be convincing and compelling reasons justifying the dissolution and/or temporary forfeiture of the right to freedom of association. Such an interference must meet a pressing social need and be "proportionate to the aims pursued."<sup>74</sup>

A dissolution of a NGO or a political party must in accordance with permissible restrictions of political rights (Articles 8, 9, 10 and 11) under the European Convention, be assessed by the yardstick of what is "necessary in a democratic society". The only type of necessity capable of justifying interference with any of those rights is, therefore, one which may claim to spring from "democratic society". Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it.<sup>75</sup>

### **C. Criminalizing activities of unregistered associations**

It is important to note that Article 193-1 applies to public associations, including political parties, trade unions, religious organizations and more. The public association is the main and most frequently used form of an NGO in Belarus.<sup>76</sup> Only public associations can engage in various form of social activities such as nominating representatives to election commissions, public board etc. Only public associations have a right to stage events (rallies, marches and demonstrations).<sup>77</sup>

To assess the compatibility with universal human rights standards of Article 193-1 of the Criminal Code of Belarus vis-à-vis the rights of non registered associations in Belarus – its existence needs to be looked at in context of the legal environment of registration and dissolution of NGOs. As evident from the above there are pervasive obstacles to obtain registration without which freedom of association is not possible. Furthermore, the existence of NGOs is vulnerable and they can be dissolved on disputable, even arbitrary grounds and denied re-registration as in the case of HRC 'Viasna'. When such conditions are combined with the legislation that provides criminal liability for activities on behalf of unregistered organisations – it is difficult not to conclude that Article 193-1 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.<sup>78</sup>

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<sup>72</sup> Application No. 250/57, Communist Party of Germany et al. v. Germany Federal Republic, European Commission of Human Rights, 20 July, 1957

<sup>73</sup> <http://www.shrlg.org.uk/2009/04/27/article-17-restrictions-on-activities-aimed-at-the-destruction-of-convention-rights/>

<sup>74</sup> Refah Partisi (The Welfare Party) and Others v. Turkey [Grand Chamber], applications nos. 41340/98, 41343/98 and 41344/98, judgement 13 February, 2003.

<sup>75</sup> Refah Partisi (The Welfare Party) and Others v. Turkey [Grand Chamber], applications nos. 41340/98, 41343/98 and 41344/98, judgement 13 February, 2003, para. 86.

<sup>76</sup> Democratic solidarity NGO sklja

<sup>77</sup> Solidarity with Democratic Belarus Information Office: Legal frameworks of activities of political parties and non-governmental organizations

<sup>78</sup> On 4 August 2011 Ales Bialiatski was arrested and put in detention within the framework of a criminal case, 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>

Authorities in Belarus maintain that Article 193.1 is [only] “aimed at precluding extremist groups and organisations in Belarus”.<sup>79</sup> That presumption complies with Article 5 of the Constitution of the Republic of Belarus 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. Freedom of association may hence only be restricted on these grounds. This list is complete and not subject to broad interpretation according to the Constitution.

According to the Assembly of Pro-Democratic NGOs in Belarus: Article 193-1 is used to punish “ members of public, political and religious organizations for performing activities on behalf of unregistered organizations, *regardless of the nature of those activities*. This can be confirmed by the materials from trial cases launched under Article 193-1: according to those, the accused were condemned not for performing activities on behalf of organizations, but solely on the basis of the fact that they belonged to those particular organizations.”<sup>80</sup>

By criminalising the activities of unregistered associations, those who in times of political turmoil stand up to defend human rights are particularly vulnerable to become subjects of harassment.<sup>81</sup> They risk being prosecuted because of their work on behalf of human rights associations that have been involuntary dissolved, even illegally as in the case of the Human Rights Center ‘Viasna’.<sup>82</sup>

A case that at present has evoked international attention is that of Ales Bialiatski, chairman of the HRC ‘Viasna’. Ales Bialatski received an official warning in February 2011 by the General Prosecutor’s Office for alleged violation of Article 193-1 concerning activities on behalf of an unregistered organisation.<sup>83</sup> He was notified that continued human rights activities could lead to criminal prosecution.<sup>84</sup> According to the Warning Ales Bialiatski is guilty of making comments and statements on various issues of social and political life of the country on behalf on the unregistered HRC ‘Viasna’.<sup>85</sup> 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.<sup>86</sup>

Civil rights defenders stated in an open letter to President Alexander Lukashenko and the General Prosecutor Grigory Vasilevich that the Warning is an unacceptable measure aiming to silence Ales Bialiatski, HRC ‘Viasna’ and other human rights defenders in Belarus (*Cf.*, II. B supra, the subsequent arrest of Ales Bialatski supports this allegation).<sup>87</sup> Ales Bialiatski stated in his appeal against the verdict of a district court that left the warning in force, that the warning against him did not contain any of the permissible restrictions under Article 22 of the ICCPR (or Article 5 of the Belarusian Constitution).<sup>88</sup>

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<sup>79</sup> <http://www.osce.org/home/71646>

<sup>80</sup> OSCE Review Conference Warsaw, 30 September – 8 October 2010. <http://www.osce.org/home/71646>

<sup>81</sup> <http://spring96.org/en/news/44974>

<sup>82</sup> Cf., The UN Human Rights Committee on 24 July 2007 adopted its View on the individual communication nr. 1296/2004 that Belarus had violated Article 22 by liquidating the HRC Viasna and that Ales Bialiatski and co-authors were entitled to an appropriate remedy, including the re-registration of Viasna and compensation.

<sup>83</sup> <http://www.civilrightsdefenders.org/en/news/11250/>

<sup>84</sup> Open letter to President Alexander Lukashenko and General Prosecutor Grigory Vailevich on 22 February 2011 <http://www.civilrightsdefenders.org/en/news/11282/>

<sup>85</sup> <http://spring96.org/en/news/44556>

<sup>86</sup> Open letter to President Alexander Lukashenko and General Prosecutor Grigory Vailevich on 22 February 2011 <http://www.civilrightsdefenders.org/en/news/11282/>

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<sup>88</sup> <http://spring96.org/en/news/44556>

Article 193-1 poses a serious threat to the right to freedom of association not least during times when human rights associations are trying to assist those whose fundamental rights are being threatened.<sup>89</sup> A member of an unregistered association who takes part in offering legal assistance to victims of human rights violations or speaks up on their behalf may be punished with a fine or two years of imprisonment.

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.

Article 193-1 penetrates the thoughts and attitudes of activists without being put into effect. And when put into effect the restriction is so severe that it not only restricts freedom of association but also freedom of opinion and expression.

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 European Convention jurisprudence.<sup>90</sup> 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 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".<sup>91</sup> 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 Codes, is incompatible with a democratic society in which persons have the right to express their opinion as individuals and in association with others.

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 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."<sup>92</sup>

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.

From the perspective of political reality and metaphorically speaking the existence and use of Article 193-1 of the Criminal Code is like a double edge sword; it may solve a political problem of settling unrest being justified as a restriction in the name of public order and national security (a Hobbesian self-preservation of any political system) but could potentially cause even more problems on the back swing.

In this respect it may be recalled that the international human rights regime and the European Convention came about as a reaction in Europe against the atrocities committed during World War II and the gross human rights violations. A victim from the holocaust said: "We who lived in concentration camps can remember the men who walked through the huts comforting others, giving away their last piece of bread. They may have been few in number,

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<sup>89</sup> <http://spring96.org/en/news/44052>

<sup>90</sup> Herdís Thorgeirsdóttir, Journalism Worthy of the Name: Freedom within the Press and the Affirmative Side of Article 10 of the ECHR (Brill 2005).

<sup>91</sup> Cf., US Supreme Court Justice William Douglas in *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1948).

<sup>92</sup> UN Human Rights Committee, One Hundred and second session, Geneva, 11-29 July 2011.

but they offer sufficient proof that everything can be taken from a man but one thing: the last of human freedom – to choose one's attitude in any given set of circumstances, to choose one's own way.<sup>93</sup>

## VII. Conclusion

Since it came into effect by Presidential Decree in December 2005, Article 193-1 has meant that unregistered civil society organizations and other groups may be penalized for their activities. Organizing or participating in an activity of an unregistered NGO has since become a criminal offence which carries a prison sentence of up to two years. In circumstances when the majority of NGOs in Belarus are working without registration, because it is practically very difficult for independent NGOs to get registered, article 193-1 in effect urges to treat thousands of Belarusian citizens as criminals.<sup>94</sup>

Article 193-1 of the Criminal Code of Belarus violates the basic right of freedom of association in the context also of freedom of expression (cf., articles 22 and 19 of the ICCPR and 10 and 11 of the ECHR respectively). 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, subject to Article 193-1 of the Criminal Codes, is incompatible with a democratic society in which persons have the right to express their opinion as individuals and in association with others.

The international community has witnessed a deteriorating situation of human rights defenders in Belarus, particularly in recent months. The evolution of the legal framework in Belarus with regard to NGOs in the last decade is worrisome. The adoption of Article 193-1 appears to 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 the conduct of civil society in trying to have an impact on its own conditions and future is unacceptable from the standpoint of democratic principles and human rights.

The Venice Commission reiterates that it is required of the Republic of Belarus as Party to the ICCPR to take steps to give effect to the civil and political rights it has undertaken to ensure to all individuals within the territory of Belarus. 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.<sup>95</sup>

In addition, the Venice Commission points out that, although the republic of Belarus is not yet a party to the ECHR, its standards are relevant for assessing its conduct in relation to fundamental rights since Belarus wishes to become a member of the Council of Europe and, if admitted, will have to ratify the European Convention on Human Rights (ECHR).

Recently the Delegation of the European Union to the Council of Europe in a declaration referred to the work of the Venice Commission in relation to Belarus when addressing the deteriorating human rights situation in the country.<sup>96</sup> The EU declaration stated that the freedom of expression and of the media, freedom of assembly and of political associations were not respected by authorities and the working conditions of NGO's in Belarus were deteriorating. The EU confirmed its readiness to cooperate closely with the Council of

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<sup>93</sup> Victor Frankl, <http://www.rjgeib.com/thoughts/frankl/frankl.html>

<sup>94</sup> <http://193.belngo.info/view.pl/english/introduction>

<sup>95</sup> CCPR/C/21/Rev.1/Add. 13 Human Rights Committee General Comment No. 31 [80]Adopted on 29 March 2004 (2187th meeting), para. 14.

<sup>96</sup> [http://eeas.europa.eu/delegations/council\\_europe/press\\_corner/all\\_news/news/2011/20110701\\_en.htm](http://eeas.europa.eu/delegations/council_europe/press_corner/all_news/news/2011/20110701_en.htm)

Europe towards improvement of the human rights situation in Belarus and urged the government *inter alia* to discontinue harassment of political opposition and civil society.

The Republic of Belarus has been an associate member of the Venice Commission since 1994 and the VC reiterates its inclination to be of assistance as hitherto in matters concerning human rights.