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of Human Rights Defenders



BELARUS

CONTROL OVER LAWYERS THREATENS HUMAN RIGHTS

Stop harassing
rights lawyers

June 2018



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INTRODUCTION

In response to alerts from the Human Rights Centre "Viasna" (HRC "Viasna"), FIDH's member organisation in Belarus, about the recent wave of repression against lawyers representing defendants in politically sensitive cases, the Observatory for the protection of human rights defenders, a partnership between FIDH and the World Organisation Against Torture (OMCT), in collaboration with the Paris Bar, sent an international investigation mission to Minsk from 17 to 19 January 2018. The Observatory and the Paris Bar are grateful to HRC "Viasna" for its support in the preparation of this mission as well as all the persons who met with the delegation.

The mission delegation was composed of Mr. **Basile Ader**, Attorney at law, Vice President of the Paris Bar, **Benoît Deniaud**, Attorney at law, Member of the Paris Bar Council, Ms. **Julia Ouahnon**, Programme Officer, Eastern Europe and Central Asia Desk, FIDH and Mr. **Hugo Gabbero**, Deputy Director of the Observatory for the protection of Human Rights Defenders, FIDH.

The mission had the following objectives:

- 1) To hold discussions with the Belarusian authorities and in particular the Deputy Minister of Justice and the Deputy Director of the International Cooperation Department within the Ministry of Justice, as well as representatives of the Republican Bar Associations, Minsk City Bar and the Minsk Regional Bar, about the laws and regulations in force governing the legal profession, abuse of them to target human rights lawyers and their level of compliance with relevant international standards.
- 2) To meet human rights defenders and lawyers who have been harassed on account of their involvement in the protection of human rights and fundamental freedoms in Belarus.

Widespread and systematic violations of human rights in Belarus have been extensively documented by a number of international and national observers¹. Freedom of expression and association continue to be subjected to numerous restrictions, while serious violations of civil and political rights as well as economic and social rights are still taking place. Repression generally intensifies in response to expressions of public discontent, like the protests in 2010 or spring 2017 (see below), targeting all independent civil society voices, including human rights defenders, independent journalists, political opponents, independent union representatives and the lawyers representing them. Since spring 2017, eight lawyers involved in representing defendants in a case considered to be politically motivated have been subject to pressure by the authorities, in particular through the legislative framework governing practice of the legal profession (see Part III below).

The following aims are pursued with this report:

- To present the international framework governing the legal profession, including human rights lawyers, which is mainly based on the Basic Principles on the Role of Lawyers ("Havana Principles");
- To describe the national legal and regulatory framework which has gradually placed the legal profession in Belarus under the supervision of the Justice Ministry, in violation of international principles on the independence of lawyers, to the detriment of human rights lawyers in particular;
- To illustrate the way in which national laws and regulations are selectively invoked to harass and silence lawyers involved in cases considered as politically sensitive by the executive authorities;
- To propose recommendations to national authorities, United Nations (UN) Special Procedures, the Organisation for Security and Co-operation in Europe (OSCE) and the European Union on the legislative, regulatory and practical measures to be taken to bring law and practice in line with international standards on the legal profession, with the aim of providing greater protection to lawyers, in particular those who defend human rights.

1. See for example, *Situation of human rights in Belarus*, report of the Special Rapporteur on the situation of human rights in Belarus, Miklós Haraszti, 2017, <https://spring96.org/files/misc/n1729738.pdf> et <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/297/38/PDF/N1729738.pdf?OpenElement>

I. POLITICAL CONTEXT: PROGRESSIVE TIGHTENING OF THE GRIP ON POWER ORCHESTRATED BY THE PRESIDENCY

The implosion of the Soviet empire in 1991 led to the independence of Belarus. In 1994, Alexander Lukashenko was elected as the first President of the Republic with 80% of the vote. Since then, he has remained in power through a series of constitutional amendments and exerting control over civil society.

In November 1996, a referendum was organised primarily aimed at changing the Constitution in order to extend presidential powers. The Supreme Council, elected in 1995, was dissolved and replaced by a bicameral legislature whose members were, in practice, knighted by the President. The international community did not recognise the results of this referendum².

On 9 September 2001, Alexander Lukashenko was reelected for a five-year term in the first round of the presidential elections with 76.6% of the vote. During the electoral process, fundamental flaws were reported by OSCE observers³.

During the parliamentary elections of 17 October 2004, President Lukashenko organised a referendum aimed at enabling him to stand again in the 2006 presidential elections. The referendum resulted in a constitutional amendment removing the limit of two presidential terms.

On 19 March 2006, tens of thousands of people gathered in October Square in Minsk to protest against the falsification of the results of the presidential election. Several thousand protesters were subjected to violence by the security forces.

During the presidential elections of 19 December 2010, a wave of repression led to significant deterioration in the situation of human rights and civil and political liberties. Hundreds of protesters were arrested and detained on 19 and 20 December, in a context of excessive use of force, interrogations and trials held in gross violation of international human rights standards, through tight control of the judicial system by the executive authority.

Furthermore, 43 persons were convicted in "criminal" cases, on fabricated charges, following the events of 19 December 2010. Among them, 31 were arrested for participating in "mass disorder", 10 for "disturbing public order" during an organised rally and two for "hooliganism". Thirty persons were given custodial sentences, including five former presidential candidates, Andrei Sannikov and Dzmitry Us, sentenced to prison terms of five years and five and a half years respectively, Mikola Statkevich, sentenced to six years' imprisonment and Vladimir Neklyayev and Vitali Rymasheuski, sentenced to suspended prison terms of two years.

Since then, **there has been no structural improvement to the human rights situation in Belarus.** On the contrary, **freedom of expression and association continue to be subjected to numerous restrictions, while serious violations of civil and political rights as well as economic and social rights are still taking place.** Repression generally intensifies in response to expressions of public discontent, like the protests in 2010 or spring 2017 (see below), targeting all independent civil society voices, including human rights defenders, independent journalists, political opponents, independent union representatives and the lawyers representing them.

2. See *Opinion on the amendments and addenda to the Constitution of the Republic of Belarus as proposed by i: the President of the Republic & ii: the Agrarian and Communist groups of parliamentarians*, CDL-INF(1996)008-e, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-INF\(1996\)008-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(1996)008-e) as well as the text published by the Institute of Security Studies, according to which "On 4 March 1997 the EU delegation presented a report to Lukashenko on the situation in Belarus. The EU asked that the November referendum be invalidated and the former parliament reinstated. Otherwise, the EU explicitly said it would adopt sanctions and stop investing in Belarus", <https://www.iss.europa.eu/sites/default/files/EUISSFiles/occ029.pdf>

3. See *Republic of Belarus Presidential Election: 9 September 2001*. OSCE/ODIHR Limited Election Observation Mission Final Report, 4 October 2001, <https://www.osce.org/odihr/elections/belarus/14459?download=true>

II. SYSTEMATIC VIOLATIONS OF THE FREEDOMS OF ASSOCIATION, EXPRESSION AND PEACEFUL ASSEMBLY

In recent years, **these various waves of repression have taken place alongside** administrative and judicial **harassment against human rights defenders, independent journalists and civil and political activists** as well as defamation campaigns aimed at tarnishing the image of civil society associations in general and certain human rights organisations in particular.

A. Systematic violations of freedom of association

Since 2003, when 51 NGOs were removed from the register of associations⁴, no human rights organisations have been registered by the Belarusian authorities. In general "technical" reasons are invoked to justify such refusals.

For example, following the withdrawal of official registration from HRC "Viasna" in 2003, the Minister of Justice refused on three occasions to re-register the organisation, invoking in particular a spelling mistake in the name of one of its founders. The numerous attempts to re-register undertaken by HRC "Viasna" with the competent jurisdictions have systematically failed⁵.

In April 2011, a major campaign was launched in the media against members of HRC "Viasna". During this campaign, public television broadcast programmes at peak viewing times on the alleged illegality, nuisance and morally corrupt nature of HRC "Viasna's" activities, highlighting in particular the role of its President and at that time FIDH Vice President, Mr. **Ales Bialiatski**. Several months later, he was arrested and sentenced to four and a half years' imprisonment on the basis of fabricated charges⁶. Ales Bialiatski was freed in 2014, after three years' detention in a penal colony under a particularly severe regime. He continues to carry out his functions as President of HRC "Viasna", which since 2003, when it was arbitrarily removed from the register of associations, operates "unofficially", despite the United Nations Human Rights Committee's decision stating that the authorities' repeated refusals to re-register HRC "Viasna" constitute a violation of freedom of association⁷.

B. Systematic violations of freedom of peaceful assembly

In recent years, it has become increasingly difficult to protest freely in Belarus. **Peaceful demonstrations generally give rise to mass arrests**, as seen during the 2010 protests⁸.

Arrests of protesters are generally based on the Law on Mass Events which sets down excessive and disproportionate restrictions, contrary to international principles guaranteeing the freedom of peaceful assembly. The rules governing the means by which organisers of such gatherings can obtain prior contractual authorisation from the authorities, require the organisers themselves

4. See *Human Rights Overview: Belarus*, 1 January 2004, <http://pantheon.hrw.org/legacy/english/docs/2003/12/31/belaru6996.htm>: "In 2003 several major nongovernmental organizations (NGOs) were liquidated, mostly on petty administrative charges. The activities of many others were severely constrained by Presidential Decree No. 8, a 2001 order that significantly increases the tax burden of organizations that receive foreign aid".

5. See the Observatory's Judicial Observation Report, *Public Human Rights Association «Nasha Viasna» v. Ministry of Justice of Belarus*, September 2009.

6. See Observatory Press Release, *BELARUS: The Observatory refers the case of Mr. Ales Bialiatski to the UN Working Group on Arbitrary Detention*, 19 April 2010 and Observatory Annual Report, *Violations of the right of NGOs to funding: from harassment to criminalisation*, 28 February 2013.

7. In decision CCPR/C/112/D/2165/2012, *Ales Bialiatski v. Belarus*, of 17 November 2014, the United Nations Human Rights Committee (HRC) recognised that the refusal to register an NGO on the sole basis that the documents provided necessitated minor adjustments to meet the requirements of the Ministry of Justice (and which could have been carried out by the Ministry itself) was a violation of the right to freedom of association. The HRC also considered that a refusal to register an NGO can lead to the unlawfulness of its operation on the state's territory and preclude its members from enjoying their rights. The Committee added that sentencing the leader of an NGO to a long term of imprisonment on the basis of actions connected to the receipt and use of funds aimed at conducting legitimate activities within the framework of the organisation was a direct consequence of the violation of freedom of association.

8. For further information, see: <http://spring96.org/ru/tags/1139> (in Russian).

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to ensure security, clean the areas of assembly and provide medical care to participants⁹. These provisions are sometimes invoked to prohibit protests or to sanction participants and organisations with sentences of up to 25 days' administrative detention or excessive fines.

Thus, several months after the mass demonstrations of 2010, in June 2011, nearly 600 persons were detained after participating in peaceful demonstrations and vigils to protest against the deterioration of economic conditions in various towns across the country.

In November 2016, the information website www.tut.by, one of the most visited information sites in Belarus, drew public attention to the exorbitant fines imposed by the authorities on activists for participating in unauthorised gatherings between May 2015 and November 2016, of a combined total of 55,000 euros. Approximately half of this sum was claimed from ordinary citizen activists¹⁰.

The most recent wave of repression in response to large-scale protests took place in spring 2017, when in March tens of thousands of people descended into the streets to protest against Presidential Decree No. 3 aimed at imposing an unemployment tax on citizens. Protests on such a scale had not been seen since 2010. More than 700 protesters were detained by the police, including at least 100 journalists and 70 human rights defenders. 177 persons were sentenced to up to 25 days in administrative detention, others to fines.

On 21 March 2017, four days before the protests planned for 25 March, the President of Belarus publicly announced the arrest of "fighters" who were trained in camps in Belarus and abroad and who were stirring up conflict in Belarus¹¹. In total, in the case which has come to be referred to as the "Patriot Case" or the "White Legion Case", 35 persons were arrested, including 20 alleged to have participated in "illegal armed groups". Among those arrested were border guard officials – including some still in office -, members of the Belarusian armed forces, internal security forces, civil servants from the Ministry of emergency situations, but also activists from the unregistered NGO "Molodoi Front" and members of the social democratic party (*Narodnaya Gromada*).

On 27 November 2017, the "White Legion Case" was formally closed. According to local human rights defenders, it had been used as a means of justifying the arrests carried out during mass demonstrations but also diverting public attention and covering over the economic and social demands of the population outraged by the Presidential Decree.

The Belarusian authorities also have a history of using a range of retaliatory measures against lawyers representing the leaders of protest movements or protesters before judicial bodies. Thus, in September 2017, eight of the sixteen lawyers providing legal representation to defendants in the "White Legion Case" were the subject an extraordinary certification that includes a de facto oral examination to check their qualifications in front of a commission controlled by the executive authorities, with the clear aim of applying pressure and conducting targeted harassment on the basis of their roles in defending fundamental freedoms (see. Chapter III).

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9. Viasna and Belarusian Helsinki Committee, *Belarus – A bad example of implementation of the right to peaceful assembly*, <http://spring96.org/ru/news/88651> (in Russian), 19 December 2017.

10. For more information on those sentenced to fines on the basis of their participation in unauthorised gatherings, see "*The price of protest: classification of fines imposed on Belarusian activists*", <https://news.tut.by/economics/521317.html> (in Russian), 25 November 2016.

11. "Fighters preparing armed provocations arrested in Belarus", cf. <http://www.belta.by/president/view/v-belarusi-zaderzhali-gotovivshih-provokatsiju-s-oruzhiem-boevikov-238543-2017/> (in Russian)

III. LEGAL OBSTACLES AND REPRESSION AGAINST LAWYERS INVOLVED IN HUMAN RIGHTS WORK

In recent years, **Belarusian authorities have repeatedly violated international standards governing the legal profession**, placing legal and practical restrictions on lawyers' freedom of expression and association, independence of internal management of the bar, freedom to exercise the profession without hindrance and the right to a fair hearing and an effective remedy in case of disciplinary proceedings.

A. International standards governing the legal profession

At the international level, the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba from 27 August to 7 September 1990 ("Havana Principles"), are the reference instrument governing practice of the legal profession.

Under the Havana Principles, the legal profession is structured around four key principles: freedom of expression and association, independence of internal management of the bar, freedom to exercise the profession without hindrance and the right to a fair hearing and an effective remedy in case of disciplinary proceedings.

1 - Freedom of expression and association

In accordance with Principle 23, "*Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession*".

Under this principle, lawyers like other citizens must be able to express themselves freely and take part in activities or organisations concerning the law, the administration of justice and the promotion and protection of human rights. A lawyer's activist work must not lead to restrictions on his/her professional activity.

2 - The principle of independence in the internal management of the bar

Principle 24 states that, "*Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference*".

Under Principle 24, lawyers can organise freely in professional associations and bars which must not be subjected, in law or practice, to any interference from or supervision by public authorities. Principle 24 sets down the principle of independence of the bar and professional associations of lawyers.

Principle 26 provides that "*Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms*".

Thus, according to Principle 26, independent professional organisations representing lawyers are competent to establish professional codes applicable to the legal profession.

3 - Guaranteeing freedom to exercise the legal profession without hindrance

Principle 16 provides that "Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics".

This provision clarifies that lawyers themselves, in addition to bars, must be able to exercise their profession freely without fear of reprisals.

4 - The right to a fair trial and an effective remedy in case of disciplinary proceedings

Under Principle 27, "Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice".

Principle 28 adds that "Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review".

These two principles set out a strict framework governing the conditions in which disciplinary proceedings must be conducted. Such proceedings must be impartial, fair and equitable, held within a reasonable time and subject to appeal before an independent body.

B. National standards governing the legal profession: an omnipresent Ministry of Justice as "guarantor of the independence of lawyers"

During the meeting with the Paris Bar on 18 January 2018, the Deputy Minister of Justice of Belarus, Mr. Igor Tushynskiy, stated that there were 2,146 lawyers registered in the country. The country is divided into six administrative regions, each with its own bar. The city of Minsk also has a regional bar, bringing the number of regional bars to seven. The Minsk Regional Bar has approximately 440 lawyers and the Minsk City Bar has around 800 lawyers. More than half of the country's lawyers are therefore concentrated in Minsk and its region.

At the normative level, the status of lawyers is governed by a set of texts which have gradually placed the legal profession under the supervision of the authorities and in particular the Ministry of Justice. The texts governing the issues related to obtaining, renewing and revoking licences, addressed in this report, include the following:

- Law on the Bar No. 334-3 of 30 December 2011¹², amended on 11 July 2017 by Law No. 42-3¹³;
- Decision of the Ministry of Justice No. 58 "On certain issues governing the question of licensing of activities concerning provision of legal services" of 7 March 2014;
- Presidential Decree No. 265 "On certain issues governing exercise of the legal profession" of 14 June 2012;
- Presidential Decree No. 450 governing authorisation to exercise various professions of 1 September 2010¹⁴;
- Rule No. 1363 governing authorisation to exercise the legal profession adopted on 20 October 2003¹⁵ by the Council of Ministers of Belarus and amended in December 2010;

12. See <http://www.rka.by/content/zakon-respubliki-belarus> (in Russian).

13. See <http://www.rka.by/content/zakon-respubliki-belarus> (in Russian).

14. See <http://pravo.by/document/?guid=3871&p0=P31000450> (in Russian).

15. See <http://www.brestjust.by/polojenie-o-licenzirovanii-advokatskoi-deyatelnosti.html> (in Russian).

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- Decision of the Ministry of Justice No. 105 on "Regulation of the Qualification Commission on issues relating to the legal profession in the Republic of Belarus" of 30 November 2010¹⁶;
 - Regulation of the Ministry of Justice "On the qualification procedures for lawyers" of 2 February 2012¹⁷, amended by Regulation of 16 May 2017¹⁸.

The above list does not include all the normative acts adopted by the executive on control of the legal profession by the various supervisory bodies, nor the rules governing record-keeping on the provision of legal services. Overall, the plethora of normative acts adopted by the executive, the fragmentation of standards within various decisions and constant amendments represent a range of tools of repression which can be invoked against lawyers at the discretion of the authorities.

It should be underlined that the **Law of 30 December 2011 No. 334-3 was adopted following the large-scale repression of political opposition figures, civil society activists, independent journalists and human rights defenders, as well as lawyers representing opponents and protesters who took part in the mass gatherings which followed the contested presidential elections at the end of 2010.**

Likewise, the Belarusian Parliament adopted the amendment to the Law on the Bar of 2011 proposed by the Council of Ministers, on 13 June 2017, **three months after the last major episode of mass repression of citizens exercising their right to peaceful assembly in March 2017** in order to protest against Presidential Decree No. 3 (see below).

These amendments further restrict the powers, which are in any case essentially symbolic, of the internal management bodies of the bar. For example, Article 38 of the Law on the powers of the Ministry of Justice was supplemented by the obligation imposed on the bar to obtain the Ministry's approval of candidates for the posts of president of the bar association, as well as candidates for the posts of leader of all legal consultations. Furthermore, amendments give the Ministry discretion to decide on the right of foreign lawyers to practise their profession in Belarus.

"During the drafting of amendments, several of us, lawyers who were struck off in 2011 [see below] and now work as legal experts in NGOs, submitted proposals to Parliament aimed at improving the Law on the Bar by granting increased powers and autonomy to self-governing bodies. None of these proposals were taken into account. In practice, bars and lawyers are as dependent on the executive as ever, with some additional restrictions. For example, candidates for the post of president of the regional bar association must be approved by the Ministry of Justice", Tatiana Aheyeva told the mission delegation¹⁹.

Today, **the range of legislative and regulatory texts governing the legal profession contravene relevant international standards, allowing the Belarusian authorities not only to exert control over Bar and lawyers but also to undertake constant harassment of lawyers involved in defending opponents, protesters or those facing the death penalty, subjects considered "sensitive" by the regime.**

16. See http://a-h.by/s153/archives/PoloZhenie_O_Kvalifikacionnoj_komissii_po_voprosam_advokatskoj_deJatelnosti_v_Respublike_Belarus.html (in Russian).

17. See <http://naviny.org/2012/02/02/by12570.htm> (in Russian).

18. See http://pravo.by/upload/docs/op/W21732047_1495486800.pdf (in Russian).

19. Interview conducted by the mission delegation with Tatiana Aheyeva, former lawyer, whose licence was revoked in 2011, 19 January 2018.

1 - Supervision of the internal management of the bar and "selection" of presidents of the bar by the Ministry of Justice

During an interview with the mission delegation, the Deputy Minister of Justice, Mr. Igor Tushynskiy described the Ministry as the "guarantor of the independence of lawyers". This phrase takes on its full meaning when it is considered that in **Belarus**, Article 4 of the Law on the Bar only symbolically guarantees the independence of **lawyers**, who **are in reality subject to strict control by the Ministry of Justice**.

Firstly, the governing bodies of the bar are placed under the authority of the Ministry of Justice, which is **entitled to submit applications for the post of president of the bar associations, to suggest their resignation** or to **dismiss** a bar association president in the event that the Qualification Commission – which is also under the authority of the Ministry (see above) – establishes that he/she infringed legislation.

The Ministry of Justice can also adopt regulations on the activities of the bar and the **suspension of decisions** taken by the bar's governing bodies or the presidents or vice-presidents of bar associations and can annul such decisions.

Moreover, the Ministry provides assistance to bar associations on legal information about the profession and assists them in **organising continuous professional training for lawyers**, which infringes Principle 24 of the Havana Principles on the independence of lawyers in the promotion of their continuing education and training.

The Ministry also drafts and approves proposals on ethical standards for lawyers. Decision No. 39 of the Ministry of Justice of 6 April 2012 established new ethical standards contravening Principle 26 of the Havana Principles, which provides that organisations of lawyers must be able to establish their codes of professional conduct independently.

Furthermore, since 1997, only lawyers registered with the bar are allowed to practise, despite the provision of the Law on the Bar of 1993 which states that, "Citizens who [had] obtained authorisation to practise as a lawyer in accordance with the laws in force, [were] entitled to exercise their professional right by registering with the bar. By a decision of the bar and in accordance with the procedure set down by the respective bar, the profession [could] be practised within the framework of legal advice services or other organisational structures" (Article 3). Thus lawyers could practise without being registered with the bar but as part of another form of association of lawyers²⁰.

Although registration with the bar is compulsory in many countries, in Belarus the obligation of lawyers to register with the bar increases their dependence on the authorities given that – as discussed above – the bars are controlled by the Ministry of Justice.

2 - The general regime governing the legal profession

Under Article 7.1. of the Law on the Bar, in order to be authorised to practise as a lawyer, a person must be a Belarusian citizen with legal training, have a minimum of three years' professional experience in his/her area of legal specialism, have undertaken a traineeship in a law firm, have passed an exam with the Qualification Commission, have obtained a licence to practise law and be a member of the bar. The amendment to the Law on the Bar of July 2017 added Article 7.2 allowing legal advice or litigation services to be provided by foreign lawyers from States with which Belarus has signed international agreements on this issue. Foreign lawyers who wish to practise in Belarus must be listed on the register of lawyers held by the Ministry of Justice.

As discussed above, the **composition of the Qualification Commission**, whose mandate includes the organisation of the professional entrance examination and its activities, is managed by the **Ministry of Justice**. All licences are issued by the Ministry of Justice.

20. See <http://laws.newsby.org/documents/laws/law1222.htm> (in Russian).

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Since 1 March 2016, in accordance with Presidential Decree of 26 November 2015 No. 475, **a lawyer's licence to practise is granted for an indefinite period. However every five years lawyers are subject** to a qualification procedure before a "Qualification Commission" under the authority of the executive, **or at any time on request of the Ministry of Justice**. As a result, every five years lawyers are subject to so-called "ordinary qualification" proceedings, while at the request of the authorities lawyers may be summoned to "exceptional qualification" proceedings, often following control procedures targeting certain lawyers in particular (see below), regardless of the date of their last ordinary qualification procedure or its outcome.

The Deputy Minister of Justice, Mr. Igor Tushynskiy, considers that this renewable qualification procedure is a means of "ensuring that lawyers remain competent throughout their career". In practice, the extremely vague nature of provisions combined with the power to nominate members of the Qualification Commission in charge of examinations **gives the authorities full discretion to remove certain lawyers they consider to be critical**.

"Today in Belarus, any lawyer can have his or her right to practise withdrawn for any reason" (which can put an end to his or her career), lamented one of the lawyers met by the mission.

3 - Human rights lawyers particularly targeted by threats to revoke their licence

In Belarus, the authorities often respond to mass demonstrations – almost systematically obstructed and repressed by the State as discussed above in Chapter II-B – with **retaliatory measures against lawyers representing leaders of protest movements or protesters** before the courts. The authorities particularly target lawyers in the most publicised and politically sensitive cases, with the aim of sending a signal to other lawyers.

Thus, **following protests in 2010, six lawyers who had represented candidates in the presidential election, as well as protesters, before the courts had their licences to practise revoked**. They were Mr. **Aleh Aheyev**, Ms. **Tatiana Aheyeva**, Mr. **Vladimir Tolstik**, Ms. **Tamara Garaieva**, Mr. **Pavel Sapelka** and Ms. **Tamara Sidorenko**.

As highlighted in a previous FIDH report published in 2011, the Ministry of Justice claimed at the time that "Some attorneys are abusing their right to defend individuals by presenting false information about the progress of the investigation, opportunities for defendants to exercise their right to legal assistance, their state of health, and conditions of detention, and are presenting biased information about the work of the country's law enforcement agencies"²¹.

The expression "some attorneys" was aimed in particular at the lawyers mentioned above²².

During the mission, the delegation met four of them. To date, none of the four have been able to recover their licence.

Although the Law on the Bar (Art. 8) provides for the possibility of requesting a new licence one year after revocation, or three years in the case of the lawyer's expulsion from the bar, the lawyers met emphasised the ineffectiveness of such a process in their situations, given the political nature of the cases.

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21. See FIDH Report, *Belarus: Restrictions on the Political and Civil Rights of Citizens Following the 2010 Presidential Election*, June 2011 https://www.fidh.org/IMG/pdf/rapport_Belarus_En_web.pdf

22. It should however be recalled that at the time, given the absence of reasons, the Minsk City Bar had refused to initiate disciplinary proceedings against them. On 18 February 2011, the then President of the Minsk City Bar, Mr. Alexander Pylchenko, had said in a press statement that, "All the executive staff of the Minsk City Bar think that the situation is critical and represents a real threat to the independence of the bar as a legal institution and to the independence of individual lawyers". On the same day, Mr. Alexander Pylchenko was expelled from the Ministry's Qualification Commission (see below). On 25 February 2011, the Bar Council condemned Mr. Alexander Pylchenko's "style of work" and "declared further exercise of his functions as President of the Bar Association impossible". See FIDH Report, *Belarus: Restrictions on the Political and Civil Rights of Citizens Following the 2010 Presidential Election*, https://www.fidh.org/IMG/pdf/rapport_Belarus_En_web.pdf

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*"I was expelled from the bar and as a result my licence was withdrawn by decision of the new Minsk Bar following a request from the Ministry of Justice to initiate disciplinary proceedings against me. What is more, this request was made at the initiative of the KGB", said Mr. Pavel Sapelka during an interview with the mission. "This shows that the prohibition on practising my profession as a lawyer is not related to a lack of competence or a violation of legislation"*²³.

*"Requesting a new licence makes no sense, not only because the system in place remains the same, but also because the authorities have continued to introduce new amendments, each one reducing the independence of the legal profession a little bit more", explained Mr. Aleh Aheyev*²⁴.

Furthermore, **protests in the spring of 2017 gave rise to a new wave of persecution aimed at several lawyers who had agreed to represent the accused in the so-called "Patriot Case" or "White-Legion Case"**, in violation of international principles governing the legal profession. In this instance, the authorities were able to invoke the legal framework put in place following the waves of repression of 2010-2011, which at the time had enabled them to put the bars under supervision in violation of international principles on the role of lawyers.

In September 2017, eight of the 16 lawyers representing defendants in the "White Legion" case²⁵, most of whose names are not mentioned on security grounds, were summoned to take an "exceptional qualification" examination organised by the Ministry of Justice, despite the fact that several months earlier some of them had already obtained an ordinary qualification before the Certification Commission of their regional bar.

Following this exceptional qualification procedure, among the eight lawyers concerned, Ms. Anna Bakhtina was struck off and subsequently lost her licence (see below), while seven others were declared as allegedly "partially complying with legal requirements".

As a result, these lawyers were obliged to take a new "exceptional qualification" examination at the end of March 2018, during which they were required to prove that they were duly implementing the Commission's recommendation "on improving their professional qualification".

Although the lawyers concerned all passed their qualification examinations, this demonstrates that under the laws in force, the executive is in a position to exert constant pressure by making wholly arbitrary requests to lawyers to prove their qualifications at any time.

"The checks undertaken by the Ministry of Justice in July 2017, which resulted in us being summoned to take an exceptional qualification examination were carried out selectively: the inspectors had lists of lawyers to verify and eight of the 16 lawyers representing the accused in the "White Legion" case were on the list", commented one of the lawyers interviewed by the mission delegation.

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23. Interview conducted by the mission delegation with Pavel Sapelka, former lawyer, whose licence was withdrawn in 2011, 19 January 2018.

24. Interview conducted by the mission delegation with Pav Aleh Aheyev, former lawyer whose licence was withdrawn in 2011, 19 January 2018.

25. For more information, see Chapter II-B above.

On 12 September 2017, Ms. **Anna Bakhtina**, who was representing Miroslav Lozovskii, arrested in March 2017 at the opening of the "Patriot case", had her licence suspended by the Qualification Commission following an exceptional qualification examination on the pretext of "insufficient qualification" (competence) to practise law. Ms. Anna Bakhtina has more than 38 years of professional legal experience, as a prosecutor for 13 years and since then as a lawyer. Moreover, Ms. Anna Bakhtina has represented several defendants in politically motivated trials. In 2011, she defended Ms. Iryna Halip, journalist and wife of Andrei Sannikov, presidential candidate in 2010 and former political prisoner. In 2016, she represented the blogger Eduard Palchis²⁶.

"In the course of the checks carried out by the Ministry of Justice, it noted technical irregularities in the way documents had been filled out, such as contracts with clients and document registers. On this basis I was summoned to take an exceptional qualification examination on 12 September 2017 during which I was asked all sorts of questions including on new legislative acts which had just come into force. I don't think that a lawyer needs to be able to recite laws by heart in order to practise his or her profession, especially if they are not relevant to his or her area of specialisation. He or she needs to know how to apply the law to represent his or her clients. In the course of my legal career, I have never been subjected to disciplinary proceedings and no complaints have ever been made against me by my clients," Anna Bakhtina told the delegation²⁷.

"During the interview, I felt unwell and asked to postpone it to another date. However, my request wasn't taken into account and the interview lasted over 40 minutes during which time I had to take medicine to be able to continue to respond to their questions", she added

"No reasons were given for the decision, taken at the end of the interview, concluding that I am insufficiently qualified, which contravenes national law. I refused to sign because without knowing the reasons for suspension of my licence, I wouldn't have been able to challenge the Commission's decision before a tribunal," explained Anna Bakhtina

On 31 October 2017, the Moskovskiy Court, in the Minsk District, confirmed the Qualification Commission's decision to suspend Anna Bakhtina's licence. She has not appealed the first instance decision.

It should be noted that this was not the first time that Anna Bakhtina has been the target of harassment by the authorities through extraordinary qualification proceedings. On 26 July 2011, a Qualification Commission of the regional bar had already concluded that Anna Bakhtina did not possess sufficient professional qualifications. At the time, the journalist Iryna Halip, who was represented by Anna Bakhtina, was under house arrest in relation to a criminal case against her for participation in mass protests on 19 December 2010, and formally charged with organising public disorder.

In July 2011, the lawyer **Daria Lipkina**, who defended Nikita Likhovid, an activist in a political opposition movement "For liberty", was also summoned to pass exceptional qualification procedure and as a result was declared having "insufficient qualification."

At the time, Anna Bakhtina and Daria Lipkina challenged the results of the qualification examination. As a result, on 4 August 2011, they both appeared before the Qualification Commission with members are selected by the Ministry of Justice (see below).

In parallel, on 30 July 2011, Anna Bakhtina and Daria Lipkina submitted their case to the United Nations Special Rapporteur on the independence of judges and lawyers. It is likely that international attention at the time eventually contributed to a decision of the Commission in favour of Anna Bakhtina and Daria Lipkina, since their licences were ultimately not revoked.

26. See in particular <http://spring96.org/ru/news/85128> (in Russian).

27. Interview conducted by the mission delegation with Anna Bakhtina, 19 January 2018.

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4 - Licences that can be suspended or revoked at any time by the Ministry of Justice through disciplinary procedures

In Belarus, in addition to the general regime based on a qualification "examination" allowing lawyers' fitness to practice to be controlled, **there is also a parallel disciplinary procedure led by the Ministry of Justice**, which grants the Ministry the power to collect any information which may prove a breach of a lawyer's professional obligations. According to the Deputy Minister, Mr. Igor Tushynskiy, this system is aimed at "guaranteeing the protection of lawyers and their rights" by the Ministry. In practice, it represents **an additional tool of executive control over certain lawyers considered troublesome by the authorities**.

In general, the Ministry of Justice is authorised to suspend the validity of a lawyer's licence **at any time** in the event of **serious violations of laws or regulations** governing the issuing of licences. There are two lists of serious violations: one under the Rules governing "authorisation to practise a certain type of occupation" (Article 110), the other under Rules governing "authorisation to practise as a lawyer" (Article 17)²⁸. The range of situations covered by these lists gives the authorities wide discretion to apply these rules on a selective and discretionary basis.

Moreover, under Article 38 of the Law on the Bar, the **Ministry is authorised to bring disciplinary proceedings against lawyers and suspend their licences for the duration of the proceedings**.

Article 22 of Law on the Bar states that such **disciplinary proceedings can be initiated by the Minister of Justice him- or herself**. Accordingly, the Minister of Justice may suspend a lawyer's licence following a disciplinary procedure which he or she initiated. Decisions in disciplinary cases are taken by a disciplinary commission composed of members of the bar elected by the General Assembly: the commission decides whether to terminate disciplinary proceedings or to impose a disciplinary sanction in the form of a warning, a reprimand or expulsion²⁹.

Furthermore, Article 24.2 of the Law on the Bar sets out extremely vague **criteria which may lead to the expulsion** of a lawyer from the bar, including inactivity for more than one year, committing two or more breaches of the "rules and conditions of legal practice, set down by law, within a twelve-month period" or "insufficient qualifications"³⁰. The assessment of all these concepts is left to the discretion of the authorities. Indeed, it should be noted that assessment of the specific notion of "lack of competence" falls within the jurisdiction of the **Qualification Commission, an organ under the authority of the Ministry of Justice** (see above).

In the event of expulsion of a lawyer from a regional bar for reasons specified Article 24.2, the Ministry of Justice of the Republic of Belarus can decide to revoke his or her licence.

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28. The serious violations listed in the Rules governing "authorisation to practise a certain type of occupation" (Article 110, <http://pravo.by/document/?guid=3871&p0=P31000450>, in Russian) are the following: acceptance of cash payment without paying commission to the office of the treasurer of the Bar Council by means of the standard receipt; refusal to provide legal assistance where the law so requires; holding or resuming elective office within independent organs of the bar where licence has been suspended; purchase or acquisition of the subject of the dispute between the client and the other party, in particular acquisition of rights to property; and a behaviour infringing the Lawyers' Code of Ethics. The serious violations listed in the Rules governing "authorisation to practise as a lawyer" (Article 17) are the following: transfer of a lawyer's licence to another person; measures aimed at preventing authorised agents from controlling lawyers' activities; repeated violation of laws governing the authorisation to practise as lawyers; concealment of income received by lawyers in the framework of their activity; violation of rules governing the calculation of fees for legal support services; refusal to provide legal assistance and violation of internal regulations in detention centres.

29. Article 25 of the same Law states that a disciplinary sanction may be the subject of an appeal, lodged within one month, before the Disciplinary Commission of the Bar of the Republic of Belarus, which acts as an appellate tribunal.

30. These criteria are: holding or resuming an elective office within independent organs of the bar by the lawyer despite the suspension of his/ her professional activity, incapacity to practise as a lawyer for more than one year, repeated violations of laws governing the profession, violation of the Lawyers' Code of Ethics, violation of regulations governing remuneration of lawyers, blocking procedures aimed at verifying legal compliance in issuing permits, lack of competence, revocation of the lawyer's Belarusian nationality, refusal to provide legal assistance as required by law, conviction for a crime of intent, repeated non-payment of fees to the Bar Council, purchase or acquisition of the subject of the dispute between the client and the other party.

Discretionary powers of inspection vested in the Ministry of Justice and violations of lawyer/client privilege made legal

Another significant control mechanism used against the bar and lawyers is the inspection power vested in the Ministry of Justice by the Law on the Bar and Presidential Decree No. 510 of 16 October 2009 "On improvements to inspection activities (monitoring) in the Republic of Belarus"³¹. Under this text, the Ministry can carry out inspections of the bars and lawyers' professional activities at any time.

In addition, the Law on the Bar of 2011 does not contain any provision guaranteeing the confidentiality of agreements between lawyer and client. Accordingly, the authorities can seize documents considered confidential under Principle 22 of the Havana Principles, and establish alleged violations of the regulations to justify, in an abusive manner, expulsions or revocations of licences.

Inspection of bars and lawyers by the Ministry of Justice

At the end of December 2010, as a result of inspections of lawyers who represented political figures detained during mass demonstrations on 19 December 2010 against the contested result of the election of President Alexander Lukashenko, the Ministry of Justice discovered violations of professional ethics rules in the actions of some of them. The inspections were carried out not only by the Ministry but also by the KGB which is not endowed with such authority. At the time, the Minsk City Bar refused to accept the Ministry of Justice's request to initiate disciplinary proceedings against the lawyers in question, considering that the alleged violations identified by the Ministry did not justify the prohibition on continued legal practice³². Moreover this refusal led to the dismissal of the President of the Bar Council and to the adoption of a new Law on the Bar at the end of 2011, which increases the Ministry of Justice's grip on the bar.

In April and July 2017, inspections were conducted by the Ministry of Justice in the Minsk City Bar and the Mogilev City Bar.

It is important to note that the violations identified during inspections by the Ministry of Justice in 2011, as in 2017, mainly concerned technical and formal breaches (which are not connected to legal practice nor to accounting, see below).

Following the inspections in 2017, the following "violations" were identified:

- Absence of lawyer's signature on the contract with the client: relating to contracts which had not been challenged by any party;
- Violations of the numbering scheme of contracts in the register: relating to contracts held internally by each lawyer;
- Indication of the expiry date of the lawyer's licence on the contract with the client. It should be noted that until 1 March 2016³³, licences were granted for a five-year period. Since then licences are issued which do not specify the period of validity³⁴. The date of validity and the date of expiry shown on the former licences should no longer be taken into account since all licences are now valid for an indefinite period. In the contracts mentioned above, lawyers used the former licence template which contained an expiry date and this was invoked by the authorities in an abusive manner in order to sanction them;

31. See <http://pravo.by/document/?guid=3871&p0=P30900510> (in Russian).

32. See FIDH Report, *Belarus: Restrictions on the Political and Civil Rights of Citizens Following the 2010 Presidential Election*, https://www.fidh.org/IMG/pdf/rapport_Belarus_En_web.pdf

33. See https://minsk.gov.by/ru/org/8643/.../ukaz_475_26112015.docx (in Russian).

34. Since 1 March 2016, in accordance with Presidential Decree of 26 November 2015 No. 475, a lawyer's licence is granted for an indefinite period. However, every five years, it is subject to a "qualification" procedure before a "Qualification Commission" under executive control, and at any time on request of the authorities. Accordingly, every five years lawyers are subjected to a so-called "ordinary qualification" procedure, while on request of the authorities lawyers can be summoned to an "exceptional qualification" procedure, regardless of the date of the most recent ordinary qualification procedure or its outcome.

- Absence of the date of provision of legal support services on the counterfoil of the lawyer's internal register;
- Unused or damaged pages of the lawyer's journal not correctly "crossed out" (under the regulations, they should be marked with a cross [X]³⁵);
- Use of paper with the law firm's letterhead to send letters to various recipients. Given that the Law on the Bar provides that the lawyer, rather than the legal consultancy, has the right to request information from various bodies (state, non-state or jurisdictional), the Minister considered that the use of the firm's letterhead constituted an infringement. However, the wording of the Law is unclear and does not expressly prohibit use by lawyers of materials with the name of their firm for the purposes of correspondence with third parties.

According to a lawyer interviewed by the mission delegation, *"During the inspection, we noticed that particular attention was paid to certain lawyers. In some law firms, inspectors came with a list of lawyers to be controlled"*.

Lawyers have no possibility to contest the conclusions of the Ministry's inspection – only the bar concerned can challenge the conclusions. The Minsk City Bar did not challenge these conclusions.

An investigation specifically targeting the lawyer Tatiana Aheyeva, in violation of lawyer/client privilege

In April 2011, following a complaint lodged by **Tatiana Aheyeva** against the actions of the Ministry of Justice terminating the validity of her lawyer's licence, a criminal investigation was opened against her at the initiative of the KGB under Article 380, Part 2 of the Criminal Code ("falsification of documents"). Later, the same charges were brought against her son, Aleh Aheyev, who was representing the then presidential candidate Ales Mikhalevich. The investigation concerned alleged violations of the procedure for concluding contracts for the provision of legal services. The opening of an investigation into a private agreement between a client and a lawyer is against the confidentiality principle recognised by the Havana Principles and was clearly an attempt by the authorities to obtain confidential information on the client of the lawyer concerned.

On 19 December 2011, the Minsk Central District Tribunal sentenced both of the accused to a fine. On 7 February 2012, the Minsk City Tribunal annulled the decision and sent the case to the Minsk Central District Tribunal for re-trial. On that occasion, the Tribunal acquitted Tatiana Aheyeva and sentenced Aleh Aheyev to a fine. The decision was confirmed on appeal and by the Supreme Court. Aleh Aheyev's case is currently being examined by the United Nations Human Rights Committee.

35. See Decision of the Ministry of Justice of the Republic of Belarus, 3 February 2012 No. 37, on approval of the Instruction governing the order of issue, registration and storage of mandates : "19. In entities practising law, the registers of mandates must be stored in conditions which preclude the possibility of unauthorised use or theft. Damaged, incorrectly completed or unused (revoked) mandates shall not be destroyed, rather they shall be crossed out and stored with the counterfoils of the registers".

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5 - A Qualification Commission at the centre of the regulation of lawyer's licences under executive control

As discussed above, since 1 March 2016, authorisation to practise as a lawyer depends on obtaining a licence which is subject to an "ordinary qualification" procedure every five years and an "exceptional qualification" procedure which may be initiated at any time.

Article 14 of the Law on the Bar defines the functions of the Qualification Commission as follows:

- Decision on the candidates' admission to the qualification examination;
- Conduct of the qualification examination;
- Assessment of other requests and/or documents related to licences, including their amendment, renewal, suspension, annulment or revocation;
- Evaluation of conformity of applicants for licence with legal requirements and conditions;
- Conduct of lawyers' qualification examinations or assignment of this function to the regional bar;
- Assessment of other issues related to practice of the legal profession.

Article 14.2 of the Law on the Bar provides that the Qualification Commission is composed of the following persons:

- The President of the National Bar of Belarus and seven representatives of each regional bar with a minimum of 5 years' experience in legal practice. The participation of the President of the National Bar in place of the President of the Commercial Court was established by amendments to the Law on the Bar of 11 July 2017 No. 42-3;
- A representative of the Supreme Court, a representative of the Office of the Chief Prosecutor and other representatives of state bodies;
- Five representatives of the Ministry of Justice, including the Deputy Minister of Justice;
- Two representatives of "scientific organisations".

It is important to note that information on the "scientific organisations" whose representatives are included in the Qualification Commission, is not accessible to the public.

According to information gathered during the mission, the two representatives of the scientific organisations concerned are not independent, in that these researchers are employees of public scientific bodies.

Thus, of the 17 current members of the Commission, lawyers are in a minority, occupying only eight positions. It should be noted that the minimum number of members of the Commission is fixed at nine (Article 3 of the "Regulation on the Qualification Commission on issues relating to the legal profession in the Republic of Belarus", 30 November 2010 No. 105), however no maximum is specified. Given that Article 14.2 of the Law on the Bar makes it possible to add "other representatives of state bodies", the representation of lawyers within the Commission can at any time be further diminished.

The current composition of the Commission is not publicly accessible. Indeed, no list of names is published.

In any event, since the composition of the Commission and the organisation of its activities are entirely under the control of the Ministry, in accordance with Article 38 of the Law on the Bar, lawyer-representatives do not play an independent role. All the more as Article 14.3 states that the Qualification Commission is chaired by the Deputy Minister of Justice.

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In response to a question on the degree of independence of the Qualification Commission, a lawyer met by the delegation during a meeting at the headquarters of the Minsk Regional Bar Council said that the Commission was independent "in certain cases". This would seem to confirm that the Commission lacks impartiality.

"The lawyers in the Commission are not on our side", added one of the lawyers interviewed by the mission delegation.

Given the Ministry's supervision of the bars and the resulting climate of self-censorship within the legal profession (see above), it is to be regretted that during the exceptional qualification procedure in September 2017 the representatives of the bars sitting on the Commission did not object to the differential treatment of the eight lawyers involved in politically sensitive cases, nor to the decisions taken against them, in particular to revoke the licence of Anna Bakhtina (see above) and to declare the seven other lawyers as partially in conformity with the law. It should be noted that in the case of Anna Bakhtina, the lawyer-representatives on the Commission requested to assess her as partially in conformity with the law, as other seven lawyers.

With regard to its composition, the Qualification Commission, which has responsibility for grading examinations on the basis of which licences are issued and revoked, represents one of the most powerful tools of the Ministry.

The Qualification Commission can entrust the qualification procedure to the regional bar concerned. This is referred to as the "**Certification Commission**". In such case, the regional bar forms a Certification Commission composed of at least five experienced lawyers (having practised for at least five years), who are not the subject of a certification procedure while they act as members of the Certification Commission. However, the conditions for such delegation are not clearly defined³⁶.

All the lawyers summoned for the exceptional qualification procedure in September 2017 (see above) took their examinations before the Qualification Commission constituted by the Ministry. Some of them were summoned before this Commission for the first time, having previously been examined by the bar Certification Commission. Those who were in a position to compare experiences of the two procedures attested to the difference in treatment:

*"In front of the bar Certification Commission, lawyers feel at ease during the procedure. The interview focuses on lawyers' performance and not on requiring them to recite legislative acts by heart, most of which have nothing to do with the lawyer's area of specialisation"*³⁷.

In practice, the file which has to be completed for each candidate in a qualification examination includes a complete assessment of the lawyer's moral and professional competence and information indicating whether he or she respects the laws in force³⁸. During the mission delegation's interview with the Deputy Minister of Justice, he stated that lawyers must be "*highly cultivated on domestic issues*" without giving any details of the way in which the Commission is supposed to assess this.

The file has to be completed by the head of the firm in which the lawyer concerned works³⁹.

The Qualification Commission examines the documents submitted and in particular the file on the competence of the lawyer requesting authorisation, in preparation for an interview with the lawyer⁴⁰.

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36. Interview conducted by the mission delegation with one of the lawyers summoned to the exceptional qualification examination in September 2017, 19 January 2018. See Article 13 of the Regulation of 2 February 2012, as amended by the Regulation of 16 May 2017.

37. Interview conducted by the mission delegation on 19 January 2018 with one of the lawyers summoned to an exceptional qualification procedure in September 2017.

38. See Article 11 of the Regulation "On the qualification procedures for lawyers", as amended on 16 May 2017.

39. Furthermore, the file on the President of the National Bar Council is prepared by his or her deputy and approved by the Council, while the file on the President of the Territorial Bar Council is prepared by the President of the National Bar and approved by the competent Council. The files on the Deputy Presidents of the Bar Council, heads of law firms and associates are prepared by the President of the relevant bar and approved by the Bar Council. See Article 12 of the Regulation "On the qualification procedures for lawyers", as amended on 16 May 2017.

40. See Article 14 of the Regulation "On the qualification procedures for lawyers", as amended on 16 May 2017.

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Until 2017, *"the interview with the Commission took place within the bar concerned and did not include questions. Instead there was a discussion on legal practice methods [and the results obtained in certain cases],"* explained one of the lawyers interviewed by the mission delegation.

Candidates must be notified that a qualification procedure – whether ordinary or exceptional – has been initiated against them within 40 working days⁴¹.

Under Article 31 of the "Regulation on the Qualification Commission on issues relating to the legal profession in the Republic of Belarus" (30 November 2010, No. 105), the decision of the Qualification Commission is subject to legal challenge by the licence holder within one month of the Commission's decision.

An exceptional qualification procedure can be ordered at any time to make the licence of certain lawyers conditional

As indicated above, while a lawyer's qualification has to be monitored every five years, Article 38 of the Law on the Bar and Article 15 of the Regulation of the Ministry of Justice "On the qualification procedures for lawyers" stipulate that an **exceptional qualification** procedure can be initiated **at any time on request of the Ministry of Justice**, where it is considered that the lawyer's level of qualification in legal matters is "insufficient", that he/she does not satisfactorily carry out his or her professional obligations or he/she has been the subject of at least two complaints in the course of the same calendar year.

It is important to emphasise the vague nature of the concepts and situations which can lead to an exceptional qualification procedure being initiated.

It should also be highlighted that targeted recourse to this exceptional qualification regime is used with the clear aim of excluding certain lawyers from the profession due to the sensitive nature of the cases they take on, as illustrated below.

Evaluation of knowledge to varying standards

In accordance with procedures for issuing and renewing licences adopted by the Ministry of Justice (Article 34 of the Regulation of 2 February 2012, as amended by the Regulation of 16 May 2017⁴²), the qualification process consists of assessing lawyers' level of legal knowledge, conformity with legislation governing lawyers' activities, lawyers' professional and personal characteristics and determining their capacity to continue legal practice in the event of a proven lack of qualification.

In reality, the content, difficulty and duration of these interviews are very variable and lawyers involved in cases of a political nature or those considered sensitive by the authorities seem to be penalised with more difficult, lengthy examinations with the clear aim of excluding them from the profession.

"According to legislation in force, during the interview lawyers can be asked an unlimited number of questions. There is no pre-established list of questions", one of the lawyers interviewed told the mission delegation⁴³.

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41. See Article 5 of the Regulation of 2 February 2012, as amended by the Regulation of the "On the qualification procedures for lawyers" of 16 May 2017.

42. See http://www.pravo.by/upload/docs/op/W21732047_1495486800.pdf (in Russian).

43. Interview conducted by the mission delegation with one of the lawyers summoned to an exceptional qualification procedure in September 2017, 19 January 2018.

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"During the exceptional qualification session held in September 2017, the Qualification Commission asked so many questions that answering them became difficult. You have to understand that the framework for the oral qualification interview is not fixed, which enables members of the Commission to ask questions about any area of law whatsoever. So lawyers had to reply to questions about the law governing banking activities when they were specialised in criminal law.", added another lawyer interviewed by the mission delegation⁴⁴.

Thus, there is no normative instrument providing the framework for conducting the qualification interview, which gives the Qualification Commission unlimited power.

As described above, at the end of the qualification procedure, the Commission has to decide if the lawyer fulfils all the conditions for compliance or whether, if he/she does not do so, the lawyer is no longer in a position to continue to practise the profession due to a lack of competence. The Commission can also decide that the lawyer only partially meets the requirements in terms of legal expertise and require him or her to implement recommendations, in particular by acquiring the necessary competence. In such cases, the lawyer's qualification is conditionally extended for six months.

Until 2011, lawyers had to take an ordinary qualification procedure every five years. The procedure was organised by the Certification Commissions of the regional bars and did not include an oral exam on the lawyer's legal knowledge. As described above, since 2011, the authorities have the power to organise extraordinary qualification procedures which, on decision of the Ministry of Justice, can be carried out by a commission depending on the Ministry (Qualification Commission), rather than the regional bars (Certification Commission). Since 2011, the Ministry has also granted authority to the Qualification Commission to ask oral questions to verify lawyers' legal competence (see above, in relation to Anna Bakhtina's and Daria Lipkina's first extraordinary qualification examination in 2011).

Infringing lawyers' freedom of expression and a climate of self-censorship

Since the wave of expulsions in 2011 aimed at lawyers who had reported violations of fundamental freedoms and the right to a fair trial to the media, the Ministry of Justice has placed the bars under supervision, creating a climate of self-censorship weighing on all the lawyers in the country.

Tamara Sidorenko's licence was revoked in 2011 on the basis of an alleged violation of the principles of professional ethics following several statements in the media. However, the Ministry of Justice did not give further details of the exact nature of this violation. At the time, Tamara Sidorenko had criticised the refusal of the security forces to allow her to visit her client, Vladimir Neklyayev, a candidate in the 2010 presidential elections, following his arrest in the protests of 19 December 2010. After filing several complaints with the prosecutor to denounce the refusal to allow her to visit her client for nine days, Tamara Sidorenko gave interviews to make public the violations committed by the security services.

In addition, the licences of **Aleh Ahgheyev, Tatiana Aheyeva** and **Pavel Sapelka** were revoked following critical interviews in various media and their alleged refusals to obey the orders of the KGB⁴⁵.

"I was expelled from the bar in particular for having tarnished the reputation of the Public Prosecutor's Office during my public statements", Pavel Sapelka told the mission delegation.

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44. Idem.

45. See above Section III-B-2 and FIDH Report, *Belarus: Restrictions on the Political and Civil Rights of Citizens Following the 2010 Presidential Election*, https://www.fidh.org/IMG/pdf/rapport_Belarus_En_web.pdf

.....
It is important to note that the Law on the Bar of 2011, unlike the previous version, does not contain a provision guaranteeing lawyers' freedom of expression.

In January 2012, a letter from the President of the National Bar, V. Chaychits, No. 01-25/488 "Regarding interviews by lawyers in the media", advised lawyers to obtain prior approval for interviews from the heads of their law firms or the presidents of the bar associations concerned or their deputies, who are also required to monitor the interviews given and to inform the National Bar⁴⁶.

* * *

A the normative level, **the legal profession in Belarus is continuously subjected to the supervision of the Ministry of Justice.**

Laws and regulations governing the organisation of the bars and the legal profession therefore infringe the main international standards guaranteeing lawyers' freedom to practise, in particular Havana Principles 16, 23, 24, 27 and 28.

At the practical level, the wide-range of situations falling under the various articles set out above, combined with the discretionary application of these provisions as reported by many lawyers interviewed by the mission delegation, demonstrate **a deliberate effort by the executive to target a certain category of lawyers due to the sensitive nature of the cases on which they work.**

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46. See <https://news.tut.by/society/271612.html> (in Russian).

CONCLUSION

Monitoring and repression carried out by the Government in Belarus affect all voices considered to be dissenting. Lawyers providing legal representation in cases viewed as "sensitive" by the authorities, in particular where they draw media attention, are no exception to this rule, as seen in the aftermath of the mass demonstrations such as those that took place in 2011 and more recently in April 2017, during which repression was severe.

Although lawyers are not the main target of this policy of repression, which is primarily aimed at demonstrators and members of the political opposition, in such a context they become collateral victims, prevented from exercising their profession independently.

Lawyers who take on cases deemed sensitive are subject to particularly severe pressure. Retaliatory measures can lead to their outright disqualification from the profession. Bar associations exist both at the local and national level in Belarus, giving the appearance of a structured profession with the capacity to guarantee the protection of its members. However, in 2011, when the Minsk City Bar attempted to oppose unjustified disciplinary proceedings requested by the Ministry of Justice, the President of the Minsk Bar was removed from office. Shortly afterwards, a new Law on the Bar was adopted, strengthening the grip of the Ministry of Justice over bar associations and enabling tighter control of the legal profession.

A legal framework in total conflict with the United Nations Basic Principles on the role of lawyers has been developed and implemented in Belarus. Bar associations were deprived of their core mandate: to regulate the profession and guarantee its independence. Access to the profession and its organisation now fall under the exclusive competence of civil servants in the Ministry of Justice.

The Ministry of Justice also controls the appointment of presidents of bar associations, since candidates for election, in all cities and regional bar associations, can only stand if they receive a favourable opinion from the Ministry of Justice.

But the centrepiece of the potential pressure on lawyers by the executive is without doubt the power to summon lawyers to a qualification procedure handled by the Qualification Commission controlled by the Ministry of Justice.

Within the Qualification Commission, lawyers are in the minority. In addition to the ordinary qualification examination which, since 2011, lawyers are required to take every five years, the Ministry has granted itself the power to summon lawyers at any time to take an extraordinary examination. Both types of qualification procedures include the possibility of submitting lawyers to oral examinations, which are difficult to challenge. Moreover, lawyers are only entitled to challenge the procedure and not the commission's decision itself. Legal provisions governing the qualification procedure remain vague, particularly with respect to the oral examination. Lawyers interviewed during the joint mission conducted by the Observatory and the Paris Bar emphasised that, during oral examinations, the commission does not take into account the lawyer's area of specialisation and can therefore question him or her on any legal issue, regardless of the lawyer's expertise. The law does not contain provisions on the number of questions that can be asked, nor the length of the interview.

If the commission considers that the lawyer does not possess up-to-date expertise, his or her licence can be withdrawn. Such a decision has immediate effect. It may be appealed to the Court of Appeal, followed by the Supreme Court, but in the various cases brought to the attention of the mission delegation, these procedures had not changed the outcome, since judges are no more independent than prosecutors.

As a consequence, the qualification procedure, in particular the exceptional qualification procedure, allows the authorities of Belarus to silence lawyers deemed troublesome "under the guise of legality and legitimacy". The official reason provided for a lawyer's disqualification is always a so-called professional infringement.

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The existence of such a qualification procedure, with its opaque methods, represents a sword of Damocles over the head of each and every lawyer in Belarus.

Lawyers can pay a very high price for their independence, human rights activism and professional conscience, where cases considered sensitive by the authorities are concerned.

Since employment opportunities are very limited in Belarus, losing the right to practise one's profession also constitutes a serious economic sanction.

This leads to **a particularly anxiety-provoking climate for lawyers and a situation of almost permanent self-censorship**. The absence of bar associations in a position to fulfil their protective role for lawyers increases the isolation of lawyers who consider taking on sensitive cases.

Weakening the role of lawyers does not only penalise an entire profession, but also undermines the rights of the defence and the right to a fair trial in Belarus.

It is vital and urgent to reconsider the role of lawyers and bar associations in Belarus and to create conditions ensuring that lawyers can practise freely and independently in order to be able to provide effective legal support to their clients.

It is particularly crucial to implement the United Nations Basic Principles on the Role of Lawyers, the international reference text governing the exercise of the legal profession, in domestic legislation.

RECOMMENDATIONS:

In light of the situation described in this report, the Observatory and the Paris Bar make the following recommendations aimed at strengthening the protection of human rights defenders, including human rights lawyers, in Belarus:

To the authorities of Belarus:

Concerning the protection of human rights defenders in Belarus:

- End all forms of judicial harassment against human rights defenders in Belarus, including human rights lawyers.
- End restrictions on freedoms of expression, association and peaceful assembly of human rights defenders in Belarus, including human rights lawyers.
- Allow relevant Special Procedures of the United Nations Human Rights Council access to the country, including the Special Rapporteurs on the Situation of Human Rights Defenders, on the Situation of Human Rights in Belarus and on the Independence of Judges and Lawyers.
- Comply with the provisions of the UN Declaration on Human Rights Defenders, adopted by the United Nations General Assembly on 9 December 1998, in particular Articles 1 and 12.2.

Concerning the protection lawyers and human rights lawyers in particular:

- Allow bar associations to operate without any interference from the authorities relating to the regulation of the profession, including access to the profession, application of disciplinary measures and the organisation of training.
- While it is permissible to have a qualification or certification procedure, it should only relate to the professional skills of lawyers and sanctions must only be applied by professional bodies without interference from public authorities. This is fundamental to ensure the independence of lawyers.
- Allow free elections of presidents of bar associations in Belarus by their peers without interference from or control by the Ministry of Justice, including by approving the list of candidates as currently required.
- Ensure that lawyers can exercise their professional duties free from any obstruction, intimidation or pressure.
- Guarantee the confidentiality in all circumstances of both verbal and written communications between lawyers and their clients.
- Ensure lawyers have access to relevant information, files and documents in sufficient time to allow them to provide effective legal support.
- Work in consultation with NGOs, both registered and unregistered, as well as other civil society actors, to identify areas in need of reform, and prepare and implement recommendations to improve the judicial system in accordance with international standards.

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To the United Nations:

To Special Procedures of the United Nations Human Rights Council, including the Special Rapporteurs on the Situation of Human Rights in Belarus, on the Situation of Human Rights Defenders, on the Independence of Judges and Lawyers, on the Rights to Freedom of Peaceful Assembly and of Association and on the Promotion and Protection of the Right to Freedom of Opinion and Expression:

- Ensure follow-up, in cooperation with other relevant Special Procedures, on individual cases of human rights defenders and lawyers who have suffered harassment on the basis of their human rights activities in Belarus.
- Send a request for invitation to the authorities of Belarus with a view to conducting an official visit in the country.

To the Office of the High Commissioner for Human Rights:

- During discussions with the Government of Belarus regarding technical assistance and the establishment of a post for the provision of technical assistance, focus *inter alia* on priority areas for the reform of the judicial system in accordance with international standards and set benchmarks and a realistic timetable to bring internal practices in line with international standards.

To Member States of the United Nations:

- Work with the Government of Belarus to improve sharing of domestic experiences and train judicial actors including in specific training on international human rights law and implementation at the domestic level.

To the European Union and its Member States:

- Implement the European Union Guidelines on Human Rights Defenders, including by taking all protective, preventive and response measures necessary, in particular:
 - by meeting human rights defenders on a regular basis and providing visibility to the activities of independent civil society;
 - by meeting, as and when possible, human rights defenders who have been harassed and criminalised;
 - by attending all public hearings in proceedings against human rights defenders, including human rights lawyers.
- Continue monitoring the situation of human rights defenders in Belarus, including human rights lawyers, and systematically and publicly condemn any act of harassment carried out against them.
- Plan enhanced financial and technical support for the benefit of such actors and in particular strengthen the capacity of bars and lawyers' associations, in coordination with the Council of Bars and Law Societies of Europe (CCBE).
- Reaffirm the European Union's expectations at the highest level, two years after the conclusions of the EU Foreign Affairs Council of February 2016 which identified "tangible steps taken by Belarus to respect universal fundamental freedoms, rule of law and human rights" as "key for the shaping of the EU's future policy towards Belarus".
- Make clear in future Council conclusions and the political dialogue held within the EU-Belarus Coordination Group that relations cannot be normalised (including by lifting the outstanding sanctions and finalising the Partnership Priorities) as long as the following measures have not been achieved:
 - the adoption of a moratorium on the death penalty;
 - the release of political prisoners;
 - the reform of laws and practices restricting the activities of NGOs, human rights defenders and lawyers;
 - the reform of the judicial system, in particular putting an end to unfair trials;
 - the reform of the electoral framework as recommended by the OSCE.

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- In accordance with the request of the European Parliament (Resolution of 19 April 2018 on Belarus), work with the authorities of Belarus on setting up a roadmap in the form of benchmarks and a timeline for the implementation of such commitments to precisely define progress expected within the framework of the Partnership Priorities which are currently being negotiated. This roadmap should be defined in consultation with civil society and international mechanisms (including the United Nations Special Rapporteur on Belarus). The European Union should also ask the authorities of Belarus to publish details of progress achieved and the future stages of implementation of the Inter-Agency Plan on Human Rights (2016-2019) to identify the opportunities for coordination with the roadmap.
 - Concerning the reform of the justice system in particular, within the framework of the definition of the "governance" component of the Partnership Priorities, recommend that the authorities of Belarus set-up a consultation process open to all relevant actors: judicial authorities at all levels, experts (including the UN Special Rapporteur on the Independence of Judges and Lawyers), bars, lawyers' associations, NGOs from Belarus and the EU. This consultation process should serve as a basis for identifying the reforms necessary to ensure the conformity of the judicial sector and regulations governing the legal profession. This is a prerequisite to any judicial cooperation between the EU and Belarus and to the provision of any technical or financial support to the State of Belarus in this field.

To the Organisation for Security and Cooperation in Europe (OSCE) and in particular:

To the OSCE Office for Democratic Institutions and Human Rights (ODIHR)

- Continue monitoring the situation of human rights defenders in Belarus, including human rights lawyers, and systematically and publicly condemn any act of harassment carried out against them.
- Monitor proceedings against human rights defenders and lawyers subject to judicial, administrative and/ or disciplinary harassment in Belarus.
- Undertake a visit to Belarus to assess the situation of human rights defenders, including human rights lawyers.

To the Permanent Council of the OSCE

- Regularly denounce violations of the rights of human rights defenders in Belarus, including human rights lawyers, and ensure regular follow-up on measures taken.

To the Ministerial Council of the OSCE

- Adopt a decision on the situation of human rights defenders in the OSCE area, with particular attention to Belarus, during the forthcoming Ministerial Council.

To Member States of the OSCE

- Implement the OSCE Office for Democratic Institutions and Human Rights (ODIHR) Guidelines on human rights defenders, including by taking all protective, preventive and response measures necessary, in particular:
 - by meeting human rights defenders on a regular basis and providing visibility to the activities of independent civil society;
 - by meeting, as and when possible, human rights defenders who have been harassed and criminalised;
 - by attending all public hearings in proceedings against human rights defenders, including human rights lawyers.

Establishing the facts

Investigative and trial observation missions

Through activities ranging from sending trial observers to organising international investigative missions, FIDH has developed rigorous and impartial procedures to establish facts and responsibility. Experts sent to the field give their time to FIDH on a voluntary basis. FIDH has conducted more than 1,500 missions in over 100 countries in the past 25 years. These activities reinforce FIDH's alert and advocacy campaigns.

Supporting civil society

Training and exchanges

FIDH organises numerous activities in partnership with its member organisations, in the countries in which they are based. The core aim is to strengthen the influence and capacity of human rights activists to boost changes at the local level.

Mobilising the international community

Permanent lobbying before intergovernmental bodies

FIDH supports its member organisations and local partners in their efforts before intergovernmental organisations. FIDH alerts international bodies to violations of human rights and refers individual cases to them. FIDH also takes part in the development of international legal instruments.

Informing and reporting

Mobilising public opinion

FIDH informs and mobilises public opinion. Press releases, press conferences, open letters to authorities, mission reports, urgent appeals, petitions, campaigns, website... FIDH makes full use of all means of communication to raise awareness of human rights violations.

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Created in 1985, the World Organisation Against Torture (OMCT) is the main international coalition of non-governmental organisations (NGOs) fighting against torture, summary executions, enforced disappearances, arbitrary detentions and all other cruel, inhuman and degrading treatment or punishment.

The strength of OMCT lies in its SOS-Torture Network composed of 311 NGOs from around the world.

Assisting and supporting victims

OMCT supports victims of torture to obtain justice and reparation, including rehabilitation. This support takes the form of legal, medical and social emergency assistance, submitting complaints to regional and international human rights mechanisms and urgent interventions.

OMCT pays particular attention to certain categories of victims, such as women and children.

Preventing torture and fighting against impunity

Together with its local partners, OMCT advocates for the effective implementation, on the ground, of international standards against torture.

OMCT is also working for the optimal use of international human rights mechanisms, in particular the United Nations Committee Against Torture, so that it can become more effective.

Protecting human rights defenders

Often those who defend human rights and fight against torture are threatened. That is why OMCT places their protection at the heart of its mission, through alerts, activities of prevention, advocacy and awareness-raising as well as direct support.

Accompanying and strengthening organisations in the field

OMCT provides its members with the tools and services that enable them to carry out their work and strengthen their capacity and effectiveness in the fight against torture.

OMCT presence in Tunisia and Libya is part of its commitment to supporting civil society in the process of transition to the rule of law and respect for the absolute prohibition of torture.

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The Paris Bar brings together more than 29,000 members that constitutes almost half of lawyers in France. It is chaired by the President and Vice-President who head a Council composed of 42 elected lawyers. Their task is ensuring professionalism in the legal profession and in the administration of justice, respect of human rights, public freedom and access to justice for all.
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Paris Bar Association
accueil_palais@avocatparis.org
<http://www.avocatparis.org/>



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Human Rights Center "Viasna" is a nongovernmental human rights organisation created in April 1996 during mass protest actions of the democratic opposition in Belarus. HRC "Viasna" provided legal aid to arrested demonstration participants and their families.
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It is a nation-wide association with its head office in Minsk and regional offices in biggest Belarus cities. For its participation in observing the 2001 presidential elections, HRC "Viasna" was groundlessly stripped of its state registration by a decision of the Supreme Court of the Republic of Belarus in 2003.

The primary objective of HRC "Viasna" is to contribute to the development of a civil society based on respect for the human rights set forth in the Universal Declaration of Human Rights and the Constitution of the Republic of Belarus.

Objectives of Human Rights Center "Viasna":

- Practical assistance to civic initiatives in the sphere of legal aid;
- Analysis of the situation of the Belarusian civil society and conditions of legal aid provision;
- Awareness raising on human rights, in particular enhancing the public's knowledge of the law applicable to human rights and freedoms;
- Democratic and legal education of citizens;
- Support to civic initiatives in the sphere of human rights;
- Lead of the campaign "Human Rights Defenders against the Death Penalty in Belarus" launched in 2009 jointly with the Belarusian Helsinki Committee, with the aim of gaining public support for the abolition of the death penalty in Belarus.

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Human Rights Centre "Viasna"
viasna@spring96.org
www.spring96.org



Activities of the observatory

The Observatory is an action programme based on the belief that strengthened co-operation and solidarity among human rights defenders and their organisations will contribute to break the isolation they are faced with. It is also based on the absolute necessity to establish a systematic response from NGOs and the international community to the repression of which defenders are victims.

With this aim, the Observatory seeks to establish:

- A mechanism of systematic alert of the international community on cases of harassment and repression of defenders of human rights and fundamental freedoms, particularly when they require urgent intervention;
- The observation of judicial proceedings, and whenever necessary, direct legal assistance;
- International missions of investigation and solidarity;
- A personalised assistance as concrete as possible, including material support, with the aim of ensuring the security of the defenders victims of serious violations;
- The preparation, publication and world-wide dissemination of reports on violations of the rights and freedoms of individuals or organisations working for human rights around the world;
- Sustained action with the United Nations and more particularly the Special Rapporteur on Human Rights Defenders, and when necessary with geographic and thematic Special Rapporteurs and Working Groups;
- Sustained lobbying with various regional and international intergovernmental institutions, especially the Organisation of American States (OAS), the African Union (AU), the European Union (EU), the Organisation for Security and Co-operation in Europe (OSCE), the Council of Europe, the International Organisation of the Francophonie (OIF), the Commonwealth, the League of Arab States, the Association of Southeast Asian Nations (ASEAN) and the International Labour Organisation (ILO).

The Observatory's activities are based on consultation and co-operation with national, regional, and international non-governmental organisations.

With efficiency as its primary objective, the Observatory has adopted flexible criteria to examine the admissibility of cases that are communicated to it, based on the "operational definition" of human rights defenders adopted by FIDH and OMCT: "Each person victim or at risk of being the victim of reprisals, harassment or violations, due to his or her commitment, exercised individually or in association with others, in conformity with international instruments of protection of human rights, to the promotion and realisation of the rights recognised by the Universal Declaration of Human Rights and guaranteed by the different international instruments".

To ensure its activities of alert and mobilisation, the Observatory has established a system of communication devoted to defenders in danger. This system, called Emergency Line, can be reached through:

E-mail: Appeals@fidh-omct.org

FIDH Tel: + 33 1 43 55 25 18 Fax: + 33 1 43 55 18 80

OMCT Tel: + 41 22 809 49 39 Fax: + 41 22 809 49 29