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RIGHT TO A FAIR TRIAL AND DUE PROCESS IN THE REPUBLIC OF BELARUS AFTER THE 2020 PRESIDENTIAL ELECTIONS

Vilnius, 2023

Published by the Law and Democracy Center (Justice Hub)
Vilnius, 15 March 2023
Lithuanian

This report was funded by a grant from the United States Department of State. The opinions, findings and conclusions stated herein are those of the authors and do not necessarily reflect those of the United States Department of State.

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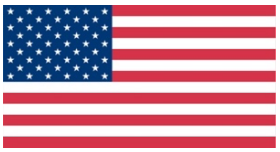

[Report is subject to editorial changes]

TABLE OF CONTENTS

METHODOLOGY

The purpose of this report is to assess the observance of the right to a fair trial by analyzing the decisions of the Republic of Belarus' courts collected database, identifying judges who have been making politically motivated decisions in the period after the 2020 elections, and establishing signs of a crime against humanity in these judges' actions.

In this regard, the following tasks were set:

- to correlate the factual circumstances of the case with the arguments of the judges;
- to analyze the grounds for the decisions in accordance with the requirements of the right to a fair trial;
- to analyze individual components of the right to a fair trial compliance according to the decisions base collected;
- to demonstrate the possibility of using the judiciary system as a mechanism for political repressions;
- to establish the crime against humanity elements presence.

The empirical basis for the research within the framework of this report consists of politically motivated decisions set collected by the Law and Democracy Center in constitutional, administrative and criminal cases throughout the Republic of Belarus' territory. The study used data provided by political prisoners themselves, taken from transcripts of court sessions audio recordings, from the Etalon information retrieval system, the official website of the Constitutional Court of the Republic of Belarus, and also received from the Viasna Human Rights Center. The UN and OSCE Special Rapporteurs' reports which had established egregious facts of violation of the right to a fair trial were also studied. In addition, Belarusian laws, media and state websites information was taken into account, too.

The International Covenant on Civil and Political Rights (ICCPR) was used as the established human rights standard that the Republic of Belarus had committed to comply with, and, to support this report conclusions, we used the “reasonable grounds to believe” standard and the European Court of Human Rights' practice.

1. CONSTITUTIONAL COURT OF THE REPUBLIC OF BELARUS

1.1. Lack of independence of judges through the prism of their appointment and decision-making as an element of political pressure

An independent judiciary is essential to the rule of law and due process[1]. Therefore, a judge must support and demonstrate judicial independence in every way possible, both personally and institutionally[2]. Proper selection and appointment procedures are an integral part[3] and prerequisite for the independence of the judiciary[4]. The European Court of Human Rights (hereinafter referred to as the ECtHR) has stated that in assessing the independence of the judiciary, "... attention should be paid, *inter alia,* to *the manner of appointment of its members* and the length of their term of office, the existence of guarantees against external pressure and the existence of external attributes of independence"[5]. Also the UN Human Rights Committee, commenting on Article 14 of the ICCPR, emphasized that the requirement of judicial independence, which is an integral part of the right to a fair trial, implies not only actual freedom from political interference, but in particular "the procedure for the appointment of judges and the necessary characteristics" [6].

Since the purpose of this report is to assess the right to the fair trial and due process after the 2020 elections, the order of appointment of judges in the Republic of Belarus (hereinafter referred to as the RB) is considered at the time of adjudication after these elections, which is current and legislated as of the date of this report.

According to the amended version of the Constitution, the chairman, deputy chairman and judges of the Constitutional Court are elected and dismissed by the All-Belarusian People's Assembly (hereinafter referred to as the ABPA) (Article 116[7]). However, according to the assessment of the Venice Commission, the goal of the ABPA is to permanently

[1] International Commission of Jurists, Delhi Declaration, 10 January 1959.
[2] Commentaries on the Bangalore Principles of Judicial Conduct. .URL:http://rsu.gov.ua/uploads/ article/commentari-bangalorski-9818bfbb11.pdf
[3] The UN Basic Principles on the Independence of the Judiciary were adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan from August 26 to September 6, 1985, and approved by the UN General Assembly resolution 40/32 of November 29, 1985.
[4] Inter-American Commission on Human Rights, Guarantees of the Independence of the Officials of the Judiciary, OEA/Ser.L/V/II. Doc. 44, December 5, 2013, p. 25.
[5] ECtHR Volkov v. Ukraine, of Januarz 09, 2013, §103; Findlay v. the United Kingdom, of February, 25 1997, §73, Reports of Judgments and Decisions 1997-I, Brudnicka and Others v. Poland), Application No. 54723/00, §38, ECHR 2005-II; ECtHR, Campbell and Fell v. the UK, (complaints No. 7819/77; 7878/77), Judgment, 28 June 1984, §78.
[6] Human Rights Committee, General Comment No. 32, Article 14: The right to equality before courts and tribunals and to the fair trial, UN Doc. No. CCPR/C/GC/32 (2007), §19.
[7] Constitution of the Republic of Belarus. URL: https://president.gov.by/ru/gosudarstvo/constitution.

preserve the rule of the President of the Republic of Belarus and «of its entourage forever, which makes it incompatible with the democratic values enshrined in the Council of Europe»[8], and also does not significantly change the existing order. Prior to the formation of the ABPA, its powers are exercised in the manner that was in effect before the entry into force of amendments to the Constitution (Art. 145 of the Constitution of the RB[9]), which is set out below.

The current procedure has predominantly one-man character with a political component, since judges are appointed under the direct control of the President of the Republic of Belarus, and there is no proper institutional hierarchy of the appointed body. In fact, the appointment of judges involves the President of the RB and the legislative body, part of which is also appointed by the President.

Order of appointment: At the time of adoption of the decisions considered in this report, the Constitutional Court of the Republic of Belarus (hereinafter referred to as the CC of the RB) is composed of 12 judges, of which:

- six judges are appointed by the President of the Republic of Belarus;

- six judges are elected by the Council of the Republic of the National Assembly of the Republic of Belarus, eight members of which are appointed by the President of Belarus (Art. 19, 20 of the Code of the Republic of Belarus on the Judiciary and the Status of Judges[10], Article 3 of the Law "On the National Assembly of the Republic of Belarus"[11]).

Thus, half of the members of the Constitutional Court of the Republic of Belarus (the CC of the RB) are appointed by the President of Belarus, which initially raises doubts about the independence and lack of political bias of the judges appointed by this entity, and, in particular, contrary to the European Charter on the Status of Judges, according to paragraph 1.3 of which every decision "affecting the selection, recruitment, appointment, tenure and termination of office of judges" must be taken by the body "independent of the executive and legislative powers" and at least half of whose members must "consist of judges"[12].

Term of office: Judges of the CC of the RB are appointed for 11 years and may be appointed for the new term (Article 116 of the Constitution of the RB[13], Article 74 of the

[8] Belarus Final Opinion on the Constitutional Reform, adopted by the Venice Commission at its 132nd Plenary Session (Venice, 21-22 October 2022) (p. 61) URL: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2022)035-e
[9] Constitution of the Republic of Belarus. URL: https://president.gov.by/ru/gosudarstvo/constitution.
[10] Code of the Republic of Belarus on the Judiciary and the Status of Judges. URL: https://kodeksy-by.com/kodeks_rb_o_sudoustrojstve.htm
[11] The Law "On the National Assembly of the Republic of Belarus" https://pravo.by/document/?guid=3871&p0=H10800370
[12] European Charter on the Status of Judges, DAJ/DOC (98) 23, Principle 1.3. https://docs.cntd.ru/document/901927869
[13] Constitution of the Republic of Belarus. URL: https://president.gov.by/ru/gosudarstvo/constitution.

Code of the Republic of Belarus on the Judiciary and the Status of Judges)[14]. However, the average tenure of the judge of the Constitutional Court is 15 years, of which two judges have been working as the judges of the Constitutional Court **for 26 years.** Such a situation is unacceptable for positions of this level in a modern democratic society and is a gross violation of all international standards.

Such a long tenure may indicate that the judge may be biased and politically biased in making judicial decisions. Especially taking into account the previous experience of some judges of the Constitutional Court under the direct control of the President of the Republic of Belarus. Whereas "the judiciary must be formed on the professional basis and separated from political power."[15] The selection of those who will be vested with judicial powers is **not just a technical issue**, but an issue of fundamental importance in terms of ensuring the quality and independence of the judiciary, protecting the rule of law and human rights, and ensuring effective access to justice[16].

Thus, the majority of judges prior to assuming the office of the judge of the Constitutional Court of the RB can be said to have undergone an approbation ("probationary period") for loyalty to the President of the RB, as they were already in one way or another subjected to his decisions. For example, the Chairman of the Constitutional Court of the Republic of Belarus, prior to assuming the position of the judge of the Constitutional Court of the Republic of Belarus, for the last four years served as Prosecutor General of the Republic of Belarus[17], who **is appointed by the President**[18] and **is accountable** to him in his activities (Article 127 of the Constitution of the RB)[19].

In addition, some of the judges exercised the powers of the member of the Council of the Republic of the National Assembly of the Republic of Belarus[20], served as head of the Main State Legal Department of the Presidential Administration of the Republic of Belarus[21], were members of the Council on Legal and Judicial Activities under the President of the

[14] Code of the Republic of Belarus on the Judiciary and the Status of Judges. URL: https://kodeksy-by.com/kodeks_rb_o_sudoustrojstve/74.htm
[15] Expert opinion of Dr. Dainius Žalimas, Professor of Mykolas Romeris University (Vilnius), Chairman of the Constitutional Court of the Republic of Lithuania of October 04, 2020. URL: https://ru.ehu.lt/novosti/zalimas-belarus/
[16] Appointment of judges: selection procedure for the judicial position in the Russian Federation. ICJ Mission Report. 2014. P. 6. https://www.refworld.org.ru/pdfid/54d08f754.pdf
[17] The head of the Constitutional Court of the Republic of Belarus Myklashevich Petro Petrovych. URL: http://www.kc.gov.by/document-3983
[18] Law of the RB "On Prosecutor's Office". URL: https://kodeksy-by.com/zakon_rb_o_prokurature/18.htm
[19] Constitution of the RB. URL: https://president.gov.by/ru/gosudarstvo/constitution
[20] Judge of the Constitutional Court of the Republic of Belarus Bodak Alla Nikolaevna. URL: http://www.kc.gov.by/document-5353
[21] Judge of the Constitutional Court of the Republic of Belarus Sergeeva Olga Gennadievna URL: http://www.kc.gov.by/document-5373

Republic of Belarus[22], even worked in the internal affairs bodies of the Russian Federation and the Republic of Belarus[23].

Thus, based on this, we see not the presence of transparent criteria for the selection for the position of judge, but the need for experience in those positions where one can trace demonstrated loyalty to the regime and its instructions in the structures also closely associated with the President of the RB. That is, prior to appointment to the judicial position, potential candidates, as a rule, have already passed the "probationary period" under the direction of the President of the RB, and their subsequent activities in the judicial position will be in every way brought under the "framework" of approval by the President of the RB, who has also promoted them up the career ladder by direct or indirect appointment to the position.

Decision-making procedure: the decision of the Constitutional Court is considered to be taken, provided the **majority** of the full composition of judges vote for it, unless otherwise stipulated by this Law (Art. 35 of the Law "On the Constitutional Court of the Republic of Belarus").

If the judges are equally divided in deciding on the constitutionality of the normative act, the decision is deemed to be **in favor** of the **constitutionality** of the challenged act.

Thus, **the President** of the Republic of Belarus, through six judges of the Constitutional Court appointed by him, can ensure that **<u>any</u> legislative act is recognized as constitutional.**

The right to initiate disciplinary proceedings: belongs to the President of the Republic of Belarus in respect of all judges (Article 95 of the Code of the Republic of Belarus on the Judiciary and the Status of Judges)[24]. Moreover, the President of the Republic of Belarus, if there are grounds and within the time limits for the application of disciplinary sanctions, may bring the judge to the disciplinary responsibility **without initiating** disciplinary proceedings (Article 102 of the Code on the Judiciary and the Status of Judges)[25].

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[22] Judge of the Constitutional Court of the Republic of Belarus Ryabtsev Viktor Nikolaevich URL: http://www.kc.gov.by/document-1113

[23] Judge of the Constitutional Court of the Republic of Belarus Danilyuk Stanislav Evgenievich URL: http://www.kc.gov.by/document-5323

[24] Code of the Republic of Belarus on the Judiciary and the Status of Judges. URL: https://kodeksy-by.com/kodeks_rb_o_sudoustrojstve.htm

[25] Code of the Republic of Belarus on the Judiciary and the Status of Judges. URL: https://kodeksy-by.com/kodeks_rb_o_sudoustrojstve.htm

This also indicates a lack of independence, transparency, predictability and accountability to the President of the Republic of Belarus in their activities, which nullifies the possibility of independence of the judge at all.

Termination of powers of judges of the Constitutional Court of the Republic of Belarus: by the President of the Republic of Belarus (Art. 108 of the Code of the Republic of Belarus on the Judiciary and the Status of Judges)[26]

Scope: Court rulings are binding **on all** state bodies, other organizations, officials and citizens (Article 115 of the Constitution of the Republic of Belarus[27]).

Thus, this analysis reveals the presence of significant political influence and control over the activities of judges on the part of the President of the Republic of Belarus. This thesis is also supported by the nature of the activities undertaken by the CC of the RB. Thus, the analysis of 505 decisions and other acts issued by the CC of the RB for the period from 2013 to 2022 did not reveal **a single decision** to recognize any law as inconsistent with the Constitution of the Republic of Belarus. At the same time, the activities of the CC of the RB are focused on practically one direction - the implementation of preliminary constitutional control (***Table 1***).

[26] Code of the Republic of Belarus on the Judiciary and the Status of Judges. URL: https://kodeksy-by.com/kodeks_rb_o_sudoustrojstve.htm
[27] Constitution of the Republic of Belarus. URL: https://president.gov.by/ru/gosudarstvo/constitution.

Table 1

Year	Total number of decisions	Preliminary constitutional review		Constitutional Review			Another kind of decisions (change of regulations, message, etc.)
		Recognized as complying with the Constitution of the Republic of Belarus	Recognized as inconsistent with the Constitution of the Republic of Belarus	Recognized as complying with the Constitution of the Republic of Belarus	Recognized as inconsistent with the Constitution of the Republic of Belarus	Recognizing the need to make changes	
2022	3	2	-	-	-	-	1 (message)
2021	45	42	-	-	-	-	3 (regulation change, message and other decision[28])
2020	46	44	-	-	-	-	2 (message, position)
2019	45	41	-	-	-	2	2 (message, revision of decision)
2018	46	40	-	-	-	5	1 (message)
2017	36	31	-	-	-	3	2 (message, change of regulations)
2016	56	53	-	-	-	2	1 (message)
2015	53	50	-	-	-	2	1 (message)
2014	60	55	-	-	-	3	2 (message, approval of regulations)
2013	115	111				3	1 (message)

[28] On (non-)compliance with generally recognized principles and norms of international law of documents adopted (issued) by the European Union, some foreign states and their bodies, providing for the introduction of restrictive measures against the Republic of Belarus. URL: http://www.kc.gov.by/document-73403

As for constitutional control, which is an important attribute of the modern democratic constitutional order, without which it is impossible to maintain constitutional legality, and therefore the rule of law in general, its implementation is virtually zero. Over the past 10 years, only 20 cases have been reviewed by constitutional review, and none of the legal acts analysed has been found unconstitutional. Each time, the Constitutional Court has only concluded that "gaps in the current legal regulation" or "legal uncertainty" must be eliminated.

In the absence of its own practice of internal constitutional review, the Constitutional Court nevertheless assessed the EU sanctions documents and made the legally unsubstantiated judgment that they did not comply with the UN Charter. It is not even the CC's function. This is stated in the decision of the CC on the case "On the compliance with generally recognized principles and norms of international law of the documents adopted (issued) by the European Union and some foreign states and their bodies, providing for the introduction of restrictive measures against the Republic of Belarus"[29]. The decision emphasizes that "the documents adopted by the EU and some foreign states in respect of certain individuals and legal entities of the Republic of Belarus create certain difficulties in the activities of economic entities in various sectors of the economy, hinder the realization of economic, social and civil rights and freedoms of citizens, stipulated by the Constitution of the Republic of Belarus and the fundamental international legal acts, which ultimately affects the national interests of the Republic of Belarus."

This decision traces the ostensible activity of the judicial corps, brought up in the spirit of obedience to the executive branch, in exercising constitutional control based on bias and control of power. The Constitutional Court of the RB, trying to take the necessary measures (in their opinion) to counteract the restrictive measures imposed by the EU against legal and natural persons of the Republic of Belarus, once again shows its controllability and use of the status to promote the interests of authoritarian regime and political elites.

There is also a tendency **to minimize the participation** of the Constitutional Court in the exercise of its functions in the state, which is reflected in the significant systematic decrease in the number of proceedings (2013 - 115 decisions, 2022 - 3 decisions).

Effective constitutional review plays a key role in ensuring the rule of law in a state. Such effective control can only be exercised by impartial bodies of constitutional justice,

[29] On (non-)compliance with generally recognized principles and norms of international law of documents adopted (issued) by the European Union, some foreign states and their bodies, providing for the introduction of restrictive measures against the Republic of Belarus. URL: http://www.kc.gov.by/document-73403

independent of external pressures. The DAC is expected to act as an arbiter in constitutional conflicts between the branches of government, which, unfortunately, is not the case. At the same time, the Constitutional Court of the Republic of Belarus has **a political context** and dependence on external pressure, which shows that it does not perform its direct functions. Thus, in the post-election period from August 2020 to May 2021, a number of **politically motivated** decisions have been taken by the CC of the RB, the contents of which are analysed below. These decisions were aimed **to legitimize the obviously undemocratic presidential election** of August 09, 2020, as well as **to legalize repressions** against the opposition and dissenting peaceful protesters. This may testify to the direct dependence of the judges of the Constitutional Court on the President of the RB and the issuance of knowingly unjust decisions by the Constitutional Court.

1.2. Analysis of decisions of the Constitutional Court of the Republic of Belarus issued after the 2020 presidential election

Let us take a closer look at the politically motivated decisions of the Constitutional Court of the RB adopted after the 2020 presidential election.

August 25, 2020 The CC of the Republic of Belarus adopted the "Constitutional and legal position to protect the constitutional order", in which the Constitutional Court recognized the presidential election of August 09, 2020 as legitimate, free and democratic, and the Coordinating Council, created by the opposition to organize the process of overcoming the political crisis - as unconstitutional.

That is, in fact, this Position was an attempt to legitimize the results of the **presidential election** dated August 09, 2020 and **officially announced** by the Central Election Commission, as well as a **legal basis for persecution and repressions against those citizens** who protest against the unfair election and demand new elections, as well as members of the Coordinating Council for organizing the process of overcoming the political crisis. According to Prof. D. Žalimas, the position adopted by the Constitutional Court of Belarus has no legal grounds; therefore, it should be regarded as a political position - a political act of support to A. Lukashenko, which confirms the total dependence of the Constitutional Court on Lukashenko in view of the following circumstances:

(1) the adoption of the Position by the Constitutional Court of Belarus had no constitutional or other legal basis: there is no such kind of act as Position according to law and they don’t have the right to adopt any decision just because of their will;

(2) the Constitutional Court of Belarus even formally according to law was unable to provide justification or confirmation of the validity of the official results of the presidential election on August 09;

(3) the decision of the Constitutional Court of Belarus on the unconstitutional nature of the Coordinating Council was made without any examination of the facts or provision of constitutional argumentation[30].

On December 01, 2020 the Decision of the Constitutional Court of the Republic of Belarus No. R-1226/2020 "On the Compliance of the Law of the Republic of Belarus "On Amendments to the Law of the Republic of Belarus "On Citizenship of the Republic of Belarus" **in violation of the universally recognized principle of international law to reduce statelessness,** provided by Article 8 of the 1961 Convention UNHCR[31].

This law provides for the possibility of **deprivation of citizenship of active participants of rallies against Lukashenko**, in connection with the presence of the court verdict, which came into force, confirming participation of this person in extremist activities or causing serious harm to the interests of the Republic of Belarus.

However, the existence of the conviction may not be such an unequivocal "measure" on the basis of which a person can be deprived of citizenship. As far as analysis of the decisions of courts of general jurisdiction has shown, such decisions are made with numerous violations of the right to the fair trial. In fact, if a person is identified and detained, in the vast majority of cases he will be prosecuted and, accordingly, a "flank" would be opened for the possible further deprivation of citizenship of all "undesirable for regime" persons. As the analysis has shown, not a single decision of the court of first instance has been overturned or significantly amended by the court of appeal, which may *indicate a formalistic approach* to the review and a failure to respect the guarantees of the right to a fair trial. The so-called judicial-executive pyramid.

Thus, there are grounds for concluding that the right to appeal a sentence is not adequately secured and, consequently, that it is impossible to provide adequate protection for the individual against arbitrary state interference. Consequently, a situation arises where a person, not having sufficient legal means to appeal an unjust sentence against himself, may receive an additional burden in the form of deprivation of citizenship and become stateless. In other words, a person will be prosecuted *twice* for the same act: criminally (according to the

[30] Expert opinion of Dr. Dainius Žalimas, Professor of Mykolas Romeris University (Vilnius), Chairman of the Constitutional Court of the Republic of Lithuania of October 04, 2020. URL: https://ru.ehu.lt/novosti/zalimas-belarus/

[31] Convention on the Reduction of Statelessness https://www.un.org/ru/documents/decl_conv/conventions/statelessness.shtml

sentence) and administratively (according to the decision on deprivation of citizenship), which is also a violation of the right to a fair trial. However, the CC of the RB did not provide an analysis and assessment of such violations.

Also, in its decision, the CC of the RB did not substantiate why participation in extremist activities (which include the right to freedom of expression, participation in rallies, etc.) is **such a serious violation as to justify the application of such an extremely disproportionate measure as deprivation of citizenship**. Extremist activity refers to the commission of crimes under Article 55 of the Criminal Code of the Republic of Belarus, many of which are widely used for **politically motivated criminal prosecutions**. In particular, according to Belarusian Human Rights Centre "Viasna," more than 1,440 people from the current list of political prisoners have been charged under these articles[32]. That is, we can say that with its decision, the CC of the RB legalized another tool of political repression in the form of possible deprivation of citizenship, without observing the necessary balance of rights and interests, and without substantiating how this measure is necessary in a democratic society.

This thesis is also supported by the Human Rights Watch study on Europe and Central Asia, according to which "**Mass** and **systematic** repression of dissenters and **numerous cases of politically motivated** prosecutions have forced a significant number of Belarusian citizens to leave their country. The authorities' attempts to reach political migrants through trials in absentia and deprivation of citizenship are an unprecedented act of cross-border repression."[33].

In the same month, on December 28, 2020, the CC of the RB adopted another decision[34] in support of legalizing increased political repression against protesting citizens, recognizing as constitutional **the increased maximum fine** imposed on individuals **for so-called offenses against the order of government**. In particular, under Article 24.23 of the Code of Administrative Offences, violation of the established procedure for holding a meeting, rally, street procession, demonstration, picketing or another mass event, committed by a participant of such events, as well as public calls for organizing or holding a meeting, rally, street procession, demonstration, picketing or another mass event *in violation of the established procedure for their organization or holding*, committed by a participant of such

[32] List of Political Prisoners. URL: https://prisoners.spring96.org/ru/table; https://www.hrw.org/ru/news/2022/12/22/belarus-new-laws-target-critics-exile

[33] Belarus: New Legislation as a Tool to Persecute Political Emigrants. URL: https://www.hrw.org/ru/news/2022/12/22/belarus-new-laws-target-critics-exile

[34] The Decision of the Constitutional Court of the Republic of Belarus No. R-1247/2020 "On Compliance of the Constitution of the Republic of Belarus with the Code of Administrative Offences"

events or by another person, shall entail a fine of up to 100 basic units, public works or *administrative arrest*. For committing the offenses specified in parts 3 and 4 of Article 24.23 of the Code of Administrative Offence, **a special duration of arrest** is established - for a period of fifteen to thirty days. The issue of disproportion to international standards was not even analysed by CC.

This decision of the CC was an ideal tool for the authorities to combat opposition protests, given that Belarus has a complicated and bureaucratic **permissive rather than declaratory system for peaceful assemblies**, which gives wide grounds for contrived and unreasonable refusals. In fact, any peaceful assembly of citizens without the permission of the authorities is unauthorized and allows for a fine of 200 basic units (equivalent to about 3000 euros) or arrest of a special duration to be imposed on each participant in such a peaceful assembly.

The logical continuation of this decision is a series of eight subsequent decisions of the CC of the RB taken **on the same day**, April 30, 2021, at least five of which are aimed at further legalizing the proposed repressive measures:

1) the possibility of dismissing an employee due to absence on work in connection with serving **an administrative arrest,** and **without notification** and **consent of the trade union** *(the Decision of the CC of the RB No. R-1267/2021[35]);*

2) granting powers to the **Presidential** Centre for Operational Analysis to suspend or restrict the operation of telecommunications networks if information-containing calls for mass disorder, participation in mass events held in violation of the established order, etc., is discovered*. (the Decision of the CC of the RB No. R-1269/2021[36]*);

3) **an extrajudicial procedure is introduced for terminating the activities of a mass media outlet** and prohibiting a foreign legal entity, a foreign citizen or stateless person, or a legal entity with foreign participation from acting as the founder or performing the editorial functions of a mass media outlet *(Decision of the CC of the RB No. R-1268/2021[37]);*

4) before permission to hold a mass event has been granted, **the organizer of the mass event is prohibited** from **publicly calling** for the organization and holding of the mass event, **announcing** in the mass media and on the Internet the date, place and time of its holding,

[35] Decision of the CC of the RB No. R-1267/2021 "On Compliance with the Constitution of the Republic of Belarus of the Law of the Republic of Belarus "On Amendment of Laws on Labor Relations " http://www.kc.gov.by/document-70263

[36] Decision of the CC of the RB No. R-1269/2021 "On Compliance with the Constitution of the Republic of Belarus of the Law of the Republic of Belarus "On Amendments to the Law of the Republic of Belarus "On Telecommunications " http://www.kc.gov.by/document-70283

[37] The Decision of the Constitutional Court of the Republic of Belarus of April 30, 2021. No. R-1268/2021 "On the Compliance of the Constitution of the Republic of Belarus with the Law of the Republic of Belarus "On Amendments of Laws on Mass Media Issues" URL: http://www.kc.gov.by/document-70273

producing and distributing leaflets, posters and other materials for this purpose *(Decision of the CC of the RB No. R-1264/2021[38]);*

5) on the definition of extremism (*Decision of the Constitutional Court of the Republic of Belarus № R-1263/202[39]*).

Even the sheer number of decisions of the CC of the RB on such fundamental issues taken on the same day can speak to the violation of the procedure for their consideration, the quality of prior constitutional review, and its improper intent.

The Decision of the Constitutional Court of the Republic of Belarus of April 30, 2021. No. R-1267/2021 "On the Conformity of the Constitution of the Republic of Belarus to the Law of the Republic of Belarus "On Amendments to the Law on Labour Relations"[40].

Clause 7 of Article 42 of the Labour Code, which establishes the grounds for termination of employment contract, is supplemented by the following grounds: absence from work **due to administrative detention**; forcing employees to participate in the strike, preventing other employees from performing their job duties, calling employees to stop performing their job duties without good cause; **employee participation in the illegal strike**, as well as other forms of refusal by the employee to perform their job duties (in full or in part) without valid reasons.

Termination of the employment contract on the above grounds, according to the amendments made by clause 2 of Article 1 of the Law to Article 46 of the LC, **is made without notification** and **consent of the trade union**.

Moreover, the addition made to the fifth part of Article 49 of the LC, establishes the right of the employer to suspend the employee if the employee encourages other employees to stop performing their job duties without good reason (clause 4 of Article 1 of the Act).

Article 26 of the Law of the Republic of Belarus "On Industrial Safety" is supplemented with a part, according to which the employees of the subject of industrial safety, which has hazardous production facilities, **do not have the right to participate in strikes**.

[38] Decision of the Constitutional Court of the Republic of Belarus No. R-1264/2021 "On the Compliance of the Law of the Republic of Belarus "On Amendments to the Law of the Republic of Belarus "On Mass Events in the Republic of Belarus" URL: http://www.kc.gov.by/document-70233

[39] Decision of the Constitutional Court of the Republic of Belarus No. R-1263/2021 "On Compliance of the Constitution of the Republic of Belarus with the Law of the Republic of Belarus 'On Amendment of Laws on Countering Extremism'" URL: http://www.kc.gov.by/document-70223

[40] Decision of the Constitutional Court of the Republic of Belarus No. R-1267/2021 "On Compliance of the Constitution of the Republic of Belarus with the Law of the Republic of Belarus' 'On changing laws on labor relations'" URL: http://www.kc.gov.by/document-70263

Since citizens went on mass strikes as a result of the rigged presidential election, this decision of the CC is obviously **politically motivated**, taken in the interests of Alexander Lukashenko and **aimed at putting pressure on the protesters and their dismissal**.

The decision of the CC of the RB No. R-1269/2021 "On Compliance of the Law of the Republic of Belarus "On Amending the Law of the Republic of Belarus on Telecommunications" [41]with the Constitution of the Republic of Belarus" was adopted. This decision recognizes as constitutional the possibility t**o suspend or limit the operation of telecommunication networks in case information** containing the following appeals to the public is **found in the telecommunication network:**

- to perform mass riots,
- to carry out extremist activities,
- **to participate in mass events held i*n violation* of the established order, etc.**

It is established that **the authority to manage the public telecommunications network is given to the** operational and analytical centre **under the President** of the Republic of Belarus.

Mobile network and **Internet disconnections** were widely used by the authorities during mass opposition **protests** against falsified presidential election results in order to prevent protesters from communicating with each other. Mobile communications and the Internet were also cut off to block communication between protesters via social networks, telegram channels, etc.

The CC of the RB considered that the legal regulation of suspension or restriction of telecommunication networks was consistent **with the principle of proportionality**, **proportionate to** constitutionally protected interests and also in accordance with the provisions of international legal instruments *that allow restrictions on freedom of information* (Article 19, clause 3 of the International Covenant on Civil and Political Rights (hereinafter referred to as the ICCPR)).

However, **it does not disclose in any way,** how these restrictions are proportional and proportionate. Furthermore, under the ICCPR, restrictions must be prescribed by law and be necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security, public order, public health or morality of the population (Article 19 clause 3 of the International Covenant on Civil and Political Rights). At the same time, this decision

[41] Decision of the Constitutional Court of the Republic of Belarus No. R-1269/2021 "On Compliance of the Constitution of the Republic of Belarus with the Law of the Republic of Belarus' 'About telecommunications' URL: http://www.kc.gov.by/document-70283

exactly violates the rights of citizens to seek, receive and disseminate information, which is important for a modern democratic society with a real system of freedom, the rule of law, political and social equality, and the right to self-determination.

Constitutional review is inextricably linked to the principles of the rule of law and the protection of human rights and fundamental freedoms. At the same time, the decision aimed at restricting the use of telecommunications networks by citizens is a clear violation of their constitutional rights. This decision of the Constitutional Court is based on preventive, clearly political rather than legal motives, the main aim of which to protect and save the authoritarian regime.

Decision of the Constitutional Court of the Republic of Belarus of April 30, 2021. No. R-1268/2021 "On the Compliance of the Constitution of the Republic of Belarus with the Law of the Republic of Belarus "On Amendments to the Law on Mass Media Issues"[42].

The law prohibits a foreign legal entity, a foreign citizen or stateless person, or a legal entity with foreign participation from acting as the founder or editorial board of a mass media outlet.

The law also introduces **an extrajudicial procedure for terminating the activities of mass media** and **expands the list of persons** who can **block access to Internet resources**; **it expands** the list of information whose distribution **is prohibited**, as well as the list of grounds for the Ministry of Information to issue a warning; **additional restrictions on journalists' rights** and grounds for revoking their accreditation are introduced.

Clause 20 of Article 1 of the Law expands the list of information the dissemination of which in the mass media and in the Internet resources **is prohibited**. **Such information includes the results of opinion polls** related to the socio-political situation in the country, including the presidential elections in Belarus.

Article 51-1 of the Media Law gives the right to Prosecutor General, the prosecutor of the region of the city of Minsk controlled by Lukashenko A.G. to restrict access to the Internet resources along with the republican body of state administration in the field of mass information by their decision. This decision is obviously **politically motivated**, taken in the interests of Alexander Lukashenko and aimed at **depriving foreign media of their accreditation** and disabling the Internet media.

[42] Decision of the Constitutional Court of the Republic of Belarus No. R-1268/2021 "On Compliance of the Constitution of the Republic of Belarus with the Law of the Republic of Belarus' 'On changing laws on media issues' URL: http://www.kc.gov.by/document-70273

The CC of the RB does not indicate how this law **creates additional guarantees for the proper safeguarding of the rights of users of reliable and timely** information, if in fact this decision recognizes the constitutionality of the ban on the plurality of existence of different sources of information, the reliability of which each entity could determine for itself. The court also limited itself to the groundless statement of the fact that the amendments **do not diminish the right to freedom of opinion**, belief and expression, enshrined in Article 33(1) of the Constitution, and *ensure a fair balance between the rights and legitimate interests of the participants of legal relations*.

The Decision of the Constitutional Court of the Republic of Belarus of April 30, 2021, No. R-1264/2021 "On the Compliance of the Law of the Republic of Belarus "On Amendments to the Law of the Republic of Belarus "On Mass Events in the Republic of Belarus" with the Constitution of the Republic of Belarus" was adopted[43].

According to the adopted amendments, **before permission** to hold a mass event is received, its organizer is **prohibited from publicly calling** for the organization and holding of a mass event, **announcing** in the mass media and on the Internet the date, place and time of its holding, producing and distributing leaflets, posters and other materials for this purpose (Article 1(6) of the Law).

Article 11 of the Law on Mass Events is supplemented with provisions that prohibit real-time (live) **coverage in mass media** and **on the Internet** of **mass events** held in violation of the established procedure for their organization or conduct.

Since citizens began mass protests as a result of falsified presidential elections, such a decision of the Constitutional Court is obviously **politically motivated**, taken in the interests of Alexander Lukashenko and aimed at putting pressure on protesters and limiting as much information as possible about planned activities of the opposition.

The right to freedom of expression is protected by Article 19 of the Universal Declaration of Human Rights and is given legal force by Article 19 of the International Covenant on Civil and Political Rights. Freedom of expression is of special value to every person in a democratic state. The Constitutional Court is called upon to strictly control the necessity of interfering with this right. Violation of this right reduces the level of human protection, as well as devalues the authority of the state. The above decision is a clear

[43] Decision of the Constitutional Court of the Republic of Belarus No. R-1264/2021 "On Compliance of the Constitution of the Republic of Belarus with the Law of the Republic of Belarus' 'On changing the Law of the Republic of Belarus "On mass events in the Republic of Belarus' URL: http://www.kc.gov.by/document-70233

expression of political bias and lack of justification as to why the restrictions are ***necessary in the democratic society*** (Article 21 of the ICCPR).

On April 30, 2021, the Constitutional Court of the Republic of Belarus adopted Decision No. R-1263/2021 "On the Compliance of the Law of the Republic of Belarus "On Amendments to Laws on Countering Extremism" with the Constitution of the Republic of Belarus.[44]

In 2020-2022, **the use of this anti-extremist legislation** became **the basis** for the self-proclaimed President Lukashenko's fight against dissent, as well as a mechanism for limiting the rights to freedom of expression, freedom of assembly and association, guaranteed by the International Covenant on Civil and Political Rights.

The rights to freedom of assembly and association are inextricably linked to the political freedom of the individual, which in turn is the basis of a democratic society. However, the changes to the laws will allow not only **any form of peaceful protest** to be labeled as "extremist," but **the entire activity of civil society** - primarily because of the broad wording and broad range of powers of government agencies. The focus on "formations" that can be deemed extremist by the Ministry of Internal Affairs or the State Security Committee jeopardizes any possibility of citizens' self-organization and solidarity, including in response to repression and gross human rights violations.

This decision is based on bias against the government and the current regime, as well as clearly coincides with the interests of the authorities, while violating the inalienable constitutional right enshrined in several international documents of the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 11), the Universal Declaration of Human Rights (Article 20), the International Covenant on Civil and Political Rights (Article 21).

May 17, 2021. The Decision of the Constitutional Court of the Republic of Belarus No. R-1271/2021 On the Compliance of the Law of the Republic of Belarus "On Amendments to the Law on Advocates' Activities" with the Constitution of the Republic of Belarus was adopted[45].

Formally, the law is aimed at strengthening the human resources capacity of the Bar, strengthening the principle of legality in the work of lawyers, improving the quality and

[44] Decision of the Constitutional Court of the Republic of Belarus No. R-1263/2021 "On Compliance of the Constitution of the Republic of Belarus with the Law of the Republic of Belarus' 'On changing laws on countering extremism' URL: http://www.kc.gov.by/document-70223

[45] Decision of the Constitutional Court of the Republic of Belarus No. R-1271/2021 "On Compliance of the Constitution of the Republic of Belarus with the Law of the Republic of Belarus' 'On changing the laws on issues of advocacy' URL: http://www.kc.gov.by/document-70603

accessibility of legal aid. In fact, the adopted amendments imposed additional restrictions on the activities of lawyers, **increasing the control** of the legal community by the Ministry of Justice and its territorial bodies.

Firstly, after the law enters into force, **the only** form of advocacy will be activities as part of the legal aid clinic.

Secondly, **a simplified** procedure is being introduced **for** former judges, prosecutors, and other **law enforcement** officers to take an internship and pass the qualification exam, **provided** that the candidates are **nominated by the heads of** the relevant departments.

Third, the powers of the Councils of Territorial Bar Associations are being expanded. In particular, they will conduct disciplinary proceedings.

Fourth, the powers of the Ministry of Justice **in the area of control over lawyers'** activities **are being expanded**. Thus, the Ministry of Justice will approve the candidates for members of the Bar Councils, can propose "their" candidates (they are subject to approval by the territorial Bar Association and can be rejected twice). Officials of the Ministry of Justice will be given the right to participate in the work of the advocates' self-government bodies, to request and receive from the bar associations, legal aid offices and lawyers the information and documents necessary for the exercise of their powers under the Law on the Bar. The Department of Justice will **give its approval for the establishment of** legal consultancy offices and determine the procedure for their operation, participate in the Ministry of Justice will give its consent to the establishment of legal consultancy offices, determine their procedures, and participate in the preparation of the rules of lawyer's ethics and give its consent to the employment of a trainee lawyer.

Analysis of the changes suggests that control over the activities of lawyers will increase both through the management of the bar associations and the Ministry of Justice. In this case, the heads of legal clinics, as well as the territorial bar associations, will be forced to focus their activities on the instructions of the authorities.

Infilling the ranks of the Bar at the expense of "retired" (former judges, prosecutors, investigators, police officers, etc.) will increase the layer of reliable personnel in the legal community, but it can hardly improve the quality of legal services and the trust of citizens to lawyers.

After the rigged presidential election, numerous trials were initiated against political opponents of the incumbent authorities and protesters. Lawyers who took on the defence of such persons were sanctioned by the disciplinary commission of the Belarusian Republican Collegium of Lawyers, summoned to the meeting of the Qualification Commission on

Advocacy for the extraordinary attestation, which in most cases resulted in the decision to revoke the license of the lawyer and his subsequent expulsion from the bar. According to former lawyer Sergei Zikratsky, about 30 lawyers lost their licenses between August 2020 and August 2021.

Such actions of the Belarusian Constitutional Court violate the Basic Provisions on the Role of Lawyers, adopted by the UN Congress in August 1990 in New York. It refers to the guarantees that the authorities must provide to lawyers for their normal work, including the ability to perform their professional duties "...without intimidation, hindrance, harassment, or improper interference"; the ability to travel freely and advise clients in their own country and abroad.

To sum up, judges of the Constitutional Court **have made more than 9 decisions in 1 year (2020/2021)**, which provided constitutional and legal justification for repressive laws and thereby legalised the repressive actions of the "regime of Lukashenko", as well as created a favourable law enforcement base for the further persecution of citizens who are unwanted by the current government for political reasons. These decisions were not objective and impartial. The only aim of it is just save and protect authoritarian regime.

2. COURTS OF GENERAL JURISDICTION OF THE REPUBLIC OF BELARUS

2.1. The right to be heard by the independent court.

The principle of the rule of law cannot be secured without strict observance of judicial procedures and principles, an important element of which is the independence of judges. The right to be heard by the independent court is enshrined in Article 14 (1) of the International Covenant on Civil and Political Rights (hereinafter referred to as the ICCPR)[46], as well as in Article 110 of the Constitution of Belarus[47] (hereinafter referred to as the RB) and Article 22 of the Code of Criminal Procedure of the RB.

Judicial independence involves the separation of the judiciary from other branches of government, and functioning independently of external influences, including political factors, in order to render judicial decisions fairly and objectively. States should take specific measures to protect judges from any form of influence or interference in their decision-making process, including through special safeguards for their resignation, as well as with respect to disciplinary, civil and criminal liability.

However, in contrast, judges of district (city), specialized, regional (Minsk City) courts **are appointed by the President of the Republic of Belarus** upon the proposal of the Chairman of the Supreme Court of the Republic of Belarus (Art. 81 Code of the Republic of Belarus on the judicial system and the status of judges).

Moreover, the President also supervises court proceedings in those cases that are under his control, in connection with which he holds personal meetings with the Chairman of the Supreme Court of the Republic of Belarus (hereinafter referred to as the SC of the RB), one of which was recorded and published with the same wording on the official website[48]. This can also be explained by the procedure for appointing judges and shows the lack of independence of judges.

Thus, the judges of the Supreme Court of the Republic of Belarus, who made decisions in the post-electoral period under study, were also **appointed by the President of the Republic of Belarus** with the consent of the Council of the Republic of the National

[46] International Covenant on Civil and Political Rights https://www.un.org/ru/documents/decl_conv/conventions/pactpol.shtml

[47] Constitution of the Republic of Belarus URL: https://president.gov.by/ru/gosudarstvo/constitution?TSPD_101_R0=08eaf62760ab2000bf703eb5045a3bf0fd5f717619f87007f72550cadc5bc26599b51abcb2448f56083bbbaade143000c9aa6491d4e01a439bf9dcbbd05485b6a15062852ccbc5ac9a6e058a4ddb2ea8dfea700233121f5f283349e716d7de77

[48] Meeting with the Chairman of the Supreme Court Valentin Sukalo https://president.gov.by/ru/events/vstrecha-s-predsedatelem-verhovnogo-suda-valentinom-sukalo

Assembly of the Republic of Belarus on the proposal of the Chairman of the Supreme Court of the Republic of Belarus. The chairman of the Supreme Court, the first deputy chairman and deputy chairmen of the Supreme Court **are appointed by the President of the Republic of Belarus** (Article 81 of the Code of Judicial System and Status of Judges)[49]. This norm is still in force and is relevant for our study, at the same time, it should be noted that Article 81 of the Constitution specifies a new order of election and dismissal by the All-Belarusian People's Assembly, not the President, but until it is formed (Article 145 of the Constitution), the above-described order applies[50]. However, these changes are just profanity, and the de facto situation will not move to an independent, democratic side.

Awarding qualification class, reduction in qualification class and deprivation of qualification class of judges of courts of general jurisdiction (except for the Chairman of the Supreme Court of the Republic of Belarus) **shall be made by the President of the Republic of Belarus** as advised by the Chairman of the Supreme Court of the Republic of Belarus. The President of the Republic of Belarus shall assign qualification classes to the Chairman, Deputy Chairman and judges of the Constitutional Court of the Republic of Belarus and the Chairman of the Supreme Court of the Republic of Belarus upon their appointment (election). The right to initiate disciplinary proceedings shall belong to: **the President of the Republic of Belarus - with respect to all judges.**

A judge may be subjected to disciplinary liability **without the initiation** of disciplinary proceedings by the President of the Republic of Belarus if there are grounds and within the time limits for imposing disciplinary sanctions[51].

The powers of the judge shall be terminated on the day on which the relevant **decision of the President of the Republic of Belarus** enters into force or on the day specified in that decision.

Thus, the President of the Republic of Belarus has influence on the judges, and accordingly on the results of their decisions, actually forms the composition of the courts of general jurisdiction single-handedly and influences them through the instruments of disciplinary proceedings. Such an order is a gross violation of the principle of independence of the judiciary.

[49] Code of the Republic of Belarus on the Judiciary and the Status of Judges https://pravo.by/document/?guid=3871&p0=hk0600139
[50] Constitution of Republic of Belarus. URL: https://president.gov.by/ru/gosudarstvo/constitution
[51] Article 102 of the Constitution of the Republic of Belarus on the Judiciary and the Status of Judges.

2.2. Right to the hearing by the impartial court

The violation of the principle of impartiality and political motivation of judges is confirmed by the case of D. Bubenko and four more Minsk residents, who were sentenced by Minsk Frunzenski District Court to 12 to 28 days of arrest[52] for "unauthorised picketing, by placing a **white sheet of paper on a window**". In court, Dmitry explained that on the window were his children's drawings, which were hung up almost 4 years ago. According to him, they protect the seedlings on the windowsill from direct sunlight. The judge N. Buguk asked why he had not received permission from the local authorities to do so. As a result, Dmitry was found guilty under Article 24.23 of the Administrative Code (violation of the order of organizing or holding mass events) and sentenced to 12 days in **jail**. The judge N. Buguk in question has also issued a large number of other politically motivated administrative rulings and politically motivated criminal convictions against at least 14 people *for fulfilling duties as a journalist, for participating in peaceful assemblies* and *for making comments on social media.*

This political bias can also be seen in a number of criminal cases against citizens who posted comments on **a photo of two staff members on a social networking site** who took away **white and red** balloons from **minors**, thereby expressing their disagreement with the unethical behaviour of those depicted.

It is quite revealing that several persons commenting on this photo were identified and convicted by judges from different regions of the Republic of Belarus. Thus, the judges of the court of Mogilevsky District of Mogilevsky Region and the court of Oktyabrsky District of Vitebsk, A. Kholodtsov and S. Bydrevich, despite the **different** geographical areas, chose the **same measure** (term) and **type** of **punishment for the same act**: 3 years of restriction of freedom with sending to an open institution for different people.

These facts testify **to the lack of impartiality of judges** and violation of *objective criteria* in rendering judicial decisions, as it is evident that there is an instruction from the Presidential Administration or a "secret" document with criteria for what kind of misconduct a judge is entitled to determine. Other people find it difficult to explain such a "coincidental" coincidence. Moreover, similar precedents were established by the ECtHR in the case *Baturlova v. Russia.* Thus, we can conclude that decisions were made not on the basis of law and evidence, but under the influence of political interests.

[52] Four Minsk residents were given 13 to 28 days for white sheets of paper on the windows URL: https://www.currenttime.tv/a/minchanam-dali-13-28-sutok-za-belye-listiki-na-oknah/31379825.html

In addition, the aforementioned judge of Oktyabrsky District Court of Vitebsk, S. Bydrevich, passed sentences **in politically motivated** cases against **at least 6 people for making comments in social media about A. Lukashenko.** This may indicate a certain "specialization" of the judge in considering this category of cases. The second of the above-mentioned judges of Mogilevsky District Court of Mogilevsky Region, A. Kholodtsov, sentenced another **activist** for insulting a judge to 3 years of restricted freedom, during which time, on 16 March 2021, he was convicted again for violating the order and conditions of serving his sentence, in particular for lying on a bed at an unauthorised time and not making a bed. Thus, there is a certain amount of discrimination on the **political** criterion.

The objective criterion of impartiality is also absent in all the above cases, because even from the point of view of the "ordinary reasonable observer" there are outward manifestations of judicial bias in this category of cases (European Court ruling on Piersack case[53]).

Furthermore, unlike the subjective test, the assertion of the lack of objective impartiality creates a positive presumption for the applicant's claim of bias, which can only be rebutted by the authorities of the respondent State if sufficient procedural guarantees are demonstrated to exclude any such legitimate doubt (European Court Judgment in the case of *Salov v. Ukraine*, §§ 80-86, Judgment of the European Court in Farhi case, §§ 27-32)[54].

The ECtHR considers the violation of the principle of impartiality to be one of the main grounds sufficient for the reversal of the lower court decision by the country's higher courts (the ECtHR judgment in the case of A. Pechnik, §§ 19-22)[55].

The violation of the right to be tried by the impartial court can also be seen in the series of trials of citizens who peacefully assembled to express their opposition to the results of undemocratic elections. States have an obligation not to prohibit, restrict, block, disperse, or disrupt peaceful assemblies without good cause, and not to **sanction participants or organizers without legitimate grounds**[56]. In spite of this, judges have massively issued politically motivated convictions of citizens who participated in peaceful assemblies and peaceful pickets to demonstrate their disagreement with the results of undemocratic elections and who used the so-called white-red-white protest symbols.

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[53] Protecting the right to the fair trial under the European Convention on Human Rights. Handbook for Legal Practitioners. The second edition, prepared by Dovydas Vitkauskas, G. Dickov. 2018. P. 78.
[54] Protecting the right to the fair trial under the European Convention on Human Rights. Handbook for Legal Practitioners. The second edition, prepared by Dovydas Vitkauskas, G. Dickov. 2018. P. 79.
[55] Protecting the right to the fair trial under the European Convention on Human Rights. Handbook for Legal Practitioners. The second edition, prepared by Dovydas Vitkauskas, G. Dickov. 2018. P. 79.
[56] International Covenant on Civil and Political Rights. General Comment No. 37 (2020) on the right to peaceful assembly (Article 21), Human Rights Committee (2020). Paragraph 23. URL: https://digitallibrary.un.org/record/3884725?ln=en#record-files-collapse-header. Last visited 2023-01-29.

Such restrictions on peaceful assemblies must not be used, directly or indirectly, **to suppress the expression of political opposition to the particular government**, challenges to the authorities, including calls for democratic changes to the government, constitution or political system, or aspirations for self-determination[57]. However, as this report demonstrates, the judicial system of the Republic of Belarus has been used to legalize and subsequently implement repressive plans against a certain discriminatory opposition group.

Recognition of the right to peaceful assembly imposes corresponding obligation on participating States to respect and ensure its enjoyment **without discrimination**. For this purpose, states must allow such assemblies without undue interference, facilitate the exercise of the right, and protect their participants, which has not been done by the Republic of Belarus. On the contrary, all participants of peaceful assemblies and rallies, which had gathered chaotically to publicly demonstrate disagreement with the election results, were held administratively and criminally liable. Although **spontaneous assemblies**, usually representing a **direct** response to current events, whether coordinated or not, are **equally protected by Article 21 of the ICCPR**[58].

The main reasoning of the judges in their decisions was that the protesters had not received permission to hold peaceful assemblies. However, a situation as illegal as holding a demonstration without obtaining prior permission does not necessarily justify interference with the right to freedom of assembly[59].

Because the need to seek permission from the authorities **destroys the very concept of peaceful assembly as a fundamental right.** The requirement to give notice of the planning of the peaceful assembly should not be used to **suppress** them. Compliance with notification requirements should not become an end in itself[60].

Also in the opinion of the ECtHR in *Bukta and Others v. Hungary* (Application No. 25691/04, §36, judgment of July 17, 2007), given the particular circumstances of the case, when the reaction to the political event through the demonstration can be justified, **the decision to terminate the peaceful assembly solely because of the absence of** the

[57] International Covenant on Civil and Political Rights. General Comment No. 37 (2020) on the right to peaceful assembly (Article 21), Human Rights Committee (2020). Paragraph 49. URL: https://digitallibrary.un.org/record/3884725?ln=en#record-files-collapse-header. Last visited 2023-01-29.
[58] International Covenant on Civil and Political Rights. General Comment No. 37 (2020) on the right to peaceful assembly (Article 21) Human Rights Committee (2020). Para. 14. URL: https://digitallibrary.un.org/record/3884725?ln=en#record-files-collapse-header. Last visited 2023-01-29.
[59] Decision in the case of Cisse v. France, Application No. 51346/99, Para. 50, ECHR 2002-III, decisions in Oya Ataman v. Turkey, para. 39, Barraco v. France, para. 45, ruling on admissibility in the case Skiba v. Poland
[60] International Covenant on Civil and Political Rights. General Comment No. 37 (2020) on the right to peaceful assembly (Article 21), Human Rights Committee (2020). Paragraph 70. URL: https://digitallibrary.un.org/record/3884725?ln=en#record-files-collapse-header. Last visited 2023-01-29.

necessary **prior notification**, without any illegal action by the participants, is a **disproportionate restriction on freedom of peaceful assembly**, in violation of Article 11 of the Human Rights Convention.

The fact that no such notice was given does not make participation illegal and should not be used as a reason to disperse an assembly, detain its participants or organizers, or impose undue sanctions, such as criminal charges against them. Spontaneous assemblies, for which there is insufficient time to give notification, **shall not be subject to notification**[61].

If the participants in the assembly behave peacefully, the fact that its organizers or participants **did not comply with certain domestic legal** requirements for holding the assembly does not by itself remove the participants from the scope of protection under Article 21 of the ICCPR[62].

Although rules governing public assemblies, such as the advance notification system, are important for the smooth conduct of mass demonstrations because they allow public authorities to minimize disruption to traffic and take other security measures, their application **cannot be an end in itself** (*Primov and Others v. Russia*, para. 118).

If the demonstrators do not engage in violent acts, it is important that public authorities show a certain degree of tolerance towards peaceful assemblies, since freedom of assembly, guaranteed by Article 11 of the Convention, cannot be denied its full essence[63].

Thus, if the participants in the assembly behave **peacefully**, which is what the collected database of decisions attests to, and the references in the verdicts to famous "round robin cases" where people simply walked around holding hands, then the fact that its organizers or participants **did not comply with** certain unfair domestic legal requirements for the assembly does not, by itself, remove the participants from the protection afforded by Article 21 (paragraph 16)[64].

In addition, judges were massively condemned for carrying **white-red and white-white objects,** which they labelled as protests, when participating in peaceful assemblies. While these colours were officially used in the image of the state flag of the Republic of Belarus until 1996 (Art. 1 of the Law of September 19, 1991 №1090-XII "On the State Flag of the

[61] International Covenant on Civil and Political Rights. General Comment No. 37 (2020) on the right to peaceful assembly (Article 21), Human Rights Committee (2020). Paragraph 71-72. URL: https://digitallibrary.un.org/record/3884725?ln=en#record-files-collapse-header. Last visited 2023-01-29.
[62] European Court of Human Rights, Frumkin v. Russia (application No. 74568/12), judgment of 5 January 2016, para. 97.
[63] The decision of Oya Ataman v. Turkey, para. 42, Bukta and Others v. Hungary, para. 37, Nurettin Aldemir and Others v. Turkey, para. 46, Ashughyan v. Armenia, para. 90, Eva Molnar v. Hungary, para. 36, Barraco v. France, para. 43, Berladir and Others v. Russia, para. 38, Faber v. Hungary, para. 47, decision in Izci v. Turkey, Application No. 42606/05, para. 89, of July 23, 2013, and the aforementioned decision in Kasparov and others v. Russia, para. 91.
[64] European Court of Human Rights, Frumkin v. Russia (application No. 74568/12), judgment of 5 January 2016, para. 97.

Republic of Belarus[65], Art. 9 of Declaration "On State Sovereignty of the Belarusian Soviet Socialist Republic" July 27, 1990[66]).

Let us examine in more detail **the systematic nature** and **scope** of such acts with the following examples.

1) Blizniuk Yu., the judge of Frunzenski District Court in Minsk passed sentences **in politically** motivated criminal cases against **at least 20 people, mostly for participating in peaceful assemblies.** The verdict expressly states that one of the accused had "**a white-red-white flag,** which was used as **a protest** symbol".

2) Mohorev A., the judge of Sovetsky District Court of Gomel passed a sentence on 68-year-old Gomel public activist and political prisoner Uladzimir Nepomniashchy, who was charged with publicly insulting the prosecutor. The specific content of the threat was not discussed by the court and was not reflected in the verdict. Also in the verdict, the judge stated, "**for raising the white-red-white flag on the flagpole in Gomel Square**".

Punishment: 2 years and 6 months in a general regime prison colony.

In addition, in one of the cases on charges of posting comments on the social network under the publication about the employee of the Interior Ministry, the court found the **aggravating** circumstance of committing a crime **motivated by political hatred**.

3) Neborskaya O., the judge of Oktiabrsky District Court of Minsk passed sentences in politically motivated cases against **at least 7 people** for **participation in peaceful assemblies**, **insulting the president, for putting protest inscriptions on the vehicles of the Ministry of Internal Affairs: "using opposition symbols - white-red-white flag,** with the purpose of publicly expressing their social and political sentiments and protesting against the current authorities", which indicates the political nature of the sentence. In substantiating guilt in one of the sentences, the court **only admits** that the defendant's actions **may** lead to the disruption of the normal operation of transport, enterprises, institutions or organizations.

4) Rudenko A., the judge of Oktiabrsky District Court of Minsk passed sentences in politically motivated criminal cases against at least 3 people **for participation in the peaceful assembly**, for **insulting the president**, in particular for making 3 stuffed animals symbolizing high-ranking officials, which were placed in a public place against **the opposition white-red-white flag symbols**, the pictures were posted in telegram channels.

[65] The Law of the Republic of Belarus of September 19, 1991 No. 1090-XII "On the State Flag of the Republic of Belarus". http://pravo.levonevsky.org/bazaby/zakon/zakb1448.htm

[66] Declaration "On State Sovereignty of the Belarusian Soviet Socialist Republic". URL: https://narb.by/ru/об-архиве/новости/document-17493.html

5) Klyshpach I., the judge of Moscow District Court of Brest also convicted for making and hanging up the stuffed animal near the road with protest inscriptions - "stole votes" and "condemned the innocent". At the same time, the above-mentioned judges did not substantiate in any way on what basis they considered the fabricated scarecrows to symbolize the President of the Republic of Belarus. The scarecrow itself was a plastic black garbage bag stuffed with plastic bottles, tree branches, and dry leaves. These facts also demonstrate the political motivation in convicting people and the lack of proper evidence that would confirm the guilt of individuals, which in turn is a violation of the right to a fair trial. The judge also convicted at **least 25 people** in politically motivated criminal cases **for their participation in peaceful assemblies** and **protests in 2020**.

6) Shut Ju., the judge of Leninsky District Court of Minsk passed sentences in politically motivated cases against **at least 13 people** for insulting the government representative**, for comments in social networks**, **for participating in peaceful assemblies, and for protest inscriptions**.

He was sentenced for participating in the peaceful demonstration in the city of Minsk on August 9, 2020, where he carried a flag, shouted slogans and used **white-red-white** cloths as process symbols to protest against the rigged presidential election results.

7) Kurovskyi D., the judge of Leninski District Court in Brest passed a politically motivated verdict in particular for putting protest inscriptions ("Live Belarus" and the letter D, **white-red-white flag**) **on the facade of the building** and sentenced at least 12 citizens, who took part in the peaceful demonstration against election fraud and violence in Brest, becoming the defendants in the so-called "**round dance** case": people were singing and dancing at the crossroads.

The court, in violation of the standards of justice, stated: "**The length of time the defendants and others were on the roadway is irrelevant and cannot indicate that their actions did not constitute a crime."**

The content of the inscriptions is partially reflected in the verdict; **according to the witness**, there were “political inscriptions and drawings on the wall”.

Punishment: restriction of liberty for various terms.

Thus, the judge did not reasonably accept the defendants' arguments about the length of time the defendants had been on the roadway, as it is important for qualification, especially in the context of the criminal law. "An assembly that remains peaceful but creates a significant disturbance, such as a *prolonged* blockage of traffic, can generally only be dispersed if such

disturbances are "serious and prolonged.'"[67] In this case, the court did not properly evaluate the circumstances of the case, which led to serious violations of the rights of citizens.

It should be noted that citizens who expressed their opinions and assessed the actions of judges and law enforcement officers who persecuted peacefully assembling people were convicted rather harshly, usually to restriction or deprivation of liberty. Not only online, as described above, but also on public transport. Thus, the judge of Novogrudok District Court of Grodno Region, Volchek I., sentenced citizen S., who in the bus spoke about the inadmissibility of such "conveyor" condemnation by another judge of Lida District Court of those who disagreed with non-democratic elections.

Peaceful assemblies are an important tool for expressing opinions and positions in society, and access to justice is necessary to protect one's rights and interests. Everyone has the right to assemble peacefully and to speak publicly and to be effectively protected before the court of law. Violation of these rights can exacerbate political and economic problems in society.

As the analysis of the collected database of decisions shows, the majority of those detained for participation in peaceful assemblies, rallies, and comments on social networks were held in custody and received punishment involving restriction or deprivation of liberty. This situation speaks to the disproportionality of the sanctions imposed. In addition, there are cases where individuals have been prosecuted even though their actions could have been qualified under a lighter article or decriminalized altogether, as indicated in some verdicts.

In administrative cases arrest was chosen as primary type of punishment. Notable in this context is the judge of the Central District Court of Minsk, Karsyuk D., which, according to human rights activists, has sentenced **at least 28 people** in politically motivated criminal cases for participation in peaceful demonstrations and rallies, insulting the representative of the authorities, for comments and publications in social networks, and **for peaceful protest activity** to administrative penalties in 2021:

1) **arrest** in relation to **112 citizens**,
2) **fines** against **23 citizens.**

Also confirming the above thesis of disproportionate punishment is the practice of the European Court of Human Rights, according to which in a number of cases detention for long

[67] General Comment No. 37 (2020) on the right to peaceful assembly (the UN Special Rapporteur's Report of 2019) para. 85. URL: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d/PPRiCAqhKb7yhsrdB0H1l5979OVGGB+WPAXj3+ho0P51AAHSqSubYW2/ROAag545hCEpG5u5zQsDpYQPUYSNeyb456XRPbWnwZ+pk4wqETaf037bwQ9eOWaCR. Last visited 2023-01-28

periods of time for unarmed opposition to police officers or throwing stones or firecrackers without causing serious bodily injury was considered disproportionate[68].

Persecution by administrative and judicial authorities for non-violent participation in demonstrations must be stopped and any measures that may have a "chilling effect" on the exercise of the rights to freedom of assembly and free speech must be repealed.

No criminal or other legal proceedings should be initiated against individuals who participated in anti-government demonstrations or were simply present at the scene of the protests at the time of their arrest, unless there is compelling evidence that these individuals personally committed serious criminal offenses.

Even if there is a real risk that a mass demonstration might lead to unrest as a result of events beyond the control of its organizers, such a demonstration is covered by Article 11, paragraph 1 of the Convention and any restrictions imposed on it must comply with the terms of paragraph 2 of this provision[69].

2.3. Fairness

"Fairness" within the meaning of Article 6 of the European Convention on Human Rights essentially depends on whether the applicant has been given a sufficient opportunity to present his case and to challenge the evidence he believes to be false, rather than on whether the domestic courts have rendered a correct or incorrect decision (see Decision of the European Court of Justice in Karalevičius case)[70] and includes the following implicit requirements:

- the conduct of the adversarial process (see the Judgment of the European Court of Justice in the case of Rauf and Davis);
- equality of procedural opportunities for the parties (see the Judgment of the European Court of Justice in the case of *Brandstetter v. Austria*, §§ 41–69);
- publicity of the process (see The Judgment of the European Court of Justice in the case of *Riepan v. Austria*, §§ 27–41).

[68] See the judgment in Gulciyu v. Turkey (<...>), para. 115, judgment in Yaroslav Belousov v. Russia, Applications No. 2653/13, and No. 60980/14, para. 180, dated October 04, 2016, and Barabanov v. Russia, Application No. 4966/13 and No. 5550/15, paras. 74 and 75, dated January 30, 2018.
[69] See the decisions in Schwabe and M.G. v. Germany, para. 103, and Taranenko v. Russia, para. 66.
[70] Protecting the right to the fair trial under the European Convention on Human Rights. Handbook for Legal Practitioners. The second edition, prepared by Dovydas Vitkauskas, G. Dickov. 2018. P. 87.

- the right to silence and the right not to incriminate oneself (see The Judgment of the European Court of Justice in the case of *Saunders v. United Kingdom*, §§ 67–81)[71].

In this context, it is important to analyse a number of decisions of the Supreme Court of the Republic of Belarus, which liquidated key socio-political and human rights organizations, including those of opposition orientation. It is noteworthy that preparations were initially **made for the liquidation of such organizations**, by creating pseudo-reasons for such liquidation:

1) in the form of mass searches on July 14, 2021[72] with the purpose of seizure of documents, the non-submission of which to the Ministry of Justice, later, slightly more than a month later, on August 27, 2021, became the reason for the Supreme Court to liquidate the public association "Belarusian Association of Journalists" and the Belarusian Popular Front "Revival", whose documents were kept in the office sealed by law enforcement authorities. The association's appeals to unblock access to the premises in order to meet the requirements of the Ministry of Justice were denied by the Investigative Committee. In connection with the failure of the association, the Ministry of Justice appealed to court with a claim for the liquidation of the PA, which was satisfied by the Supreme Court of the Republic of Belarus on November 10, 2021. At the same time, the court did not take into account **the objective inability** of the organizations to comply with the requirements to provide documents **through no fault of their** own, making the unreasonable decision without providing justification as to how the failure to provide such documents provides grounds for applying such an extreme measure as liquidation.

2) The receipt by the Ministry of Justice, as a result of unidentified investigative actions, of documents on payment of fees for "services for long-term observation of the 2020 presidential election". When the Ministry of Justice considered this claim and made the decision to liquidate Republican Public Association "Belarusian Helsinki Committee", it violated the presumption of innocence, since a person's guilt can be established in a sentence, based on a comprehensive, complete investigation of all the circumstances and evidence in the case.

3) The Ministry of Justice sent written warnings, the second of which later became a formal reason to liquidate the association "Movement for Freedom", as well as the liquidation of the PA "Tell the Truth" for lack of legal addresses of some regional branches of the

[71] Protecting the right to the fair trial under the European Convention on Human Rights. Handbook for Legal Practitioners. The second edition, prepared by Dovydas Vitkauskas, G. Dickov. 2018. P. 87.
[72] Anniversary of the “rainy day” of Belarusian civil society organizations URL: https://www.lawtrend.org/freedom-of-association/godovshhina-chyornogo-dnya-belarusskih-ogo

association. Despite the fact that this violation had been eliminated by the time of the court session, that is, at the time of the Supreme Court's decision of October 08, 2021, the court ruled on the liquidation.

The analysis of the Supreme Court's decisions shows that in their decisions the judges **implemented the repressive plan of the authorities** aimed at complete destruction of the key socio-political and human rights organizations in the Republic of Belarus, thereby infringing the rights and freedoms of citizens.

The analysis of the court decisions demonstrates that the verdicts were based on **evidence** that raised doubts about their credibility, such as disputed statements by police officers, whose misconduct was the subject of discussion on social networks, which led to the initiation of the prosecution process.

Quite often the court approached the assessment of the evidence **very formally, without giving it a proper assessment, only quoting** the defendant's testimony about the absence of intent to insult, and the victim, indicating the expert opinion about the non-normative form of speech address. Courts have not provided **a proper assessment** of such forensic linguistic expertise. Moreover, in cases where the initial examination did not establish the "right" conclusion, a number of re-examinations were conducted, which reached the "right" conclusion. If the forensic expert still did not achieve the "necessary" goals, the judge tried to give his opinion on this matter in the verdict, pointing out that knowledge in the field of psychology is necessary and considering the direction and content of other messages in the telegram channel in which the message was posted. As a result, the court concluded that the expert's conclusion that it was impossible to establish whether there were signs of verbal aggression in the form of a threat because of the limited context did not indicate that the victim's actual perception of it was unreasonable. Other evidence, as a rule, was not analysed by the court. The motive of political hatred was imputed as an aggravating circumstance for the committed act.

The judge of Bobruisk District Court, Litvin A., pronounced the verdict for **insulting** A. Lukashenko and other representatives of the authorities, pointing out that **during detention on the administrative case they found the image of Lukashenka and Belarusian officials in Nazi uniform in the phone of K.,** which she had posted in a **closed chat room more than 1 year ago.** The punishment was 1 year and 6 months of **imprisonment** in the prison colony.

In the above-described case, it is not clear from the court verdict on what basis law enforcement officers accessed personal correspondence on the phone during administrative detention and why the court did not provide the legal assessment of this, based in particular on the "fruit of the poisonous tree" doctrine, which is **a flagrant violation of the right to the fair trial**.

In one of the cases reviewed by the regional court (judges Ananich E., Brysina J., Zenkevich V.), the verdict of Moscow District Court of Minsk of April 7, 2021 was left without significant changes, according to which P., born in 1999 and not previously convicted, was sentenced **for participation in the peaceful assembly** under part 1 of article 342 of the Criminal Code of Belarus to the penalty of **restriction of freedom** without sending to the open type correctional facility **for the period of 3 years.** The conviction of the court of first instance was upheld without significant changes. However, the analysis of the case reveals a number of following violations, which have not been eliminated by the judges of the appellate instance:

1) the conclusions of the court do not correspond to the factual circumstances: the time and purpose of the defendant's presence at the peaceful assembly established by the court **do not correspond to reality**:

- time: the evidence examined by the court, including her testimony, phone records, and video surveillance footage, confirmed that she arrived at the specified place at 00:26 a.m., not at 11 p.m., as stated in the verdict. In this connection, the court's conclusion that her actions caused the stoppage of public transport is unfounded;

- purpose: Witness L. testified that the defendant informed her of her intention to *visit the centre* of Minsk on August 10, 2020, where mass events were taking place, in order to *assist citizens* affected by the actions of law enforcement officers, a different purpose is stated in the verdict.

2) the court went beyond the charge against her by stating in the verdict that she disobeyed the lawful demands of the representatives of the authorities to stop the group actions that grossly violate the public order. The defendant did not see any law enforcement officers, and no one personally approached her with the requirement to leave her location.

3) the punishment imposed on the accused does not correspond to the degree of the offense due to its severity. The court did not take into account that she was positively characterized, was brought to criminal responsibility for the first time, realized the wrongfulness of her actions, her state of health and did not mitigate the appointed punishment;

4) was held in custody until sentencing;

5) Victim's right to participate in the peaceful assembly was violated;

Thus,

- the circumstances to be proven under Article 89 of the Code of Criminal Procedure are not reflected;

- the evidence supporting them has not been analysed, not properly evaluated, and the conclusions related to the issue of qualification of the crime have not been substantiated;

- the equality of the parties has been violated, and the adversarial principle has not been implemented by the parties;

- all the necessary conditions for the comprehensive and complete investigation of the circumstances of the case have not been created;

- the punishment imposed by the court does not take into account the nature and degree of public danger, the gravity of the crime, the motives and goals of the offense, the data about the personality of the accused, in its type, term and conditions of serving is not fair and not consistent with the objectives of criminal responsibility. The court took into account that, according to the expert opinion, at the time of the incriminated act P. could be aware of the actual nature and public danger of her actions and control them, but did not take into account, however, that she **could not be fully aware of the meaning of her actions and control them**;

- does not indicate what is the social danger of the deed.

As stated above, the court, when justifying guilt in one of the sentences, **only admits** that the actions of the accused **may** lead to the disruption of the normal operation of transport, enterprises, institutions or organizations. This is a direct violation of Article 356 of the Code of Criminal Procedure, according to which **the verdict cannot be based on assumptions**.

2.4. Reasoning of judicial decisions

In their decisions, the judges of the courts of general jurisdiction justified the violation of public order by peaceful protesters by pointing to the obstruction of transportation and businesses, limiting themselves to the simple indication of this, without citing any evidence.

At the same time, participating States **should not rely on a vague definition of public order** to justify overly broad restrictions on the right to peaceful assembly[73].

To illustrate this thesis, we will give the example of the judge of Leninski District Court of Brest, Kalina S., who sentenced at least 24 people in politically motivated cases. Among them are 12 defendants accused of mass riots in Brest, sentenced to various terms **of imprisonment** for participating in peaceful protests (human rights defenders deny the existence of mass riots in Brest in August 2020). This judge also convicted at least 10 defendants in the case known as the "*round dance case*," in which demonstrators went to the crossroads and began to dance and sing songs there. **At least 130 people** have already been convicted by different judges in this case, which also shows **the large-scale and systematic nature of attacks on citizens**, and that this is not random, and also confirms the thesis put forward above about the possible "specialization" of judges. That is, only certain judges are allocated a certain category of politically motivated cases, because the results of such hearings are predictable. Human Rights Activists from Viasna compiled a rating of the most repressive judges in Minsk[74], which also confirms the thesis put forward in the report.

Not a single piece of evidence in support of the fact of participation and gross violation of public order, deliberate obstruction of the movement of vehicles and normal functioning of businesses and organizations, resulting in the disruption of transport movement «...», as well as the disruption of the normal operation of businesses and organizations, **were provided** by the courts in their decisions.

There are a large number of such cases, where it is stated or even assumed that there is obstruction of public transport. However, no evidence for this is usually cited, nor is it taken into account that **disruption of traffic <u>is not a reasonable basis</u> for** prohibiting a peaceful assembly, nor is reference to noise during a peaceful assembly. The court must consider the specific circumstances of the case, in particular **the degree of "disturbance of habitual conditions of life"** (see the judgment in Primov and Others v. Russia, para. 145[75]).

"Any demonstration in a public place can lead to a certain level of destabilization of daily life, such as disruptions in transportation. **But this fact alone <u>does not justify</u>**

[73] International Covenant on Civil and Political Rights. General Comment No. 37 (2020) on the right to peaceful assembly (Article 21), Human Rights Committee (2020). Paragraph 44. URL: https://digitallibrary.un.org/record/3884725?ln=en#record-files-collapse-header. Last visited 2023-01-29.

[74] Rating of the most repressive judges in Minsk. URL: https://spring96.org/be/news/104344; https://www.the-village.me/village/city/whatsgoingon/289259-sudji-otlichniki

[75] Primov and others v. Russia, Application 17391/06, June 2014. URL: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-9522%22]}

interference with the right to freedom of assembly[76], because it is important for public authorities to demonstrate a certain degree of tolerance."[77]

None of the cases analysed from the database **provide evidence of how peaceful assemblies**, for the participation in which civilians have been convicted in numerous convictions, could have created or created a real threat to public order.

The General Comments on the Right of the Peaceful Assembly to the UN International Covenant on Civil and Political Rights, published in 2020, state that assemblies "because of their scale or nature <...> may hinder, for example, vehicular or pedestrian traffic or economic activity. These consequences, whether intentional or unintentional, **do not constitute grounds for depriving such assemblies of the protection** they enjoy" (para. 7)[78].

In the report of 2019, the UN Special Rapporteur on Freedom of Peaceful Assembly and Association stressed that "roadblocks should **never carry criminal penalties**," as "roadblocks and prolonged sit-ins in public spaces have become central to social movements and peaceful protests around the world. The roadway, in particular, is a common place for peaceful protests". The special rapporteur called this approach "disproportionate criminalization" and strongly condemned it as potentially deterring peaceful demonstrations[79].

In the report of 2016, the special rapporteur noted that "assemblies are just as legitimate a use of public space as commerce or vehicular and pedestrian traffic. Any use of public space requires a degree of coordination to protect various interests, but there are many legitimate uses of public space. A certain disruption of the ordinary course of life caused by assemblies, including disruption of traffic, annoyance to merchants, and even harm to commercial activity, must be tolerated so that this right does not lose its essence."[80]

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[76] "Berladir and Others v. Russia", para. 38, and Gün et al. v. Turkey (<...>), para. 74.

[77] The decision of the ECtHR in Ashughyan v. Armenia, para. 90, Barraco v. France, para. 43, the decision in Disk and Kesk v. Turkey, Application No. 38676/08, para. 29, November 27, 2012, Judgment in Izci v. Turkey, para. 89), Annenkov and Others v. Russian Federation (Complaint No. 31,475/10), Nurettin Aldemir and Others v. Turkey (Complaints Nos. 32124/02, 32126/02, 32129/02, 32132/02, 32133/02, 32137/02, 32138/02), para. 43; Pati and Others v. Hungary (Complaint No. 35127/08), paras. 42-43.

[78] General Comment No. 37 (2020) on the Right to Peaceful Assembly (The report of 2019 of the UN Special Rapporteur) URL: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d/PPRiCAqhKb7yhsrdB0H1l5979OVGGB+WPAXj3+ho0P51AAHSqSubYW2/ROAag545hCEpG5u5zQsDpYQPUYSNeyb456XRPbWnwZ+pk4wqETaf037bwQ9eOWaCR. Last visited 2023-01-28

[79] The UN General Assembly, "Report of the Special Rapporteur on Freedom of Peaceful Assembly and Association" (September 11, 2019) UN Doc A / 74/349.

[80] The UN General Assembly, "Report of the Special Rapporteur on Freedom of Peaceful Assembly and Association" (February 4, 2016) A/HRC/31/66, para. 32

Thus, **the criminalization of short-term** and minor interference with the movement of pedestrians and vehicles and the practice of court decisions that have been collected and analysed **is incompatible with the requirements of international law**. It was not counted by courts in their decisions at all.

In addition, to justify the use of violence by the protesters, the judges everywhere used the following wording: "... **with their bodies they started pushing** officers of the Department of Internal Affairs out of their way, thereby **using violence** against these officers".

Here is one of the many examples that also support the above thesis of the widespread use of the phrase "traffic violations" for the prosecution and prohibition of the peaceful assembly **without any proper evidence of it**.

Leusik A., the judge of Leninski District Court of Grodno passed the politically motivated verdict on March 10, 2021 for **participation in the peaceful demonstration against falsification of the results of the presidential election**, as well as for resisting its dispersal by holding hands with other persons and lining up in a row, coming very close to the police officers, continuing to move towards them, **pushing** police officers from their way, thereby **using violence** against the said officers.

In this case, there is no evidence in the verdict confirming the obstruction of traffic and encroachment on the public peace, disturbance of the conditions of recreation and life of citizens.

The punishment was restriction of liberty with placement in the open-type correctional facility for varying periods of 3 to 3.6 years.

However, in the context of Article 21 of the ICCPR, violence generally refers to the use of physical force by participants against others that may result in injury or death, as well as significant property damage. **Mere pushing and shoving or obstructing vehicular or pedestrian traffic or daily activities is not violence**. Failure to respect and ensure the right to peaceful assembly is generally a sign of reprisal[81].

Although the need to secure public order and protect the rights and freedoms of others during an assembly may be a legitimate ground for restriction, but according to the established jurisprudence of the European Court of Human Rights, the communication

[81] General Comment No. 37 (2020) on the Right of Peaceful Assembly (the report of 2019 of the UN Special Rapporteur). Paragraph 2, 15. https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsrdB0H1l5979OVGGB%2BWPAXj3%2Bho0P51AAHSqSubYW2%2FROAag545hCEpG5u5zQsDpYQPUYSNeyb456XRPbWnwZ%2Bpk4wqETaf037bwQ9eOWaCR

requirement "should not be a covert obstacle to the Convention-Protected Freedom of peaceful assembly," and that "it is well understood that any demonstration in a public place may entail a certain level of disruption of ordinary life and cause hostility." In addition, in several decisions, the Court has clearly emphasized that the state has a positive obligation to protect freedom of peaceful assembly.

2.5. Equality of arms and adversarial proceedings

As the analysis of the collected database of decisions demonstrates, quite often, judges gave preference to the testimony of victims of nasty comments on social media to law enforcement officers, without justifying this one-sided approach to the evaluation of evidence in the case.

For example, the sentence was handed down on November 18, 2021, **for commenting on the Internet publication** about the police officer: "What a face". The defendant pleaded not guilty. She testified that she had seen the victim's photo and decided to comment on it, describing the victim's external features. She **did not intend to insult or humiliate** the victim in connection with the performance of his official duties because she was not aware of his position and the powers he had been entrusted with. She believes that the comment left is not offensive because she uses the expressions contained therein in her daily life, including in relation to her son.

According to the court decision, the guilt of the accused is confirmed **by the testimony of the victim**, who saw her comment and the publication containing his photo image with the text "It was me who testified in court, so that innocent people would be sent away for 24 hours".

There was also another case, where a politically motivated sentence was passed **for comments in a social network about the persecution of protesters** by a district police officer: "Yaruk Alexander, district police officer, senior lieutenant, beat detainees on August 9 in Orsha"; the materials of the case do not refute the content of the comment. As the only evidence that the accused posted untrue information about the beating of protesters by the district police officer, is the **testimony of the district officer himself**, which is not supported by anything but his words. The **punishment** was 1 year of restriction of freedom with placement in the open-type institution.

In addition, one of the judges of Frunzenski District Court of Minsk, Erokhina M., gave as evidence of S.'s participation in the unauthorized **peaceful** rally (Article 23.34 of the Code of Administrative Violations) the testimony of witness N., who was on duty to protect public order, noticed S. being prosecuted. However, *such evidence is questionable* in view of the witness' official position and his close connection to the authorities, as well as how he could have remembered S, having seen S. only once and briefly in the midst of a large crowd. Administrative arrest was imposed for 15 days. The judge in question also issued **37 fines** and **108 administrative arrests** for participation in peaceful assemblies, lawful expression of opinion in the form of pickets and use of protest symbols during the year 2021, thus grossly violating the right to free expression and peaceful assembly **of over 100 citizens**.

Also, the judge of Yel′sk District Court of Gomel Region, Korneevec E., issued a politically motivated sentence **for posting the comment on the social networking site**, under a publication about the involvement of the employee in repressions against peaceful protesters, the **content of which is not reflected in the verdict** (as in many other sentences, the content of comments for which persons are convicted is not stated).

The defendant explained that he left the comment based on the emotional outburst in connection with the information posted under the photo that this person was in charge of the repression of peaceful protesters. Considering the form of speech expression from the point of view of the ethical and speech norms, the court concludes that it is focused on the negative assessment of the person, contains the negative assessment of the victim's personality, which caused the latter to feel hurt and humiliation. However, the court did not take into account that the scope of criticism with respect to public figures who perform public functions is much broader than with respect to private individuals. No other evidence of the person's **guilt is given** in the verdict. The judge actually qualified the commentary himself, reprising his role as a forensic linguist. Nevertheless, it sentenced him to 1 year and 6 months of freedom restriction with placement in the correctional facility.

Here is another case where the judge unreasonably prefers the testimony of the law enforcement officer without bothering to cite additional evidence. In view of the nature of the offence committed *(participation in the rally, shouting)* and the personality of the perpetrator *(unreasonable),* the court concluded that the aims of criminal liability, and primarily the prevention of further crimes, would be best achieved by sentencing the defendant **to 1 year 6 months imprisonment,** as his isolation would protect society from criminal encroachment and would further the aims of criminal liability.

2.6. Right to remain silent and not to incriminate oneself

International human rights law and international humanitarian law prohibit torture and protect the right not to confess. Article 14(3)(g) of the ICCPR guarantees that a person shall not be compelled to testify against himself or to confess guilt "through any direct or indirect physical or undue psychological pressure by the investigating authorities on the accused in order to obtain a confession of guilt."[82] Forcing a defendant to plead guilty by force or other form of coercion violates both the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment and the right to the fair trial.

During the analysis, a violation of the prohibition on forced confessions by law enforcement agencies in criminal proceedings is seen. Because it is, clear from the text of some of the sentences that the defendants entered guilty pleas because they lost confidence in the fairness of the proceedings and/or wanted to mitigate the punishment, because the procedural guarantees did not prevent human rights violations against them.

Thus, the judge of Lida District Court of Grodno Region, Gavrilov A., passed the sentence under Article 369 of the Criminal Code against K., who made rude remarks against the police officer in the telegram channel. Questioned K. admitted guilt and showed that he wanted to influence the **socio-political situation** in the country and to induce the law enforcement agencies to the peaceful dialogue, without the use of physical force, he created his own channel in the Internet application telegram.

A very distinctive feature of this verdict is that the court considered the possibility of applying Article 86 of the Criminal Code to the accused and **relieving him of criminal responsibility and bringing him to administrative responsibility**. However, given the circumstances of the offense, namely that his actions were public, since a significant number of people had access to the message posted by the accused, the court concluded that it was impossible to apply this rule of law.

In light of the fact that this is a rare verdict in which the question of the possibility of replacing criminal responsibility with administrative responsibility was raised, in this case we see a high probability that the defendant was promised exemption from criminal responsibility with administrative responsibility in exchange for a confession.

[82] International Covenant on Civil and Political Rights
https://www.un.org/ru/documents/decl_conv/conventions/pactpol.shtml

Under international humanitarian law, no one should be forced to testify against himself or to confess guilt. This right protects every citizen from unfair investigative activity and helps ensure the impartiality and independence of judicial decisions.

Despite these safeguards, violations of the right not to be sentenced to testify against oneself or to confess guilt do occur.

Thus, the judge of Polotsk District and Polotsk City Court of Vitebsk Region, Derhachev A., passed the sentence against B. on articles 188, 364, 369 of the Criminal Code, who was accused of **posting comments in the social network** that contained insults and threats to the police officers; the content of these messages is not mentioned in the verdict.

At trial, the defendant denied the insults and threats; she accompanied the forwarded publication with a question as to whether the information contained therein was true. She wrote a statement in which she confessed to the insults and threats **under pressure** from police officers, and subsequently consistently denied the facts. **The interrogated officer denied pressuring the defendant, so the court rejected her position**, thus grossly violating the equality and adversarial principle.

According to the expert opinion, it was **not** possible **to establish** whether there were signs of verbal aggression in the form of a threat, due to the limited context. At the same time, recognizing the testimony **of the detective officer** in this part **as credible**, **the court takes into account** that according to the above-mentioned expert opinion, the problem of the perception of the particular speech message as a threat by a specific subject **belongs to the field of psychology**, and taking into account the focus and content of messages in the telegram channel in which the message was posted, concludes that the expert conclusion that it is impossible to establish whether there are signs of verbal aggression in the form of the threat because of the limited context, does not demonstrate that her perception of the victim is unfounded. According to the materials of the case, there were no complaints about the actions of the police officers and Novopolotsk Police Department.

This case also confirms:

- the lack of voluntariness of confession,

- the violation of the right to the effective remedy for violations by government forces, because the judge found it sufficient to rebut the defendant's complaints with the testimony of the officer, who expectedly simply denied the fact, but that was enough for the judge,

- the judge's attempt to substitute his own conclusions and interpretations to confirm the guilt of the person with the opinion of the expert, who was unable to establish the signs of threat in the communications that gave rise to this criminal case.

There are also problems with unequal treatment in qualifications:

- the actions of those who confessed and cooperated with the investigation were qualified under less serious articles and a milder punishment was imposed, or all were prosecuted for committing an administrative offense;

- the court did not shy away from double jeopardy for the same act: both administrative and criminal responsibility.

In cases where the defendant pleaded guilty, the courts did not properly consider the following:

- examination of other important evidence in the case;

- checking their voluntariness;

- without evaluating the defendant's testimony under the prism of its possible forcible giving under violence or threat of violence.

A formal question to the defendant about the voluntariness of the guilty plea cannot be **the only argument for admitting such voluntariness**. This practice does not adequately establish whether they were given under duress and torture, and is therefore not the effective guarantee of judicial protection against coerced consciences. As a consequence, this leads not only to the improper administration of justice, but also creates a favourable basis for law enforcement agencies to further violate human rights in order to obtain confessions.

2.7. Prohibition of double jeopardy for the same crime

The principle of not being convicted twice for the same crime, also known as the principle of non bis in idem, is a basic principle of international law, which guarantees that a person cannot be prosecuted or punished twice for the same crime.

The ECtHR recognizes this principle as fundamental, stating that "the application of this principle is governed by the triune condition of identity of facts, unity of the offender and unity of the protected legal interest. Consequently, according to this principle, the same person cannot be sanctioned more than once for the single unlawful conduct calculated to protect the same legal asset.

At the same time, the analysis of the materials shows a number of cases in which this principle has been ignored.

For example, the judge of Oktiabrsky District Court of Grodno, Kedal D., passing a politically motivated verdict in the "round dance case", where the accused held hands with

other protesters and blocked together with them a part of the sidewalk, for which she had been previously subjected to administrative arrest, pointed out that **the fact of holding Yancheuk to administrative** responsibility under Article 23.34 of the Administrative Code for violation of the order of the mass event **[for the same actions]** is not a circumstance that excludes criminal **proceedings in** the **criminal** case. Moreover, the verdict did not cite a single piece of evidence in support of the violation of public order or the work of transport or businesses: **not a single** protocol of the victim's interrogation, not a single recording of video surveillance cameras from the buildings whose work they allegedly violated. The punishment was restriction of freedom for 2 years and 6 months.

In addition, the judge of Oktiabrsky District Court of Grodno, Lancevich M., pronounced verdicts in politically motivated criminal cases against B., who took part in a peaceful rally against falsification of the election results and violence in Grodno. Also, the resolution on the case of the administrative offense established the participation of B. in the street procession on September 06, 2020 in the specified place, for which he received a punishment of restriction of freedom with referral to the correctional institution.

Thus, there is a clear violation of the principle of not being convicted twice for the same crime and a violation by judges of the right to a fair trial.

2.8. Right to the Public Trial

International human rights law provides that criminal trials should generally be conducted orally and in public, which ensures publicity, transparency of proceedings, and serves as an important safeguard for the individual by permitting public scrutiny of the proceedings. This right is protected by many international human rights treaties and is considered an important component of the rule of law.

At the same time, some cases were heard in closed sessions, closed institutions (colonies, prisons) and decisions were not published in accordance with the law.

For example, the judge of Moscow District Court of Minsk, Kascer S., issued administrative orders against the protesters, including **considering them in the premises** of the Detention Centre for Offenders of the Main Department of Internal Affairs on Okrestina Lane at the time when the detainees were **being mass tortured** there. The judge of Bobruisk District Court, Litvin A., sentenced at least 5 people for tearing down and throwing a flag on the ground. The trial was held **behind closed doors with no legal grounds** for that.

Also, the judge of the Central District Court of Gomel, Solovskyi S., reviewed cases in the closed trial and passed sentences in the **politically** motivated cases against at least 9 people (human rights defenders of the Human Rights Centre "Viasna") for carrying out human rights activities, etc.

Trial of criminal cases **in camera,** despite the lack of proper justification, is a violation of the right to the public trial and **raises questions about the fairness of such processes.**

Although international human rights standards permit a court to exclude the public from a hearing on national security grounds, the practice of holding the entire trial in camera **without justification is inconsistent with** this exception to the general principle of openness of court proceedings.

The above examples are not isolated. Within the scope of this report, only a few of them are given as examples, well illustrating and reflecting the ubiquitous picture in the RB. Thus, the judge of Polotsk District Court, Derhachev A., and the town of Polotsk of Vitebsk region passed a verdict in the criminal case against S. in the **closed** trial, in connection with **which the court documents are not available**. In the verdict itself, the judge fully reflects **the political motivation behind his decision**. S. was found guilty of attempting to make railroad tracks unusable (part 1 of article 14, part 1 of article 309 of the Criminal Code), as well as of the act of terrorism (part 1 of article 289 of the Criminal Code) and sentenced to **11 years in prison**. The sentence was imposed in violation of **fair trial principles,** the evaluation of facts and evidence was arbitrary and made manifest errors, thus violating the court's obligation of independence and impartiality, and the imposition of demonstrably harsh sentences substantially worsened the position of the accused as compared to other convicted persons in the similar situation without political motivation.

In several court hearings, **witnesses** for the prosecution, railroad employees, argued that actions such as those committed by the defendant **could not lead to criminalized consequences.** Therefore, the defendant was to be acquitted under Article 309 of the Criminal Code. Also in similar circumstances (throwing metal screws, spikes, etc.) such actions were qualified by other corpus delicti (for example, as hooliganism). Their qualification as an act of terrorism is **wittingly excessive**, and the final sentence is wittingly disproportionate to the gravity of the offense.

3. ELEMENTS OF CRIME AGAINST HUMANITY

The analysis of the decisions of the Constitutional Court and the courts of general jurisdiction of the Republic of Belarus may indicate that the judges were actively involved in facilitating the implementation of the undemocratic political regime aimed at **the massive attack** on the civilian population. These facts are **documented** in their decisions. It was through these decisions that the CC of the RB assisted in recognizing as "constitutional" the political repression imposed on **peaceful civilians**, which was then upheld by judges of general jurisdiction by prosecuting a particular identifiable group/community on political and national grounds, imprisonment or other cruel deprivation of physical freedom in violation of fundamental rules of international law (Article 7 of the Rome Charter)[83]. That is, in the analysed court decisions we can see the allocation of **a certain identifiable** group of civil society, namely: the peaceful protesting civilian people against the repressive policy of the state and regime of Lukashenko's A, aiming to have fair President's elections.

The breadth and **political** motivation of the actions of the judges of the CC, as a body of constitutional jurisdiction, and the courts of general jurisdiction is due:

- **the entire territory of the Republic of Belarus,** to which they extends its jurisdiction: judicial decisions that have come into force are **binding on all** state bodies, other organizations, as well as officials and citizens and are enforceable throughout the territory of the Republic of Belarus **(geographical criterion)**;

- against all opposition-minded people who disagree with the election results, as well as against the independent media, i.e. **the number of victims affected by such policies is significant (quantitative criterion)**. This is also stated in paragraph 73 of the Report of the United Nations High Commissioner for Human Rights (A/HRC/49/71): *"...By the end of 2021, **969 people** (858 men and 111 women) were in prison on charges for which the OHCHR has reasonable grounds to believe they are **politically** motivated. Several of those convicted received prison sentences of 10 years or more ... "*[84].

"By May 2021, around 37,000 people had been detained and incarcerated in Belarus in connection with the elections, including some 13,500 between August 9 and 14, 2020."[85].

[83] Report of the United Nations High Commissioner for Human Rights "The Human Rights Situation in Belarus Ahead of the 2020 Presidential Election and Beyond" A/HRC/49/71. https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf
[84] Report of the United Nations High Commissioner for Human Rights (A/HRC/49/71) URL: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/276/99/PDF/G2227699.pdf?OpenElement
[85] OSCE Rapporteur's Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus by Professor Dr. Wolfgang Benedek – Стор. 3. https://www.osce.org/odihr/469539

Such a weighty number of convictions also confirms the magnitude of the act in quantitative terms.

The High Commissioner noted that the measures taken by the government in connection with the disputed elections in Belarus were not primarily aimed at protecting public order, but rather **at suppressing criticism and dissenting views of government policy**[86]. Moreover, there is a direct dependence of judges on the President of the Republic of Belarus in their activities, and as a result, judges in the territory of Belarus did not provide **guarantees** for fair trial and **did not meet the requirements of independence and impartiality**, which confirms the nature of **the scale**.

Systematicity reflects a qualitative criterion, which manifests itself in the *orderliness* and *consistency* of the decisions made closely related to the policies pursued by the regime of Lukashenko A. This fact can be traced **in the series of eight politically motivated decisions** of the CC of the RB, **taken in one day**, the analysis of which is given above, as well as in the actions of the judges of the Supreme Court, who used the same "scheme" to liquidate unwanted public organizations through far-fetched orders of the Ministry of Justice and the inability to provide documents due to their seizure by law enforcement or the sealing of offices.

The liquidated public organizations had **a number of common identifying characteristics**:

- the opposition to the brutal repressive actions of the authorities,
- the human rights activities,
- the information activities about human rights violations in Belarus, including at the international level.

There is also a direct **intent** in the actions of the judges, since there is no reason to doubt the consciousness of their actions due to their profound legal knowledge and considerable professional experience, which entitles them to be aware of the following:

- the obvious discriminatory nature is exclusively directed at those negatively disposed against the authoritarian regime and the repressive methods of law enforcement against peaceful protesters, as well as those who disagree with the results of the presidential election,
- on the violation which fundamental rights of citizens and standards of the right to the fair trial these decisions are directed,
- the political context of their decisions,

[86] "Human rights in Belarus continue downward spiral, warns Bachelet", UN News, 24 September 2021. Paragraph 80. URL: https://news.un.org/en/story/2021/09/1101102).

- are part of a widespread and systematic attack on civilians based on **political** and **national** affiliation,

- their decisions will be taken into account **by all** courts and state authorities throughout the RB,

- the consequences of these decisions will affect a large number of citizens of the RB.

Thus, the above analysis indicates **the large-scale nature of the attack, its state-organized nature in depriving citizens of their basic rights** to fair justice, peaceful assembly and freedom of expression **on the grounds of belonging** to peaceful protesters who disagree with the results of the Lukashenko's election and his repressive **policy pursued against opposition-minded citizens**. Also, **in order to promote the policies of Lukashenko A.,** it is seen as **collective** in the commission of crimes against humanity by judges against civilians who have actively (through participation in rallies) and passively (online in social networks) resisted the regime of Lukashenko.

CONCLUSIONS

This report evaluates the administration of justice by the courts of the Republic of Belarus through the prism of the right to a fair trial in order to identify judges who render politically motivated decisions by:

- the correlation of the factual circumstances of the case with the conclusions reached by the court in its decisions;

- establishing evidence of the unreasonableness of court decisions;

- the reveals and demonstrations, how the judicial system can be used as a repressive mechanism.

Based on the systematic collection of administrative and criminal rulings issued after the 2020 presidential election, certain elements of the right to the fair trial are found to have been violated:

1) lack of independence and impartiality of judges (institutional and organizational aspect);

2) mass restrictions by the courts on the rights to freedom of assembly, freedom of expression, freedom of association, freedom of access to information and other rights without proper justification of the legitimate purpose of such cruel restrictions, the proportionality between the applied restrictions and the stated goal;

3) lack of due process and fair trial rights;

4) the absence of a real and effective opportunity to appeal the decisions of the court of first instance;

5) violation of the right to the public hearing;

6) lack of equality of arms.

The report considered elements of the crime against humanity in the actions of judges. A similar precedent of the Justice trial took place during the third of the Nuremberg trials (from 05.03 to 04.12.1947), which resulted in 10 convictions and 4 acquittals[87].

Thus, the collected database of decisions may be a unique source of documented violations of the right to the fair trial by the violators themselves.

[87] The Nuremberg Trials: The Justice Trial URL: https://famous-trials.com/nuremberg/1991-alstoetter