OSCE

Office for Democratic Institutions and Human Rights

Report

Trial Monitoring in Belarus

(March – July 2011)

Warsaw

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LIST OF ABBREVIATIONS

CC	Criminal Code of the Republic of Belarus
CPC	Criminal Procedure Code of the Republic of Belarus
HRC	Human Rights Committee of the United Nations
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe
UDHR	Universal Declaration of Human Rights
UN	United Nations

EXECUTIVE SUMMARY

1. This report presents the findings of the monitoring of trials of individuals who were criminally charged in the aftermath of the events in central Minsk following the elections on 19 December 2010, undertaken by the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE) in line with its mandate and the applicable OSCE commitments. As per the modalities of the monitoring exercise agreed by the authorities of the Republic of Belarus and ODIHR, the trial monitoring was carried out to: (a) assess compliance of the monitored trials and relevant domestic law with international fair trial standards, (b) identify possible shortcomings in the criminal justice system, and (c) present the Belarusian authorities with recommendations aimed to improve the administration of criminal justice in light of their OSCE commitments.

2. In addition to the OSCE commitments, the international standards employed in the analysis arise out of the International Covenant on Civil and Political Rights (ICCPR), as interpreted by the relevant General Comments of the UN Human Rights Committee (HRC) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The ICCPR and the CAT have been legally binding for the Republic of Belarus since 1973 and 1987, respectively. Moreover, the interpretation of these standards in the report was based on best practices, guidance documents, and jurisprudence from other jurisdictions.

3. The monitoring focused primarily on the public phase of criminal proceedings – the trials – but also encompassed the review of relevant domestic legislation against international standards. The monitoring teams attended court hearings and at the close of the trials sought meetings with both the defence and the prosecution of each case. When meetings were granted, parties were asked the same questions based on applicable human rights standards. Most defence counsel agreed to meet with the team. The Prosecution agreed only to meet at the level of Head of Public Prosecution and Appeals Department, with whom the team met on four occasions. Meetings with the trial judges were also sought. However, none were granted.

4. Certain human rights-related aspects of the events of the 19 December lie outside the scope of this report. Foremost among them is the nature of the state's intervention in the demonstration. The monitoring team observed many hours of video footage of the events, and on several occasions, riot police are seen clubbing protesters. In some instances, protesters are initiating altercations with the police. On other occasions, however, the protesters being clubbed are either putting up no resistance, or if they had been resisting, had since been subdued. Since OSCE/ODIHR did not itself monitor the assembly, the potential issue of excessive force is largely beyond the scope of this report.

5. Similarly, the legality or illegality of the demonstration itself according to national law and international standards is not the subject of analysis herein, except to the extent evidence thereto was produced at trial. For example, the analysis below examines the extent to which evidence of "organizing an unauthorized demonstration" may have been conflated with evidence of "organizing mass disorder."

6. Finally, a number of lawyers lost their licenses during their representation of persons suspected in connection with the events of 19 December. ODIHR did not analyse the lawyer sanction regime in depth. Conclusions are drawn only to the extent this licensing and sanction regime – operated by the Ministry of Justice – had an impact on the right of the defendants to the counsel of their choice.

7. The project employed eight monitors of seven different nationalities. In line with the agreed modalities, the number of monitors in the country was limited to four at one time, for the duration of the trials.

8. With some exceptions, the monitors attended court hearings in teams of two, always accompanied by a Russian and Belarusian language interpreter. However, when more trials were taking place simultaneously than there were monitors deployed, some hearings had to be observed by one monitor only. For each observed hearing, the monitors produced a summary report. At the close of each case, they prepared a final trial report using a uniform checklist based on international and national fair trial standards. These reports served as primary sources for this Report. The monitors also gathered contextual information from meetings with the Ministry of Justice, Supreme Court representatives, members of the prosecution service, NGO representatives, other legal experts and human rights organizations – both domestic and international – with information relevant to Belarus, its criminal justice system, and the events of 19 December 2010.

9. In the period from 9 March 2011 to 23 July 2011, ODIHR monitored 10 criminal cases in the first instance and on appeal, and two additional cases only on appeal, involving a total of 41 defendants.

10. Most defendants were charged under Article 293 of the Belarus Criminal Code. It contains two relevant parts. The first criminalizes "organizers" of mass disorder that result in "arson, violence against persons, pogroms, destruction of property, and armed resistance to authorities." The penalty range is five to 15 years in prison. The second part penalizes the "participants" in such disorder. That charge carries a sentence range from three to eight years in prison. Article 293 had never previously been invoked in a criminal trial in Belarus. With few exceptions the remaining defendants were charged under Article 342, "serious breach of public order." That article carries a lesser penalty ranging from a fine to three years in prison.

11. All 41 defendants were found guilty in the first instance proceedings. No judgment was altered on appeal. Eleven defendants were given non-custodial sentences (fines or restricted freedom in a non-custodial setting), while 30 received partially or fully custodial sentences (some of these were suspended),

ranging from two to eight years of imprisonment. Thus, 28 of the convicted persons, including three former presidential candidates, remained imprisoned after their trials.

12. The report is organized topically according to applicable fair trial standards. The first area addressed is the right to liberty and security (Chapter 1), the right to a competent, independent and impartial tribunal (Chapter 2), followed by equality of arms (Chapter 3), the presumption of innocence (Chapter 4), the right to a public hearing (Chapter 5), the right to defend oneself or through legal counsel of one's choice (Chapter 6), the right to silence and exclusion of unlawfully obtained evidence (Chapter 7), and the right to examine opposing witnesses and evidence (Chapter 8). Each chapter presents the applicable international standards, reviews the relevant national legislation, and ends with a set of conclusions and recommendations drawn from an analysis of the events measured against the applicable standards. The monitoring revealed a number of key concerns.

13. Not having been granted access to pre-trial detention facilities, ODIHR did not systematically collect information on pre-trial detention. However, information emerged during monitored trials and in meetings that gave rise to concerns with regard to the right not to be deprived of liberty and the right to security of the person while in detention. The period of detention in the pre-trial phase was between three and six months, which is within international standards for the right to trial within a reasonable time. However, for those detained, serious matters arose concerning the basis for their detention, their treatment while detained, and the access to their counsel. Issues of access and treatment are addressed separately.

14. ODIHR observed a number of problematic issues with the right to a competent, independent and impartial tribunal, some of which were structural in nature while others were specific to the trials related to the events of 19 December 2010. Foremost among the difficulties was the pervasive influence of the executive in matters that are normally the reserved purview of the judiciary. Manifestations of a too-close relationship between the prosecutor and the judge lent credence to suspicions of judicial bias as did the statistics related to motions and sentencing. The difficulties in structural independence centre on the appointment and dismissal procedures, tenure, discipline, and access to benefits, interference of the executive, and bias in favour of the prosecution. The presence of Ministry of Interior and, reportedly, KGB personnel at the trials may have influenced the judges, lawyers and, in general, the conduct of the proceedings. Many judges showed patterns that may be interpreted as prosecutorial bias.

15. As regards the principle of equality of arms, ODIHR noted that the prosecution enjoys a number of legal and procedural powers that are not available to the defence, or at least not in the same manner. These structural differences whereby the prosecutor, rather than the judge, acted as a gatekeeper to defence's use of experts, searches and compelled testimony translated into an advantage for the prosecution. In fact, many of the monitored cases revealed shortcomings with regard to genuine procedural equality between prosecution

and defence, contributing to the 100 percent conviction rate for the prosecutors in the monitored trials.

16. During the monitoring of the trials, significant concerns emerged over the right to the presumption of innocence, raising doubts as to whether the defendants were in fact presumed innocent until proven guilty. Factors contributing to this assessment include the posture of the executive and judicial branches with respect to the trials, the provisions of the criminal and criminal procedure codes themselves, as well as the treatment of the defendants during the trials. Moreover, based on what was observed, the prosecution did not appear to meet the substantial burden of proof with regard to the requisite intent under Article 293 of the Criminal Code. However, having been denied access to verdicts, it was not possible to engage in more detailed analysis.

17. ODIHR observed that Belarusian authorities made an effort to ensure the right to a public hearing as access to the trials for some members of the public and the media was provided in all of the monitored trials. The exclusion of an internationally organized coalition of NGO observers, however, was not in line with the right to a public hearing and applicable OSCE commitments. Moreover, the lack of public access to verdicts is also inconsistent with the right to a public trial.

18. In reference to the right to defence, ODIHR observed that the right to defend oneself or through legal counsel of one's choosing was respected in these cases insofar as every accused was represented at trial by counsel, whether privately hired or state appointed. Nevertheless, the rights of some defendants were in some instances hampered by license revocations of defence counsel, which is perceived as undue executive interference with the professional independence and ethical obligations required of those in the legal profession. Moreover, some defence counsel were denied access to their clients for prolonged periods while they were held in the KGB detention centre.

19. ODIHR observed that in relation to the right to silence and the exclusion of unlawfully obtained evidence, judges failed to follow up allegations that statements were obtained under duress, intimidation, inhuman treatment and possibly torture in the manner required by international standards. In every instance, the judge was satisfied upon ascertaining that any statement used at trial had been signed with an attorney present. No judge attempted to gather the facts concerning the alleged mistreatment, nor did any judge order an independent inquiry. Defence motions to exclude evidence based on the alleged maltreatment were ignored or denied. Moreover, the reliance on evidence obtained through wire-tapping may also have given rise to concern.

20. The observed practice during the trials revealed heavy reliance of judges on pre-trial witness affidavits which impacted negatively on the right to examine opposing witnesses. On several occasions, reading the pre-trial affidavits in lieu of live testimony occurred to the detriment of the defendant's right to examine the witnesses against him. Judges were rather liberal in granting excuses for prosecution witnesses who did not want to attend trial. When witnesses did appear in the observed trials, the judges were often inclined to rely on their pre-trial affidavits rather than the examination of their oral testimonies given

in court, especially when such testimonies were inconsistent.

21. ODIHR wishes to thank the Ministry of Foreign Affairs of the Republic of Belarus for its cooperation in the implementation of this exercise.

CONSOLIDATED RECOMMENDATIONS

To legislators and policy makers:

On the role of the executive

1. To reform and improve the system of judicial self-governance with a view to freeing it from executive/Presidential decision-making on issues such as discipline or benefits and bonuses by establishing an independent judicial council for selection, promotion and disciplining of judges; in particular eliminate the power allowing the President to impose any disciplinary measure on any judge without instituting disciplinary proceedings;

2. To reform the judicial appointment system, eliminating the executive's role until the final stage; at a minimum institute a selection mechanism that gives the primary role to an authority independent of the executive and legislative powers within which a substantial number of those who sit are judges elected by their peers;

3. To refrain from the practice of temporary judicial appointments which may be prone to abuse and strengthen the lifetime tenure model for judges; allow public, transparent and directly accessible competition for recruitment of judicial vacancies rather than through court chairs and executive authorities; make all decisions on judicial appointments public;

4. To remove any influence from the executive branch on detention decisions;

5. To revamp the lawyer licensing regime to comply with the strictures set out in the UN Basic Principles on the Role of Lawyers. Specifically, remove the role of the Ministry of Justice in licensing the legal profession;

6. For public officials at all levels, to abstain from public statements affirming the guilt of the accused;

7. To ensure unhindered access for international NGO monitors at public trials;

On amending the Criminal Procedure Code

8. To amend CPC provisions related to detention so as to:

   a. provide that judges, and not prosecutors, render detention decisions in the first instance;

   b. conduct hearings regarding detention on remand and make such hearings open and the defendant's participation mandatory;

   c. ensure that detention decisions are founded on a reasonable suspicion that the individual has committed a crime, and subsequently, are based on an individualized assessment of the threat that the detainee will abscond, tamper with evidence or witnesses, or re-offend. The decision to detain someone should articulate specifically the basis for the findings;

d. remove provisions that permit detention based solely on the gravity of the charge;

9. To review and amend the relevant provisions of the CPC to equalize the parties' procedural powers, including *inter alia*:

   a. strip the prosecutor of the right to order an expert assessment *proprio motu* and instead, place the decision on whether an expert assessment is needed in the hands of the court; allow defence the same right of access to expert studies as enjoyed by the prosecution;

   b. ensure that the prosecution must deliver all exculpatory evidence in its possession – not only that which will be included in the file - to the defence, with clearly and narrowly defined exceptions (matters of state security, witness protection, etc.) Judges should oversee the redaction of sensitive material and ensure that the remainder is delivered to the defence;

   c. ensure that the filter of relevance and probative value with regard to witnesses and evidence is applied without bias; institute tighter controls over the admission of irrelevant evidence that may have been included in the case file;

   d. ensure that all statements admitted at trial, whether by video or in writing, have appropriate documentation attesting that all the appropriate rights were explained to the person providing the statement. Especially for defendants who retract at trial a previously provided written testimony, these testimonies should be excluded from the evidence and not relied upon by the court;

10. To take additional steps to eliminate prosecutorial bias, and in particular:

    a. eliminate the practice whereby the trial judge is exposed to the entire prosecutor's case file, particularly the evidence, prior to the beginning of the trial. The judge's file should include only materials necessary to conduct a preliminary hearing and schedule a trial;

    b. separate the adjudicatory and sentencing phases of the trial and not allow character evidence to be presented prior to sentencing;

    c. eliminate the practice of exposing the judge to the defendant's criminal record prior to the determination of guilt or innocence.

11. To revise the relevant legislative provisions concerning public access to court judgments and ensure that such access is guaranteed, subject to lawful restrictions on personal data disclosure and matters of national security;

On amending the Criminal Code

12. To clarify for each criminal offence, particularly those that reference both actions and consequences/results, the precise mental element (*mens rea*) that

the prosecution is required to prove. The provision should indicate whether direct or indirect intent is required. With regard to Article 293, it should be clarified whether one or all of the listed consequences are to be proven;

On amending the Law on Investigative Activity

13. To amend the CPC and the Law on Investigative Activity as follows:
    a. permit only judges to authorize wiretapping and similar investigative measures that violate privacy; follow up the amendment with appropriate training on evaluating such requests in light of international standards and best practices;
    b. preclude wiretapping and similarly intrusive forms of privacy invasion unless other investigative procedures have been tried and failed or they reasonably appear to be too dangerous or unlikely to succeed if tried;
    c. set out in the Law on Investigative Activity the same legal standard for authorizing wiretapping and similar investigative measures that violate privacy as currently exists in the CPC;

14. To amend the Law on Investigative Activity to permit those who have been the subject of a privacy invasion, upon the close of the measure, rather than only in the case of acquittal or non-institution of criminal proceedings, to learn a) why they have been tapped, b) for how long, and c) by what means, and d) to receive evidence that the information gathered during the tap has been destroyed;

On court security

15. To review courthouse security procedures to ensure that the Chairperson of the Court is in charge of security and that this important function is not delegated to those who are not part of the judiciary;

On independent investigations

16. To undertake an independent investigation into the allegations of maltreatment raised by the suspects in these cases. As part of the investigation, review the entire collection of available video material. Ensure the investigation meets the standards set out by the UN in "The Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment";

17. To undertake an independent investigation into the propriety of wiretaps as authorized in these cases. In particular assess whether the taps were "necessary" and whether they were sufficiently substantiated under a "reasonable basis for suspicion" standard connected to a "grave or exceptionally grave" crime;

On cooperation with international human rights procedures and mechanisms

18. To cooperate with international human rights procedures and mechanisms, in particular in the implementation of the recommendations included in

    a. the concluding observations of the UN Committee against Torture from 2000 and upcoming,

    b. the report of the UN Special Rapporteur on the independence of judges and lawyers from 2000,

    c. the report of the UN Working Group on Arbitrary Detention from 2005,

    d. the Universal Periodic Review of the UN Human Rights Council from 2010,

    e. the concluding observations of the UN Committee on the Elimination of Discrimination against Women from 2011.

To the Judiciary:

On structural/institutional reforms

19. To allocate cases to individual judges based to the maximum extent possible on objective and transparent criteria established in advance by the law or by special regulations on the basis of the law, e.g. in court regulations. Exceptions should be justified;

20. To re-assess the system of zonality (oversight by zonal judges), and consider prohibiting a zonal judge from acting as reporter, or otherwise participating in an appeal, in cases in which he or she was involved in trial level oversight;

On administration of criminal justice

21. To compel the in-court testimony of important witnesses, especially those deemed necessary by the defence, as a means of safeguarding the right to confrontation. If their attendance cannot be compelled, remove their affidavit from the case file;

22. To eliminate the practice of keeping defendants in cages during the trial. Security measures applied to the defendants should be based on individual risk assessments in every case. These measures should safeguard the presumption of innocence and every effort must be made to prevent humiliating and degrading treatment. General security measures to ensure order in the courtroom should not create an impression of guilt of the defendants;

23. To revise the practice of holding perfunctory appellate hearings. Judges should be prepared to engage with both parties, focusing on material legal and factual issues which could potentially alter the judgment. The appeal judgement need not be delivered immediately after the oral hearing to allow the judges sufficient time to consider in depth the matters raised. The defendant should be present at his or her appeal hearing;

24. To ensure that the role of victims and witnesses in criminal proceedings is not conflated thereby undermining the special status afforded to victims or interfering with the right to a fair trial;

25. To institute training for judges to eliminate practices that lead to a perception of prosecutorial bias;

26. To officially transcribe all proceedings, including appellate hearings, to ensure a complete and accurate record;

On court administration

27. When significant public interest in a trial is present, to take concrete measures to accommodate the anticipated numbers, for example by setting up video screens or moving to a larger courtroom or facility. Employ sound amplifying equipment;

28. To ensure that security personnel working in courthouses receive proper training on dealing with the public, wear identification, and respond courteously and respectfully to visitors. Public participants are to be welcomed and their attendance at hearings is to be facilitated - so long as decorum is maintained;

29. To end the practice of overtly filming all entrants to the court. Where strictly necessary for security purposes, to consider installing CCTV cameras, and to ensure that, in the absence of recorded illegal acts, all video records are destroyed in a timely manner;

To law enforcement agencies:

30. To investigate alleged denial of counsel to those detained at the KGB facility in the aftermath of the events of 19 December. Ensure appropriate sanctions are applied for anyone implicated in an intentional denial of counsel;

31. To review and revise the existing procedures in order to ensure prompt access to counsel for those detained in the KGB facility;

32. To investigate the source of the leaked investigative materials which were publicized in the state media, take appropriate steps to discipline those responsible and set up mechanisms to prevent such leaks in the future;

To the media:

33. To abandon the practice of broadcasting fragments of interrogations or of wiretapped conversations, especially of persons who have not been found guilty by court.

INTRODUCTION

Background to the Report

22. This trial monitoring exercise was launched pursuant to an agreement between the authorities of the Republic of Belarus and the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE) which set out the modalities for ODIHR to monitor trials of individuals who were criminally charged in the aftermath of the events in central Minsk following the elections on the 19 December 2010.

Scope, Focus and Methodology

23. As per the agreed modalities, the trial monitoring was carried out to: (a) assess compliance of the monitored trials and relevant domestic law with international fair trial standards, (b) identify possible shortcomings in the criminal justice system, and (c) present the Belarusian authorities with recommendations aimed to improve the administration of criminal justice in light of their OSCE commitments.[1]

24. In addition to the OSCE commitments, the international standards employed in the analysis arise out of the International Covenant on Civil and Political Rights (ICCPR), as interpreted by the relevant General Comments[2] of the UN Human Rights Committee (HRC), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The ICCPR and the CAT have been legally binding for the Republic of Belarus since 1973[3] and 1987[4], respectively. Moreover, the interpretation of these standards in the report was based on best practices, guidance documents, and jurisprudence from other jurisdictions.

25. To comply with the Vienna Convention on the Law of the Treaties[5] and OSCE commitments,[6] Belarus is bound to fulfill its obligations under the ICCPR, the

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1 For OSCE commitments in the field of rule of law and criminal justice see *inter alia* the documents adopted in Vienna 1989, Copenhagen 1990, Moscow 1991, Ljubljana Ministerial Council Decision No. 12/05 on Upholding Human Rights and the Rule of Law in Criminal Justice Systems and Helsinki Ministerial Council Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area. See also Annex 5 of this report.

2 UN HRC General Comments are available at http://www2.ohchr.org/english/bodies/hrc/comments.htm (last visited 31 May 2011).

3 Belarus has no reservations, declarations or objections to the ICCPR on file. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#16 (accessed on 27 June 2011).

4 Belarus has no reservations, declarations or objections to the CAT on file. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (accessed on 2 September 2011).

5 Vienna Convention on the Law of the Treaties, Article 31. Belarus acceded to the Convention on 1 May 1986. http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en (accessed on 3 September 2011).

6 Helsinki 1975, Principle X; Brussels 2006; Helsinki 2008.

CAT, and other treaty-based obligations in good faith and in the light of the object and the purpose of those treaties. Reliance on treaty body general comments and communications forms part of good faith interpretation and implementation of international treaty obligations.

26. The monitoring focused primarily on the public phase of criminal proceedings – the trials – but also encompassed the review of relevant domestic legislation against international standards. The monitoring team attended court hearings and at the close of the trials sought meetings with both the defence and the prosecution of each case. When meetings were granted, parties were asked the same questions based on the applicable human rights standards. Most defence counsel agreed to meet with the team. The Prosecution agreed only to meet at the level of Head of Public Prosecution and Appeals Department, with whom the team met on four occasions. Meetings with the trial judges were also sought; however, no such meetings were granted.

27. As will be discussed in some detail below, ODIHR sought both the indictments and verdicts in each case; however, official access to these documents was not granted.

28. Certain human rights-related aspects of the events of the 19 December lie outside the scope of this report. Foremost among them is the nature of the state's intervention in the demonstration. The monitoring team observed many hours of video footage of the events, and on several occasions, riot police are seen clubbing protesters. In some instances, protesters are initiating altercations with the police. On other occasions, however, the protesters being clubbed are either putting up no resistance, or if they had been resisting, had since been subdued. As OSCE/ODIHR did not itself monitor the assembly, the potential issue of excessive force is largely beyond the scope of this report.[7]

29. Similarly, the legality or illegality of the demonstration itself according to national law and international standards is not the subject of analysis herein, except to the extent evidence thereto was produced at trial.[8] For example, the analysis below examines the extent to which evidence of "organizing an unauthorized demonstration" may have been conflated with evidence of "organizing mass disorder" (See Chapter 4, Presumption of Innocence).

30. Finally, a number of lawyers lost their licenses during their representation of persons suspected in connection with the events of 19 December. ODIHR did not analyse the lawyer sanction regime in depth. Conclusions are drawn only to

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[7] The issue is relevant to the extent that police officers were injured during these altercations and testified at trial as victims. Normally, a police officer injured by someone committing a crime is correctly categorized as a crime victim. However, where that police officer is employing excessive force and the persons being beaten defend themselves, any resulting injuries to the officer must be viewed in the light of legitimate self-defence. Also, the possibility exists that some police officers were accidentally injured by a colleague using excessive force. ODIHR was not in a position to examine these aspects and therefore rendered no specific conclusions in this report.

[8] Other organizations have addressed this issue. For example The Committee on International Control over the Situation with Human Rights in Belarus. See "Interim Human Rights Assessment of the Events of 19 December 2010 in Minsk, Belarus by the Special Rapporteur of the Committee on International Control over the Situation with Human Rights in Belarus. http://hrwatch-by.org/en/presentation-report-events-19-december-2010-minsk. (Accessed on 25 August 2011).

the extent this licensing and sanction regime – operated by the Ministry of Justice – had an impact on the right of the defendants to the counsel of their choice.

31. The project employed eight monitors of seven different nationalities.[9] In line with the agreed modalities, the number of monitors on the ground was limited to four, for the duration of the trials.[10]

32. With some exceptions, the monitors attended court hearings in teams of two, always accompanied by a Russian and Belarusian language interpreter. However, when more trials were taking place simultaneously than there were monitors deployed, some hearings had to be observed by one monitor only. For each observed hearing, the monitors produced a summary report. At the close of each case, they prepared a final report using a uniform checklist based on international and national fair trial standards. These reports served as primary sources for this Report. The monitors also gathered contextual information from meetings with the Ministry of Justice, Supreme Court representatives, members of the prosecution service, NGO representatives, other legal experts and human rights organizations – both domestic and international – with information relevant to Belarus, its criminal justice system, and the events of 19 December 2010.

33. Trial monitoring activities began on 9 March 2011 and ended on 23 July 2011. ODIHR monitored 10 criminal cases in the first instance and on appeal, if filed, and two additional cases only on appeal.

34. The monitored criminal cases involved a total of 41 defendants. ODIHR observed proceedings involving 37 defendants in the first instance and on appeal (if appealed); and proceedings involving a further four defendants only on appeal, as follows:

    i. First instance trial of Artyom Breus and Ivan Gaponov (no appeal);
    ii. First instance trial of Dzmitry Miadzvedz (no appeal);
    iii. First instance trial and appeal of Mikita Likhavid;
    iv. First instance trial and appeal of Dzmitry Bandarenka;
    v. First instance trial and appeal of Uladzimir Khamichenka, Dzmitry Drozd, Ales Kirkevich, Pavel Vinahradau, and Andrey Pratasenya;
    vi. First instance trial and appeal of Andrei Sannikau, Illya Vasilevich, Aleh Hnedchyk, Fiodar Mirzayanau, Uladzimir Yaromenka;
    vii. First instance trial and appeal of Uladzimir Niakliayeu, Andrei Dzmitryieu, Vital Rymasheuski, Aliaksandr Fiaduta, Anastasiya Palazhanka, and Siarhei Vazniak;
    viii. First instance trial and appeal of Uladzimir Loban, Siarhei Kazakou, Andrei Fedarkevich, Evgeniy Sakret, Dzmitry Daronin, Vital Matsukevich,

[9] Monitors were from Armenia, Georgia, Germany, Hungary, Italy, Moldova, and the United Kingdom.

[10] The project methodology was developed on the basis of ODIHR's *Trial Monitoring: A Reference Manual for Practitioners* (2008), available at http://www.osce.org/odihr/item_11_30849.html.

ix. First instance trial and appeal of Mikalai Statkevich, Dzmitry Uss, Andrei Pazniak, Aliaksandr Klaskouski, Aliaksandr Kviatkevich, Artsiom Hrybkou, and Dzmitry Bulanau;
x. First instance trial and appeal of Pavel Seviarynets, Siarhei Martsaleu, and Iryna Khalip;
xi. Appeal of Vasil Parfyankau;
xii. Appeal of Aliaksandr Atroshchankau, Dzmitry Novik, and Aliaksandr Malchanau;

35. Most defendants were charged under Article 293[11] of the Criminal Code. It contains two relevant parts. The first criminalizes "organizers" of mass disorder so long as the disorder results in "arson, violence against persons, pogroms, destruction of property, armed resistance to authorities." The penalty range is five to 15 years in prison. The second part of Article 293 penalizes the "participants" in such disorder. That charge carries a sentence range from three to eight years in prison. Article 293 had never previously been invoked in a criminal trial in Belarus. With few exceptions, the remaining defendants were charged under Article 342,[12] "organization and preparation of acts that flagrantly breach public order, or active participation therein." That article carries a lesser penalty ranging from a fine to three years in prison.

36. Of the 41 defendants whose cases were monitored, all were found guilty. No verdict was altered on appeal.

37. Of the 41 convicted individuals, 11 were given non-custodial sentences (fines or restricted freedom in a non-custodial setting),[13] while 30 received partially or fully custodial sentences (some of these were suspended), ranging from two

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11 CC Article 293 reads "1. The organization of the mass riot which was accompanied by violence against people, pogroms, arson, destruction of property, armed resistance to authorities, is punished by 5-15 years of imprisonment. 2. Participation in mass riot which manifested in the direct implementation of the actions that were mentioned in part 1 of the article, is punished by 3-8 years of imprisonment." "1. Организация массовых беспорядков, сопровождавшихся насилием над личностью, погромами, поджогами, уничтожением имущества, вооруженным сопротивлением представителям власти, – наказывается лишением свободы на срок от пяти до пятнадцати лет. 2. Участие в массовых беспорядках, выразившееся в непосредственном совершении действий, названных в части первой настоящей статьи, – наказывается лишением свободы на срок от трех до восьми лет."

12 CC Article 342 reads: "1. Organization of group acts that flagrantly breach public order and are accompanied by apparent disobedience to lawful demands of representatives of the authorities or that have resulted in interference with traffic, business activities or activities or institutions or organizations, or active participation in such activities in the absence of elements of a more serious crime are punishable by a fine, or arrest for up to 6 months, or limitation of liberty for up to 3 years, or deprivation of liberty for the same term." "1. Организация групповых действий, грубо нарушающих общественный порядок и сопряженных с явным неповиновением законным требованиям представителей власти или повлекших нарушение работы транспорта, предприятий, учреждений или организаций, либо активное участие в таких действиях при отсутствии признаков более тяжкого преступления - наказываются штрафом, или арестом на срок до шести месяцев, или ограничением свободы на срок до трех лет, или лишением свободы на тот же срок."

13 Restricted freedom in nine cases.

to eight years of imprisonment. 28 of the convicted persons, including three former presidential candidates, remained imprisoned after their trials.[14]

38. By the time this report was drafted, 19 individuals have been pardoned and released.

39. The project team intended to monitor every case related to the 19 December events. Despite all efforts to do so, two criminal cases involving four defendants charged in connection with the events were not monitored, or were monitored only in part. This was due to the trials beginning prior to all formal arrangements being in place for the team to deploy. In one instance, the monitoring team was unable to attend the final day of a trial due to an insufficient number of monitors allowed in the country.[15]

Structure of the Report

40. The report is organized topically according to applicable fair trial standards. The first area addressed is the right to liberty and security (Chapter 1), followed by the right to a competent, independent and impartial tribunal (Chapter 2), equality of arms (Chapter 3), the presumption of innocence (Chapter 4), the right to a public hearing (Chapter 5), the right to defend oneself or through legal counsel of one's choice (Chapter 6), the right to silence and exclusion of unlawfully obtained evidence (Chapter 7), and the right to examine opposing witnesses and evidence (Chapter 8). Each chapter presents the applicable international standards, reviews the relevant national legislation, and ends with a set of conclusions and recommendations drawn from an analysis of the events measured against the applicable standards.

41. Many of the issues discussed throughout the report have already been subject to of consideration by relevant international human rights procedures and mechanisms such as the UN Committee against Torture, UN Special Rapporteur on the independence of judges and lawyers, the UN Working Group on Arbitrary Detention, the UN Committee on the Elimination of Discrimination against Women and the Universal Periodic Review of the UN Human Rights Council. Their recommendations, especially those which have emerged from the Universal Periodic Review are particularly pertinent to the findings of this monitoring exercise. They have been included in Annex 4.

Background to the Trials

42. From the outset of the election campaign, opposition candidates Vladimir Nyaklyaeu, Vital Rymasheuski, Andrei Sannikau and Nikolai Statkevich called on their supporters to "defend their vote" peacefully on Oktyabrskaya/Kastrychnitskaya Square in Minsk on 19 December.

43. On the evening of election day, candidate Nyaklyaeu was prevented from reaching Oktyabrskaya/Kastrychnitskaya Square and was severely beaten. He was hospitalized, and subsequently removed from hospital by unidentified individuals. Many other presidential candidates, except the incumbent, as well

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14 See Annex 1 for a table of defendants and their sentences.

15 On 11 May, there were five trials held simultaneously. ODIHR sought agreement for a fifth monitor to join on an exceptional basis. However, the Belarusian authorities denied the request.

as thousands of demonstrators gathered on Oktyabrskaya/Kastrychnitskaya Square. Five candidates, accompanied by the demonstrators, then moved to Nezavisimosti/Nezalezhnasti Square, the location of the parliament and the Central Election Commission. Further away from the peaceful demonstration, a group of individuals attempted to break into the House of Government, causing damage in the process. This action was countered by the OMON (riot police), which used force against the assailers, but also against peaceful demonstrators. Indiscriminate use of disproportionate force left several demonstrators suffering from severe injuries.[16] Many demonstrators subsequently left the site, while some five thousand remained on the square together with candidates Rymasheuski and Sannikau, who took turns addressing the crowd.

44. Just before midnight, hundreds of OMON personnel violently dispersed the demonstration. Seven presidential candidates, their campaign managers and proxies, hundreds of activists, among them journalists, civil society representatives and foreign citizens, were arrested during and immediately after the demonstration. While being apprehended, candidate Andrei Sannikau was beaten. The majority of those arrestees were subsequently convicted in administrative proceedings and sentenced to between five and fifteen days in jail. Several dozen, including some presidential candidates, were charged with criminal offences.

45. On 20th December, President Lukashenka gave the figure of those arrested as 639 and confirmed that the candidates were being interrogated in a KGB detention facility.[17] For two days, there was no information available regarding the whereabouts of several of the candidates arrested.

46. Immediately after the election night events, the OSCE/ODIHR EOM attempted to schedule meetings with the courts and the City Department of Internal Affairs, but was not successful. These institutions refused to provide any information on the arrests and trials. Belarusian authorities explained at the time that a number of participants in "unauthorized activities" had been sentenced by the courts to administrative arrests and fines, in addition to which criminal proceedings were being instituted under the title of "mass riot" and "grave violation of public order".

47. Administrative court hearings of those detained took place at closed sessions, with access only granted by court summons. The arrested were sentenced either to pay administrative fines (30 "basic units" – approx. 265 EUR) or were incarcerated for between 10 and 15 days for violation of provisions on participation and/or conduct of mass events.[18] Several hundred people served

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16 OSCE/ODIHR Election Observation Mission Final Report, 22 February 2011, p. 22, http://www.osce.org/odihr/elections/75713.

17 http://president.gov.by/press104951.html.

18 The Minister of Justice, Mr. Halavanau, also announced on 21 December that political parties and non-governmental organizations that authorized their members to participate in the post-election event could face shut-down. Leaders of registered political parties subsequently informed the Ministry of Justice that "the ruling bodies of their parties made no decisions regarding their parties' participation in the unsanctioned actions on election day," http://www.minjust.by/ru/site_menu/news?id=726.

these sentences or paid the fines, and were then released. The remainder was charged criminally and their trials were the subject of this monitoring exercise.

48. During the monitored trials, a number of contentious legal issues arose. For instance, whether

- the crowd violence in this case could meet the legal threshold for "mass disorder;"
- in fact all the consequences listed in Article 293 had to have occurred or just one of them;
- the acts of those smashing the doors of the House of Government can be attributed to, or otherwise connected with, the broader assembly which remained largely peaceful;
- the implements used by the protesters amounted to "arms" that would satisfy the legal requirement of "armed resistance;"
- the video clips relied upon by the prosecution, which had been heavily edited and its source unidentified, was admissible evidence.

49. Similarly, several factual issues were contested at trial, for example:
- whether there were implements such as metal bars, batons, and "Molotov cocktails," brought by the protesters and left behind on the square when they dispersed;
- why the assembly left Oktyabrskaya/Kastrychnitskaya Square for Nezavisimosti/Nezalezhnasti Square;
- whether businesses along Nezavisimosti/Nezalezhnasti Avenue suffered a loss of income;
- what was the nature of the injuries suffered by the police and who exactly was responsible for them;
- whether someone other than the accused initially broke the glass in the doors to the House of Government.

50. These were among the key issues confronting the court as it tried those accused in relation to the events of the 19 December.

CHAPTER 1: THE RIGHT TO LIBERTY AND SECURITY OF THE PERSON

51. All detentions encroach upon a fundamental human right: the right to liberty and security of the person. One's personal freedom should be scrupulously protected by the state, and any limitation imposed on a person's liberty should be exceptional, objectively justified, and as short as possible.

52. Without access to pre-trial detention facilities, ODIHR did not systematically collect information on pre-trial detention. However, information emerged during monitored trials and in meetings that gave rise to concerns with regard to the right not to be deprived of liberty and the right to security of the person while in detention.

A. International Standards

53. Major international human rights instruments such as the UDHR[19] and ICCPR,[20] provide for the right to liberty. The same right is contained in the 1991 Moscow Document of the OSCE.[21]

54. Respect for the right to liberty requires that no one be subjected to arbitrary arrest or detention. Deprivation of liberty is only permissible on such grounds and in accordance with such procedures as are established by law,[22] i.e. in compliance with the principles of legality and legal certainty. The term "in accordance with law" refers to domestic law, but the domestic law itself must be in conformity with the principles expressed or implied in international human rights law.[23] The principle of legality requires that the law itself not be arbitrary, that the deprivation of liberty permitted by law not be "*manifestly unproportional, unjust or unpredictable*."[24]

55. International human rights standards provide for a series of protective measures to ensure that individuals are not deprived of their liberty unlawfully or arbitrarily, and to establish safeguards against other forms of abuse of detainees. In particular, access to defence counsel should be available soon after arrest.[25] Arrested persons must immediately be informed in simple, non-

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19 UDHR, Article 3.

20 ICCPR, Article 9.

21 1991 Moscow Document, §23.1(i).

22 ICCPR, Article 9(1).

23 Belarus recognizes the supremacy of international law in Article 8 of its Constitution. "*The Republic of Belarus shall recognize the supremacy of the universally acknowledged principles of international law and ensure that its laws comply with such principles*."

24 In the case *Albert Womah Mukong* v. *Cameroon*, UN Doc. CCPR/C/51/D/458/1991, 21 July 1994, §9.8, the HRC explained that the term "arbitrary" in Article 9(1) of the ICCPR is not only to be equated with detention which is "against the law", but is to be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.

25 See, e.g., Concluding Observations of HRC, Georgia, UN Doc. CCPR/C/79 Add.75, April 1, 1997, §27; UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,

technical language which they can understand of the essential legal and factual grounds for their arrest, so as to be able, if they see fit, to apply to a court to challenge its lawfulness.[26] As noted by the HRC, the first sentence of ICCPR Article 9(3)[27] "is intended to bring the detention of a person charged with a criminal offence under judicial control".[28] Importantly, a periodic judicial review of the lawfulness of detention should be conducted at reasonable intervals. The HRC has also determined that public prosecutors are not the appropriate entity to render detention decisions.[29]

56. Detention is regarded as the most severe measure of restraint and should be used as a last resort – and only if less restrictive measures cannot ensure the proper conduct of the defendant and due administration of justice. In short, detention must be lawful, necessary and reasonable. The HRC has recognized at least three permissible grounds for pre-trial detention that do not fall afoul of the Covenant:

> *"The Committee reaffirms its prior jurisprudence that pre-trial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party."*[30]

57. Suspicion that a person has committed a crime is not sufficient to justify detention throughout the period of investigation and in the lead up to trial.[31] On the other hand, the Committee has also held that a person may be detained

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principle 17(1); Basic Principles on the Role of Lawyers, principle 1; UN Centre for Human Rights, *Human Rights and Pre-Trial Detention*, June 1994, pp. 21-23.

26 Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, UN General Assembly, Doc. A/RES/43/173, Principle 13 ("Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively, with information on and an explanation of his rights and how to avail himself of such rights.").

27 Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.

28 UN HRC, Communication No. 521/1992, *V. Kulomin v. Hungary* (Views adopted on 22 March 1996), in UN doc. GAOR, A/51/40 (vol. II), p. 80, §11.2.

29 Note that in the case of *Kulomin*, whose detention on remand had been repeatedly extended by the prosecutor, the HRC was not satisfied that "that the public prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an 'officer authorized to exercise judicial power' within the meaning of article 9(3)" and stated that it "considers that it is inherent to the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with." Id., p. 81, §11.3.

30 UN HRC, *Hill v. Spain*, UN Doc. CCPR/C/59/D/526/1993, 2 April 1997, §12.3. See also General Comment No. 27, CCPR/C/21/Rev.1/Add.9, 2 Nov 1999, §14.

31 See Report of the Working Group on Arbitrary Detention, Addendum, Mission to Armenia, A/HRC/16/47/Add.3, 17 February 2011, §76. See also http://www.ohchr.org/Documents/Publications/training9chapter5en.pdf section 4.5, pages 173 and 192.

when he or she constitutes a clear and serious threat to society that cannot be contained by any other manner.[32]

58. Anyone who is arrested has the right to be brought promptly before a judge or another officer authorized by law to exercise judicial power. Detained persons shall be entitled to trial within a reasonable time or to release.[33] Detained persons shall never be subjected to torture, or other inhuman or degrading treatment.[34]

B. National Legislation

59. The Constitution of Belarus enshrines the right to liberty and security of the person by providing that "[t]he State shall safeguard personal liberty, inviolability and dignity. The restriction or denial of personal liberty is possible in the instances and under the procedure specified in law."[35] The Constitution affords the detainee the right to review the legality of his or her detention.[36]

60. The Criminal Procedure Code (CPC) allows the arrest of a person: a) on suspicion they committed a crime punishable with imprisonment; b) upon being indicted or in the event of non-compliance by the accused with the conditions of the measure to secure appearance at trial; c) upon violating the terms of a non-custodial measure.[37] A person arrested on suspicion of committing a crime cannot be held in custody for longer than 72 hours.[38] However, a longer (10 day) pre-charge custody term applies with respect to those arrested on suspicion of committing a number of specified offenses, in particular terrorism and organized crime-related, as well as *coup d'état*.[39] Once the 72-hour (or 10-day, as applicable) term has expired, the detainee must be released or a measure to secure appearance must be authorized in his or her respect.[40] The prosecuting body is obliged to decide whether to institute criminal proceedings within 12 hours from the moment of apprehension.[41] If the suspect in 72-hour pre-charge custody is subjected to a measure to secure appearance, he or she must be indicted within 10 days.[42]

61. The CPC provides for a number of measures to secure appearance, two of which (detention on remand and home detention) are custodial and the remainder, such as bail, release on one's own recognizance, or supervision (for

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32 See *Cámpora Schweizer* v. *Uruguay* , UN Doc. CCPR/C/OP/2 at 90, 12 October 1982, §18.1.

33 See ICCPR, Article 9(3).

34 Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment, adopted by UN GA Resolution 43/173 of 9 December 1988, Principle 6. See also the Convention Against Torture, ratified by Belarus on 13 March 1987.

35 Constitution of the Republic of Belarus, Article 25.

36 Id., ("A person who has been taken into custody shall be entitled to a judicial investigation into the legality of his detention or arrest.").

37 Code of Criminal Procedure of the Republic of Belarus, Article 107(2).

38 Id., Article 108(3).

39 Id., Article 108(4). The crimes charged in these cases do not fit in this category.

40 Id., Articles 108(3) and 108(4).

41 Id., Article 108(2).

42 Id., Article 108(5).

minors), are non-custodial.[43] The Code provides for a number of general grounds to assist the judge in determining which measure is appropriate to secure appearance.[44] There is no requirement in the law that detention on remand be used as a means of last resort.

62. Belarus legislation allows detention on remand where the charges concern a crime punishable by over two years of imprisonment.[45] In cases involving crimes categorized as grave or especially grave, the decision to detain on remand may be based solely on the gravity of charges.[46]

63. The power to authorize detention on remand is vested in the Prosecutor General and lower-level prosecutors, as well as in the Minister of Interior, the Chair of the State Security Committee, and the Deputy Chair of the State Control Committee/Director of Finance Investigation Department.[47] The detention warrant must be duly substantiated.[48] If the prosecutor or other relevant official rejects the request for detention, the request cannot be re-filed unless new circumstances in the case are discovered.[49]

64. The maximum term for detention on remand is two months,[50] however, this term may be extended for up to three months by a district prosecutor if completing the investigation within two months is not feasible and further up to 18 months, also by prosecutors, including the Prosecutor General, if the detainee in question is accused of a grave or especially grave crime or poses a flight risk, among others.[51]

65. Either the defence counsel or the detainee is entitled to appeal the detention decision.[52] Appeals by detainees concerning pre-trial custodial measures are filed with the court, while appeals by persons subjected to home detention and other persons concerning pre-charge custody, home detention or detention on remand, or extension of home detention or detention on remand are filed with the prosecuting body.[53] Judicial appeals of the legality of pre-charge custody are reviewed by a single judge within 24 hours, and those of the legality of detention on remand or home detention, within 72 hours from the time the appeal is filed.[54] Court hearings to review the lawfulness of detention on remand are conducted *in camera*.[55] Although the defence counsel, the victim and the defendant's legal representative have the right to participate in the

43 Id., Article 116.

44 Id., Article 117(1); Id., Article 127(2).

45 Id., Article 126(1).

46 Id.

47 Id., Article 126(4).

48 Id., Article 126(2). The law does not contain a standard against which the evidence should be assessed.

49 Id., Article 126(6).

50 Id., Article 127(1).

51 Id., Article 127(3); Id., Article 127(4).

52 Id., Article 126(5).

53 Id., Article 143(1).

54 Id., Article 144(1).

55 Id., Article 144(2).

hearing, as mentioned elsewhere, there is no provision whereby the defendant is entitled to participate.[56]

66. Belarusian law in the sphere of pre-trial detention is inconsistent with international standards. The law permits detention to be based solely on the gravity of the charges for which the detainee is being investigated, rather than on an individualized assessment as to whether the detainee might *"abscond or destroy evidence, influence witnesses or flee from the jurisdiction*."[57] Moreover, the law still foresees prosecutors making detention decisions in the first instance. The HRC previously held Belarus in breach of the ICCPR for allowing prosecutors to render this type of decision.[58] Their role in subsequent prosecution means they lack the impartiality required under ICCPR Article 9. The UN Working Group on Arbitrary Detention came to the same conclusion, observing that prosecutors in Belarus – even if considered as independent bodies in the local judicial system[59] – are not an appropriate body to render detention decisions.[60] While judicial review of the detention is available on appeal, it is unclear whether the scope of that review is limited to procedural matters rather than the merits.[61]

C. Findings and Analysis

67. The majority of suspects in the monitored trials were held in detention throughout the investigation and trial. The period of detention in this pre-trial phase was between three and six months, which is within international standards for the right to trial within a reasonable time.[62] However, for those detained, serious matters arose concerning the basis for their detention, their treatment while detained, and the access to their counsel. Issues of access and treatment are addressed in Chapter 6 and Chapter 7, respectively. Ten suspects eventually faced charges under the lesser crime in Article 342 of the Criminal Code. These suspects were released on their own recognizance for the remainder of the investigation, and they remained at large during trial.

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56 Id.

57 See supra, footnote 30.

58 UN HRC, *Yuri Bandajevsky v. Belarus*, Communication No. 1100/2002, UN Doc. CCPR/C/86/D/1100/2002 (2006). §10.3 "Committee recalls, first, that it is inherent to the proper exercise of judicial power, that [detention decisions] be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with. It further considers that the public prosecutor cannot be characterized as having the institutional objectivity and impartiality to be considered as an 'officer authorized to exercise judicial power' within the meaning of article 9, §3. In the circumstances, the Committee concludes that the author's rights under article 9, §3, of the Covenant, were violated." (citations omitted) (Available from: http://www1.umn.edu/humanrts/undocs/1100-2002.html (last visited 13 July 2011).

59 Although considered independent, Prosecutors answer hierarchically to the President. See Article 127 of the Belarus Constitution.

60 See Report of the UN Working Group on Arbitrary Detention, Mission to Belarus, 25 November 2004, E/CN.4/2005/6/Add.3, §39.

61 See CPC Art. 143(3): "The body conducting the criminal proceedings must [...] forward the appeal to the court enclosing the case materials that support the lawfulness and the justified nature of pre-charge custody, detention on remand, home detention or the extension of detention on remand or home detention. The court may request that other materials be submitted, if necessary."

62 See supra, footnote 33.

Pre-trial Detention

68. With the sole exception of Dmitry Uss, all persons charged with Article 293 offenses remained in custody throughout the proceedings. The decision to detain them was taken by a prosecutor in most cases. Most counsel with whom the monitors spoke reported that they had sought a review of the custodial measures imposed. To ODIHR's knowledge, no detention order was ever changed without a corresponding change in the gravity of the charge.[63] That these detention decisions are taken by a prosecutor, as noted above, means they violate international standards.

69. Not only is the entity taking the initial decision on detention problematic, but the basis for the decision, at least insofar as applied in these cases, also runs counter to international standards. For example, in each trial where applicable, the defence moved the court to decrease or eliminate the custodial measure imposed upon the accused. In each instance the prosecution opposed the motion. From the discussion in court and the eventual in-court ruling,[64] it became clear that the basis for continuing detention was the gravity of the charge alone, and not an individualized assessment of the defendant, nor the permissible grounds for pre-trial detention.[65] Such rulings contravene international human rights standards.

Prohibition of Arbitrary Detention

70. During the monitoring, the head of state suggested in the media that it was him, rather than judicial authorities, that rendered detention decisions. On 17 April 2011, the President was quoted by multiple media outlets which reported essentially the same statement, as follows:

> *"Bahdankevich, Kazulin, Lyabedzka have appeared again. By the way, I released the latter from jail, but he is yapping now,"* Lukashenka said. *"They are lowlifes. You should rather say thanks to this president for he has released you from prison,"* he added.[66]

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63 One candidate, A. Mikhalevich, was released for reasons that are unknown to ODIHR. He later fled Belarus and appears to have been granted political asylum in the Czech Republic. See http://www.nytimes.com/2011/03/15/world/europe/15belarus.html and http://praguemonitor.com/2011/03/25/%C4%8Dr-grants-asylum-belarusian-dissident-mikhalevich (accessed on 25 Aug 2011.)

64 The monitors had no access to any written decisions in detention matters.

65 For example, see Sannikau trial, 27 April 2011, morning session. The permissible grounds are risk of absconding, risk of tampering with witnesses or evidence, or risk of reoffending. A clear threat to society is also a permissible ground. See CPC Art 126(1).

66 Reported at http://www.charter97.org/be/news/2011/4/16/37792/. "Повылазили Богданкевич, Козулин, Лебедько, которого, кстати, выпустил из тюрьмы, а он сегодня вякает", - сказал Лукашенко. "Это же подонки. Скажите лучше спасибо, что этот президент вас выпустил из камеры", - продолжил он. Other versions of this quotation, all of which confirm the President himself as the one who decided to release the detainees are available at http://www.svaboda.org/content/article/4746363.html (Belarusian), http://bdg.by/news/politics/14515.html (Russian), and http://www.belaruspartisan.org/bp-forte/?page=100&backPage=10&news=81979&newsPage=0 (Russian). All sites accessed on 30 June 2011. The implications of the President's statements on a defendant's presumption of innocence are addressed in Chapter 3, infra.

71. This places Belarus in violation of ICCPR Article 9(3). The ICCPR is clear that detention decisions must be taken by "a judge or other officer authorized by law to exercise judicial power." If the decision was in fact taken by a prosecutor or judge, but at the behest of the President, the ramifications are an equally grave infringement on the independence of those entities.

D. Conclusions and Recommendations

72. The right to liberty of the person is a fundamental human right that is contingent on the right to a fair trial as a safeguard against its unlawful and arbitrary curtailment. It is of utmost importance that the entity making detention decisions be independent, both from the prosecution and investigation bodies on one hand, and from interference from the executive branch on the other. The court is obliged to take into account the factual evidence related to the specific defendant. Detention should never be considered as a default option whenever someone allegedly commits a criminal offence, and should only be resorted to if there exists a real threat of absconding, tampering with evidence, or reoffending.

Recommendations:

- To remove any influence from the executive branch on detention decisions;
- To amend the Criminal Procedure Code so that judges, and not prosecutors, render detention decisions in the first instance;
- To amend the CPC to ensure that detention decisions are founded on a reasonable suspicion that the individual has committed a crime, and subsequently, are based on an individualized assessment of the threat that the detainee will abscond, tamper with evidence or witnesses or re-offend. The decision to detain someone should articulate specifically the basis for the findings;
- To remove provisions in the CPC that permit detention based solely on the gravity of the charge.

CHAPTER 2: RIGHT TO A COMPETENT, INDEPENDENT AND IMPARTIAL TRIBUNAL

73. Judicial independence and impartiality are two of the most fundamental aspects of a fair trial. Under binding provisions of international law as well as under OSCE commitments, all criminal defendants in Belarus have the right to be tried by a competent, independent and impartial tribunal established by law.[67] Independence and impartiality can be difficult to assess as its manifestations are not always apparent to a neutral observer. Still, the monitoring team noted a number of problematic issues in this arena, some of which were structural in nature while others were specific to the trials of those charged in relation to the events of 19 December 2010. Foremost among the difficulties was the pervasive influence of the executive in matters that are normally the reserved purview of the judiciary. The influence was readily perceived in the heavy presence of police and plain-clothes operatives in and around the courthouse and inside the trials themselves. Manifestations of a too-close relationship between the prosecutor and the judge lent credence to suspicions of judicial bias as did the statistics related to motions and sentencing.

74. This chapter examines these issues, all of which tend to damage the public perception of a judiciary that is charged with being impartial and unbiased. In addition to undermining the perception of impartiality, biased conduct and executive interference is inconsistent with the principle of equality of arms and the presumption of innocence (see Chapters 3 and 4 below).

A. International Standards

> *In the determination of any criminal charge or of rights and obligations in a suit at law, everyone shall be entitled, without undue delay, to a fair and public hearing by a competent, independent and impartial tribunal established by law.*[68]

75. The UN Basic Principles on the Independence of the Judiciary (Basic Principles) contain standards relating to the relationship of the judiciary to other authorities; the selection, appointment and training of judicial officials; the conditions of their service and tenure; immunity; and their suspension and removal from office. [69] The HRC has declared it the obligation of states "*to take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the*

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67 ICCPR Article 14(1). See also 1989 Vienna Document, Article 13(9).

68 ICCPR Article 14(1).

69 The Basic Principles on the Independence of the Judiciary (Basic Principles), adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders. Later adopted by the UN General Assembly, UNGA Res. 40/32 and 40/146 (1985). Available online at: http://www2.ohchr.org/english/law/indjudiciary.htm (last accessed 31 May 2011).

constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them."[70]

B. National Legislation

76. The principle of judicial independence is enshrined in the Constitution of Belarus as follows: "[i]n administering justice judges shall be independent and subordinate to law alone" and "[a]ny interference in judges' activities in the administration of justice shall be impermissible and liable to legal action."[71] These constitutional provisions should set out the framework for a separation of powers between the executive, legislative, and judicial branches of government.

77. This language is closely mirrored by Article 85 of the Judicial Code, which itself provides for a number of guarantees of independence for judges. The Judicial Code regulates the procedure of appointment, suspension, and dismissal of judges, judicial immunity, the work of the judges, the secrecy of deliberations and a host of other issues and guarantees that pertain to the status of judges and their independence and impartiality.[72] The specifics of this law are addressed below under relevant subheadings.

78. For its part, the Criminal Code (CC) penalizes interference with a judge's work by providing that "[a]ny interference by a public official or private executive officer . . . with the work of judge or people's assessor, or prosecutor, or investigator or interrogator in order to prevent thorough, full and objective examination of a case or in order to achieve the pronouncement of an unlawful judgment or decision . . . shall be punishable."[73] Violence[74] and threat of violence[75] against a judge also constitute criminal offenses under Belarusian law.

79. The CPC specifically requires that courts be fair and impartial. Where a judge may be biased in favour or against a particular party or have interest in the case or personal knowledge of disputed evidentiary facts concerning the proceeding, the judge is required by law to recuse him/herself.[76]

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70 UN HRC, General Comment 32 (on Article 14: Right to equality before courts and tribunals and to a fair trial), CCPR/C/GC/32, 23 August 2007, §19. See also the ODIHR's *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia,* published in 2010 based on in-depth expert research of judicial independence in the region offer a number of recommendations also in areas relevant here such as the selection process, judicial councils, judicial budgets, disciplinary processes, judicial tenure, training, bonuses and remuneration, among others. Available at www.osce.org/odihr/73487 (last visited 31 May 2011).

71 Constitution of the Republic of Belarus, Article 110.

72 Judicial Code of the Republic of Belarus, Article 85.

73 CC Article 390.

74 Id., Article 388.

75 Id., Article 389.

76 CPC Article 79; see also Articles 77 and 78.

80. On their face, these provisions appear in line with international standards intended to secure judicial independence. However, as will be discussed below, other provisions in Belarusian law, specifically those on discipline and removal of judges, their appointment and tenure, undermine these provisions.[77]

C. Findings and Analysis

81. A number of difficulties with judicial independence were noted during the observation. However, a monitoring exercise such as this, limited in the number of trials, the access to materials and the number of personnel, cannot attempt to address them comprehensively. In short, the difficulties centre on structural independence, interference of the executive, and bias in favour of the prosecution. The presence of Ministry of Interior and, reportedly, KGB personnel at the trials may have influenced the judges, lawyers and, in general, the conduct of the proceedings. Many judges showed patterns that may be interpreted as prosecutorial bias. Each of these is addressed in turn.

Structural Judicial Independence

82. The manner of judicial selection, appointment, compensation, bonuses and tenure do not meet international standards of judicial independence.[78] Despite the guarantees of independence in the Constitution and other criminal justice legislation, the executive branch as manifested in the Presidential Administration and the Ministry of Justice retains far-reaching control of elements within the judiciary.[79] The following summation touches upon only a few of the most notable areas:

83. **Selection process**: ODIHR understands that candidates for a judicial position are placed on a "reserve list." Its members are hand-selected by the Head of the Regional (oblast) Department of Justice (executive branch) together with the Chair of the court where the vacancy exists. There is no application process, and no candidate can go forward without the acquiescence of the executive at this initial stage. The mechanism injects a level of arbitrariness and executive interference into the selection process that falls short of international standards.[80]

84. **Appointment**: Candidates for judicial appointments are proposed jointly by the Minister of Justice and the Chief Justice of the Supreme Court (in the case of

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77 See also Belarus Report of the UN Special Rapporteur on Independence and Judges of Lawyers, E/CN.4/2001/65/Add.1, §108 (Special Rapporteur's Report).

78 Id.

79 Id. §110.

80 See Basic Principle 10, "Any method of judicial selection shall safeguard against judicial appointments for improper motives." European standards are far more exacting. For example, the Venice Commission has found that, "[t]he principle that all decisions concerning appointment and the professional career of judges should be based on merit, applying objective criteria within the framework of the law is indisputable." See the *Report on the Independence of the Judicial System Part I: The Independence of Judges,* Venice Commission, 13 March 2010, §27. http://www.venice.coe.int/docs/2010/CDL-AD(2010)004-e.asp. (Accessed 16 Aug 2011). Also, the European Charter on the Statutes of Judges insists that an independent council play a determinative role in judicial selection. See European Charter on the Statute of Judges (European Charter), Council of Europe, 1998, Art. 1.3. http://www.judicialcouncil.gov.az/Law/echarte.pdf (Accessed 16 Aug 2011).

Supreme Court justices, only by the Minister of Justice).[81] Appointments are made by the President of the Republic who has full authority and discretion to accept or reject any nominated candidate without substantiation.[82] The fact that both entities nominating candidates are themselves Presidential appointees,[83] coupled with the fact that the President ultimately appoints the candidate, renders the President fully in control over all aspects of the judicial appointment. This role is incompatible with an independent judiciary.[84]

85. **Tenure**: In accordance with the Judicial Code, judges are initially appointed for a five-year fixed term following which their performance is reviewed. A judge may then be reappointed for another five-year term or may receive an appointment without limitation (i.e. until they reach the maximum age for civil servants).[85] The Judicial Code is silent on the specific criteria governing the choice of lifetime tenure over fixed-term (i.e., temporary) appointment. While a resolution of the Ministry of Justice[86] provides for a detailed description of the contents of a judge's personnel file that must be submitted for review[87] in connection with the judge's reappointment,[88] the ultimate decision-maker is not bound by any specific rules.

86. Temporary judicial appointments are disfavoured under the UN Basic Principles.[89] The difficulty with such probationary periods is that they presumably apply a lower threshold for dismissal/nonrenewal than those facing permanent judges. Terminating a judge's employment for reasons other than those clearly defined in the law and the ethics code infringes on judicial

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81 Judicial Code of the Republic of Belarus, Article 99.

82 See id. See also the Constitution of the Republic of Belarus, Article 84, and Special Rapporteur's Report, §§108-111.

83 Constitution of the Republic of Belarus, Article 84.

84 See, for example, Special Rapporteur's Report §110, "The Special Rapporteur considers that the placing of absolute discretion in the President to appoint and remove judges is not consistent with judicial independence."

85 Judicial Code of the Republic of Belarus, Article 99.

86 Resolution of the Ministry of Justice of the Republic of Belarus of 8 April 2008, On the Approval of the Regulation on the Conditions and Procedure of Consideration of Materials for the Appointment (Removal) of Judges of General Courts of the Republic of Belarus and Professional Regrading.

87 The review is conducted first by the Judiciary Qualification Commission, which then submits the file for approval by the President of the regional Executive Committee. If approved, the file is submitted to the Ministry of Justice of 8 April 2008, op. cit., §§2-4).

88 Resolution of the Ministry of Justice of the Republic of Belarus of 8 April 8 2008, op. cit., §12.

89 Principle 18 requires that judges be suspended or removed only for reasons of incapacity or behaviour that renders them unfit to discharge their duties. See also the UN Special Rapporteur on the Independence of Judges and Lawyers, who is 'concerned that the requirement of re-appointment following a probationary period runs counter to the principle of the independence of judges' (Report of the Special Rapporteur on the independence of judges and lawyers to the Eleventh Session of the Human Rights Council, A/HRC/11/41, 24 March 2009). The Venice Commission also strongly recommended "that ordinary judges be appointed permanently until retirement. Probationary periods for judges in office are problematic from the point of view of independence." See Report on the Independence of the Judicial System, Part I: The Independence of the Judges, CDL-AD (2010)004, Adopted by the Venice Commission Report at its 82nd Plenary Session (Venice, 12-13 March 2010), §38, (hereinafter "Venice Commission Report"). Belarus is an associate member of the Venice Commission, See http://www.venice.coe.int/site/dynamics/N_Members_ef.asp?L=E (accessed on 10 Aug 2011).

independence. Moreover, the loophole with respect to specific criteria governing the decision leaves a judge's career effectively at the discretion of the executive.[90] Even more, those judges who are renewed for a second five-year term remain with uncertain career prospects.

87. ODIHR sought information about the judicial tenure of each judge presiding in the subject cases. However, despite requests to the Supreme Court and the Ministry of Justice, the information was not forthcoming. In a meeting with a representative of the Supreme Court, monitors were told that the tenure of judges presiding in these cases comprised a mixture of temporary and indefinite appointments.[91]

88. **Discipline and Removal:** The Judicial Code provides the grounds under which a judge may be removed from his or her position. Most of the grounds provided, such as reaching the maximum age limit for civil service, resignation, incapacity, or death,[92] are compatible with international standards and can be found elsewhere in the OSCE region.[93] One provision, however, appears to give the President power to institute disciplinary proceedings against judges.[94] Even more, the code allows the President to impose "any disciplinary measure on any judge without instituting disciplinary proceedings"[95] (emphasis added). One of the disciplinary measures under the Belarusian law is dismissal.[96] This combination of laws provides the President *carte blanche* to remove a judge without providing due process.[97] This framework contradicts international standards of judicial independence.[98]

89. Moreover, under the law currently in force, the President can decide to remove a judge under his own initiative.[99] Notably, this provision applies to justices of the Supreme Court and the Supreme Economic Court, who may be removed by

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90 Special Rapporteur's Report, op. cit., §113.

91 Meeting with Judge Kalinkovich, Deputy Chairperson of the Supreme Court, 23 July 2011. Notes on file with ODIHR.

92 Judicial Code of the Republic of Belarus, Article 124.

93 See UN Basic Principles, 10, 11, 12, 13, and 18. See also, for example, the Irish Constitution, Article 35, the Serbian Law on Judges, Article 51 – 52, and many other legislative and Constitutional acts of OSCE participating States available at Legislationline.org.

94 Judicial Code of the Republic of Belarus, Article 115.

95 Id., Article 122.

96 Id., Article 112.

97 A similar conclusion was reached by the Special Rapporteur on the situation of human rights in Belarus E/CN.4/2206/36, §22; Special Rapporteur's Report, op. cit, §111; and the Committee Against Torture (A/56/44, §45 (f) "[The committee is concerned with the] absence of an independent judiciary, the President of the State party the sole power to appoint and dismiss most of the judges, who must also pass an initial probationary period and whose continued employment is not the subject to certain necessary safeguards."

98 See HRC communication No. 814/1998, *Pastukhov v. Belarus* and HRC General Comment CCPR/C/GC/32 (footnote 1), para. 20: concern of the HRC about dismissal of judges by the executive without specific legal and procedural safeguards.

99 Id., Article 124. The text reads, "including by joint proposal of the Minister of Justice of the Republic of Belarus and, as applies, the Chief Justice of the Supreme Court or Chief Justice of the Supreme Economic Court." The use of the word "including" suggests that this is one of the ways of initiating removal, but not the only way.

the President without consultation, and with only an obligation to notify the Council of the Republic of the National Assembly of the Republic of Belarus.[100]

90. **Evaluation**: Judges should not be evaluated under any circumstances for the content of their decisions or verdicts.[101] However, according to information available to ODIHR, judges are evaluated based on the number of judgments appealed against, reversed and modified, among other criteria, which is in contravention of this principle. Judges will be less likely to rule based solely on their view of the law if they perceive that doing so could hinder their careers.

91. **Salaries, bonuses and benefits**: As with all civil servants in Belarus, salaries, benefits and bonuses derive from the President's Administration. For the presiding judges in the trials monitored during this exercise, as with all judges of general jurisdiction courts, Belarusian law provides that their salaries are determined by the President as a percentage of the salary of the President of the Supreme Court and President of the Supreme Economic Court (the latter being set by law/parliament).[102] These amounts are set forth in an unpublished special addendum to the Presidential Ordinance.[103] Similarly, the amounts of bonuses due to a judge by virtue of his or her rank and seniority are determined by the Head of State. Financial control over the remuneration of judges serves only to weaken their independence with respect to the Presidential Administration.[104]

92. Other benefits also subject judges to the will of the executive. These include, among others, the entitlement to improve the housing conditions[105] and the

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100 Id.

101 See, inter alia, ODIHR's Kyiv Recommendations, *supra* note 70, §. 28. See also The Special Rapporteur on the Independence of Judges and Lawyers, *supra* note 89, wherein it is mentioned that appropriate structures and conditions should be put in place "in order to avoid having situations in which the overturn of judgements by higher judicial bodies includes a sanction to the lower-level judges that made those rulings, which would result in a lessening of the independence of an individual judge within the judiciary," par 50.

102 §§4-6, Article 48, The Law of the Republic of Belarus No.204-3 of June 14, 2003 "On Civil Service" (Пункты 4-6 статьи 48 Закона Республики Беларусь от 14 июня 2003 года №204-З «О государственной службе в Республике Беларусь». См. ссылку 45).

103 Ordinance of the President of the Republic of Belarus No.625 of December 4, 1997 "Concerning the improvement of remuneration of judges and the improvement of asset, technical and staffing situation of the courts of the Republic of Belarus"//Collection of Decrees and Ordinances of the President and Resolutions of the Government of the Republic of Belarus, 1997, No.34, Art.1070. No.19, Art.501//National Registry of Legal Acts of the Republic of Belarus, 2003, No.133, 1/5113 (Указ Президента Республики Беларусь от 4 декабря 1997 г. № 625 «Об упорядочении оплаты труда судей, материально-техническом и кадровом обеспечении судов Республики Беларусь»//Собрание декретов ,указов Президента и Постановлений Правительства Республики Беларусь.1997.№ 34.Ст.1070. 1998. № 19.Ст.501. Национальный реестр правовых актов Республики Беларусь, 2003 г., № 133, 1/5113).

104 See HRC General Comment 32, *supra* note 70, §19.

105 §1.11, Ordinance of the President of the Republic of Belarus No.195 of April 3, 2008 "Concerning some social and legal guarantees for military personnel, judges and prosecutors"// National Registry of Legal Acts of the Republic of Belarus, 2008.No.83, 1/9603, No.248, 1/10104 (Пункт 1.11 Указа Президента Республики Беларусь от 3 апреля 2008 года № 195 «О некоторых социально-правовых гарантиях для военнослужащих, судей и прокурорских работников»// Национальный реестр правовых актов Республики Беларусь, 2008. № 83, 1/9603. № 248, 1/10104). People who are officially registered as "in need of improving housing conditions" can get housing for half of the price as compared with the free market.

award of subsidised housing loans.[106] Because the organs of local executive power are responsible for distributing these benefits, a prime opportunity for undue influence results.

93. **Zonal Judges**: Another infringement on judicial independence emerges in the creation of a hierarchical relationship between lower judges and those at the next instance. This relationship includes, but then goes beyond, the relationship of appellate control. The "principle of zonality" includes a dimension of oversight, based upon which aspects such as a judge's evaluation and promotion take place.[107] Local courts are assigned at least two "zonal judges" from the oblast court: one for the civil chamber and one for the criminal chamber. Each zonal judge reviews the activities of the court he or she is assigned to and renders practical assistance in the application of the law to judges of that court. A hierarchical organization of the judiciary wherein lower court judges are subordinate to judges in higher instances stands in opposition to the principle that judges are subject only to the law.[108]

94. This seemingly innocuous relationship between the upper and lower courts becomes additionally problematic in independence terms when appeals lodged against decisions of that lower court are considered, as a rule, by a panel that includes the corresponding zonal judge. The zonal judge is said to act as a rapporteur on such appeals, taking the lead.[109] That role may create a conflict of interest. Where the zonal judge has advised a lower court judge on a case or a particular category of cases, it would be difficult for that same zonal judge then to argue for overturning the judgement on appeal.[110] The same goes for the trial level judge. He or she will be highly motivated to follow the orientation

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106 Section 3, subpara. 1.10, §1, Ordinance of the President of the Republic of Belarus No. 185 of April 14, "Concerning the extension to citizens of subsidized loans for the construction (reconstruction) or purchase of housing"// National Registry of Legal Acts of the Republic of Belarus, 2000, No.38 1/1172; 2001. No. 100, 1/3137; 2004, No. 37, 1/5373; 2005. No. 2, 1/6115; 2007, No. 223, 1/8874, 2008 No.29, 1/9411, No. 83, 1/9603, No. 133, 1/9730, No 172, 1/9873, No. 248, 1/10104**,** 2009, No. 70, 1/10539 (Часть 3 подпункта 1.10 пункта 1 Указа Президента Республики Беларусь от 14 апреля 2000 года № 185 «О предоставлении гражданам льготных кредитов на строительство (реконструкцию) или приобретение жилых помещений**»//** Национальный реестр правовых актов Республики Беларусь, 2000. № 38, 1/1172; 2001. № 100, 1/3137; 2004 г., № 37, 1/5373; 2005. № 2, 1/6115; 2007.№ 223, 1/8874.2008.№29, 1/9411.№ 83, 1/9603, № 133, 1/9730 № 172, 1/9873. № 248, 1/10104 **.** 2009.№ 70, 1/10539).

107 This principle is discussed in detail in: Дубровин Е.В.Отчет и рекомендации национального эксперта проекта//Проект «Содействие более широкому применению международных стандартов в области прав человека в процессе отправления правосудия в Республике Беларусь».Конференция «Эффективное функционирование судебной системы».30 марта 2009 года,Минск,2009.С.9-11 (E.V. Dubrovin, Report and recommendations of the Project national expert//Project "Promotion of a wider application of international human rights standards in the administration of justice in Belarus". Conference on the "Effective functioning of the judiciary", 30 March 2009, Minsk, p.9-11).

108 See *Kyiv Recommendations*, *supra* note 70, §35. See also the Venice Commission on Democracy through Law, Report on the Independence of the Judicial Systems, Part I: The Independence of Judges, CDL-AD(2010)004, §68 (Venice Commission Report).

109 Теоретические основы эффективности правосудия.Петрухин И.Л.,Батуров Г.П.,Морщакова Т.Г.М., «Наука»,1979. С. 221 (Theoretical basics of the effectiveness of justice, I.L.Petrukhin, G.P.Baturov, T.G. Morshchakova, M.,"Nauka", 1979, p.221).

110 That is, assuming the zonal judge's advice was followed. The converse is presumably true where the zonal judge's advice was not followed.

of the zonal judge, knowing that any appeal will be ruled upon by that zonal judge.[111] Moreover, with the number of cases overruled on appeal being considered in a judge's evaluation, the principle of zonality is, in ODIHR's view, prejudicial to judicial independence.

95. **Case Assignment**: Criminal cases are assigned to specific judges by the chairperson of the court.[112] The chairperson has latitude to distribute cases based upon such considerations as a judge's workload, experience and expertise. However, unless there is in place a default to a randomized system of case assignment, the existing mechanism opens the door to abuse. European practice favours randomized case assignment.[113]

Improper Interference with Judicial Independence

96. In the trials monitored during this exercise, the executive branch was present in the day-to-day operations of the court. Monitors observed that persons in Special Forces uniforms (camouflage, "SpetsNaz") appeared frequently in the hallways. Their role was not clear, although they may have been helping the regular court officers ensure security. They also appeared to be involved in the taping of the proceedings. One SpetsNaz officer in camouflage uniform was seen entering the room immediately behind the judge's bench during a break in the trial. He did not exit during the remainder of that day's hearings.

97. The procedures for security in the courthouses varied from one location to another, although monitors made note of a number of unusual but consistent practices. As has become increasingly common at courthouses everywhere, visitors often must pass through an airport-style security check. At these trials the public participants had their person and their belongings searched. Differently from such practice elsewhere, entrants also had to produce an identity document and their names were noted down. In all trials, plain-clothes personnel bearing no identification did this recording of names. In the monitors' assessment, in some instances they did not appear to be regular staff of the judiciary.

98. At some trials each member of the public was filmed as s/he entered the courtroom. The filming took place while the entrant was subject to a second search. The filming of each entrant was done only with regard to trials concerning the 19 of December and not at any of the other trials ongoing in the various courthouses.

99. The monitors were generally among the first to enter the courtroom. In many instances, inside each courtroom a number of operatives were already present before anyone from the public entered. Consistently unmistakable in appearance, the men were distributed at various locations around the inside of the room, thereby raising concerns that they were assigned to listen in on and watch other trial attendees. How these measures contributed to courtroom

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111 Стецовский Ю.И.Судебная власть.М., «Дело»,1999.С.68 (Y.I. Stetsovskiy, The Judicial Power, M., "Delo", 1999, p.68).

112 Art. 32 of the Code on Judicial System and Status of Judges.

113 Venice Commission Report, op. cit., § 74. See also Kyiv Recommendations, para. 12, "case assignment . . . should be either random or on the basis of predetermined, clear and objective criteria determined by a board of judges of the court. Once adopted, a distribution mechanism may not be interfered with."

security, if at all, is beyond the scope of this report. However, the overt presence of this executive branch force inserting itself into judicial matters can be viewed as intimidation, if not outright interference.

100. Another indicator of the relationship between judges and security personnel is the interaction with the regular courthouse guards. Clearly identifiable in uniform and numbering from 4-8 people per trial, the courtroom security staff patrolled the public areas as well as the front of the courtroom guarding the defendants in the cage. Their task vis-à-vis the public was to ensure that the rules of decorum were strictly followed. At one point in a trial, a guard admonished the judge herself in front of everyone, telling her to "remind the audience about the rules!"[114] The judge duly complied. While courtroom security incidents are to be handled by these guards, it is the judge, and not the guard, who is responsible for maintaining decorum and for rendering decisions thereto. Any usurping of this role by security guards is an infringement upon judicial independence.

Impartiality – Statistics and Figures

101. A third area of concern with respect to judicial impartiality relates to the decisions taken by individual judges. The monitors observed that both parties regularly moved the court to, for example, include certain witnesses or evidence, to accept or reject a piece of evidence, to alter the measures of restraint, to take a break, or to change the course of the procedure, among others. Monitoring teams recorded the results of motions and objections by the prosecution and the defence. A few notable patterns emerged:

- The total number of rulings on motions and objections in all trials that went against the position of the defence was 117.[115]
- The number of rulings that went against the position of the prosecution was 14.[116]
- Only two prosecution motions to proffer evidence in all of the trials were denied.[117]
- All motions by the defence challenging prosecutorial evidence (for example wiretaps or internet-based video materials) were denied.
- The converse was not true: when the prosecutor opposed a piece of evidence proffered by the defence, the evidence was usually rejected by the court (for example photos of Nezavisimosti/Nezalezhnasti Square taken after

114 Sannikau trial, April 29 2011, afternoon session.

115 To make this calculation, the monitors added a) the numbers of defence motions rejected, with b) the number of prosecution motions granted over a defence objection.

116 To make this calculation, the monitors added a) the numbers of prosecution motions/proposals rejected, with b) the number of defence motions/proposals granted over a prosecution objection. As a typical example, in the Nyaklyaeu case, the Prosecution proposed that the remainder of a video not been seen as it was, in his view, irrelevant to the charges. When the defence objected, seeking to play the entire video in order to show the context in which the allegedly incriminating parts had taken place, the judge ruled in favour of the defence and the full video was shown.

117 The only prosecution evidence that was denied came in the Nyaklyaeu case where two prosecution witnesses – who were defendants in another case - were brought to the courtroom to testify. They were allowed to depart without testifying when the witnesses managed to invoke their right against self-incrimination. They had not been fully informed of this right, but defence counsel pressed the point and eventually the prosecution's proffer was denied.

the event).[118]

- No witness that the prosecution sought to hear was ever denied. Conversely, several witnesses proffered by the defence were denied, especially when opposed by the prosecution.

102. Of course these figures and patterns are not conclusive of bias; there may well have been solid legal grounds for each of the rulings. Still, to a neutral observer, in light of the stark contrasts, the figures raise questions.

103. Yet another form of prosecutorial bias appeared in the rulings on relevant and irrelevant evidence. The prosecution was permitted to include a vast quantity of what should have been considered irrelevant evidence. For example, the court heard the number of times the candidates crossed the border, their property ownership records, their administrative court records, their traffic/driver's records, their medical history, their bank accounts, the contents of their offices, computers, apartments – even the contents of envelopes and files on their desks. These materials were entered into the file and were often read out in court, yet without a showing of relevance, they will have had little bearing on the guilt or innocence of the defendant.

104. The same tolerance was not always shown to evidence from the defence. For example, when the defence attempted to secure evidence of the security forces hierarchy (names of commanders directing the actions of police on the scene), or the fact that former candidate Nyaklyaeu was involved in an altercation on his way to the square,[119] these approaches were ruled irrelevant. It may well be that the defence requests were irrelevant. However, if the judge is to be impartial, rulings on relevant evidence must be applied consistently.[120]

105. Also indicative of bias is the manner in which judges interacted with others in the courtroom. For example, the monitoring teams observed that frequently judges put additional questions to witnesses and victims which tended to support the prosecutor's theory of the case or to undermine that of the defence.

Example: Questions asked by the judge of defendant Sakret during the Loban et al. trial

Why do you think militia appeared on the ground? Do you think this place is a good one to commit acts of hooliganism? Did you perpetrate hooliganism? These actions of hooliganism manifest themselves and you know it exactly. You knew where you were and broke windows. Did you understand that if

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118 In delivering its rulings on motions and proposals, the courts substantiated them less than half of the time. Even when judges retired to deliberate on a significant motion, upon return only the result was read out, but not the reasoning.

119 Sannikau trial, 12 May 2011, afternoon session.

120 The topic of relevant and irrelevant evidence is revisited in Chapter 8 on the Right to Examine Opposing Witnesses and Evidence.

the event was unsanctioned what the consequences could be and who is behind the event?[121]

Consistencies and Inconsistencies in Sentencing

106. Another pattern that emerged as a potential indicator of prosecutorial bias within the judiciary was in sentencing. As the table in Annex One reveals, a pattern emerged whereby in nearly every case, the judge sentenced the defendant to exactly what the prosecutor requested when he requested the minimum, or roughly 75% of what was requested if he requested more than the minimum.[122]

107. Monitors also observed an inexplicable inconsistency in the actual sentences delivered. On one side, the judges gave sentences that fell below the statutory minimum. For example all three of the following were found guilty of participating in mass riots under Article 293: Myadvedz (3 years of restricted freedom), Russian citizens Breus and Gaponov (monetary fines) and Pazniak (2-years suspended sentence). On the other hand, also convicted under Article 293 for essentially the same *acteus reus*, Mirzayanau, Kirkevich and several others received three and a half to four years in the heavy prison regime. Information available to ODIHR could not explain the wide sentencing discrepancies other than those sentences were what the prosecution had requested.

108. Some examples of prosecutorial bias observed in the trials:
    - At an appellate hearing for one of the presidential candidates, while the defence counsel was reading out their remarks, one of the judges looked at the prosecutor and rolled her eyes;[123]
    - At trial, whenever judges left the courtroom in order to deliberate on a motion, the prosecutor nearly always left as well through the same door. The prosecutor would return to the courtroom immediately before the judges. Defence counsel, on the other hand, always stayed behind in the courtroom;[124]
    - In many of the observed trials, the prosecutor sat closer to the judge than did the court secretary;
    - The monitoring team noted that the court secretary in a case spoke to the prosecutor in the 'informal,' and used his first name. The same informality was not noted in relations with the defence counsel.

Appellate proceedings

109. Monitors observed that the appeals process appeared entirely perfunctory. Monitors had no access to the written submissions of the parties. However, based on observations of the oral arguments presented at the hearing, there appeared little reason to hold such an event. In their oral presentations,

121 Loban et.al. trial, 5 May 2011, morning session.

122 Without access to the verdicts, these patterns cannot be further analysed.

123 Sannikau appeal, 15 July 2011.

124 This was not the case during appeals, where all the parties remained in the courtroom.

defence counsel made a number of legal and factual points – often counsel appeared to raise an entire "shopping list" of issues. However, there was no engagement by the panel of judges. They posed no questions, took no notes, and appeared at times not even to be listening. Neither did the prosecutor in his remarks attempt to address the points raised by the defence. All prosecutors read from a previously prepared statement (as did most defence counsel). After each side read their piece, the judges retired for approximately one half hour.[125] Upon their return, they stated simply that the judgement would not be altered.

D. Conclusions and Recommendations

110. The monitoring revealed that in a number of instances the justice system operated in such a way as to leave its impartiality open to doubt. In light of the structural influence on the judiciary that is retained by the executive branch in the person of the Head of State and the Presidential Administration, it is comprehensible why judges would be reticent to rule against the administration. The pervasive influence of the executive's police powers was apparent to all courthouse personnel, legal professionals, and the public at large in the unavoidable presence of operatives both inside and outside the courthouse, and in the courtrooms themselves. While not conclusive of this point, the figures and patterns presented in this chapter indicate that the prosecution was heavily favoured by in-court rulings, a feature shared by justice systems of a number of OSCE participating States.[126] This holds *a fortiori* in cases such as these where the criminal acts apparently had political undertones.

Recommendations:

- To reform and improve the system of judicial self-governance with a view to freeing it from executive/Presidential decision-making on issues such as discipline or benefits and bonuses by establishing an independent judicial council for selection, promotion and disciplining of judges; in particular eliminate the power allowing the President to impose any disciplinary measure on any judge without instituting disciplinary proceedings.

- To reform the judicial appointment system, eliminating the executive's role until the final stage; at a minimum institute a selection mechanism that gives the primary role to an authority independent of the executive and legislative powers within which a substantial number of those who sit are judges elected by their peers.

- To refrain from the practice of temporary judicial appointments which may be prone to abuses and strengthen the lifetime tenure model for judges; allow public,

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125 The time for deliberation was largely the same in each of the ten cases irrespective of the number of defendants or counsel. This fact suggests either that the actual deliberation takes place prior to the oral hearing, or that the judges during deliberation do not discuss each specific point raised by counsel – whether in their written or oral proceedings.

126 ODIHR *Kyiv Recommendations*, op. cit., at Number 34, "The prosecutorial bias of justice systems in most countries of Eastern Europe, South Caucasus and Central Asia requires remedies."

transparent and directly accessible competition rather than through court chairs and executive authorities; make all decisions on judicial appointments public.

- To allocate cases to individual judges based to the maximum extent possible on objective and transparent criteria established in advance by the law or by special regulations on the basis of the law, e.g. in court regulations. Exceptions should be justified.

- To institute training for judges to eliminate the practices that lead to a perception of prosecutorial bias.

- To consider placing the responsibility for courthouse security squarely within the hierarchy of the judiciary.

- To re-assess the system of zonality (oversight by zonal judges), and consider prohibiting a zonal judge from acting as reporter, or otherwise participating in an appeal, in cases in which s/he was involved in trial level oversight.

- To revise the practice of holding perfunctory appellate hearings. Judges should be prepared to engage with both parties, focusing on material legal and factual issues which could potentially alter the judgment. The appeal judgement need not be delivered immediately after the oral hearing to allow the judges sufficient time to consider in depth the matters raised.

CHAPTER 3: EQUALITY OF ARMS

111. As a fundamental fair trial right, "equality of arms" is grounded in a conception of fairness. It requires that both parties be in an equal legal position throughout the proceedings, meaning that they are entitled to equal treatment before the court and they have the same legal and procedural tools available to them, both in law and in practice.

112. A number of OSCE participating States, including Belarus, have reformed their justice systems to move away from a pure "inquisitorial" system towards one that retains features of both the inquisitorial and the "adversarial" systems.[127] Observing this mixed system in practice, the monitors noted that the prosecution enjoys a number of legal and procedural powers that are not available to the defence, or at least not in the same manner. The question in terms of fair trial rights is whether these structural differences translate into an advantage. The statistics from Belarus' Supreme Court indicate that, in any given year, the country's prosecutors are normally successful in 95 percent of the cases.[128] In the monitored trials, the prosecutors were 100 percent successful. Whether disparities in the "arms" available to each side during the proceedings had an unfair impact in these results is the subject of the analysis that follows.

A. International Standards

113. The UN Human Rights Committee has stated that a fair hearing requires a number of conditions, including equality of arms, respect for the principle of adversarial proceedings and expeditious procedure.[129] Distinctions may be made in specific areas; however, they must be based in law and justified on

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127 Both "inquisitorial" and "adversarial" judicial systems vary significantly, but the differences tend to centre on the conduct of the investigation and the role of the judge. Inquisitorial systems operate with a judicial officer responsible for conducting criminal investigations. Their role is to be impartial and ensure that both inculpatory and exculpatory evidence is collected. At trial, judges in inquisitorial systems tend to participate actively in unearthing the facts and frequently take the lead in questioning witnesses. Adversarial systems, on the other hand, place the onus for investigation on the prosecutor and others aligned with the executive branch of government. At trial, the prosecution presents the case by leading the presentation of evidence. The judge acts in the role of arbiter on legal procedural matters. In systems where there is no jury, the judge also acts as adjudicator and ultimately renders the verdict as to whether the prosecutor has succeeded in proving the case to the standard required by law – generally "beyond a reasonable doubt." For more on the distinction, see, Peter J. Van Koppen and Steven D. Penrod, 'Adversarial Versus Inquisitorial Justice', 17 *Perspectives in Law & Psychology* (2003), 1-19.

128 Statistics posted on the Supreme Court's website indicated that in 2010, for example, 57,823 criminal cases passed through the court system, in which 61,054 people were found guilty and 217 people were acquitted – a conviction rate of 99.6 percent. However, when the calculation includes cases that are stopped prior to the end of trial, or which are overturned on appeal, the final conviction rate appears to be 95 percent. See table at Annex Two for rates covering additional years in Belarus and a comparison of conviction rates in Belarus with those of Armenia, Germany, Kazakhstan, and the Russian Federation.

129 See UN HRC, *Morael v. France*, UN Doc., Supp. No. 40 (A/44/40) at 210 (1989), 28 July 1989, §9.3.

objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.[130] The international consensus is that each party must be reasonably empowered to present its case on an equal footing vis-à-vis its opponent.

114. In criminal trials, where the prosecution is supported by state structures and resources, the principle of equality of arms is an essential guarantee. It encompasses the right to have knowledge of and comment on all evidence adduced or observations filed. It also ensures that the defence has adequate opportunity and facilities to prepare and present its case on a footing equal to that of the prosecution. Further, the combination of these rights imposes an obligation on prosecuting and investigating authorities to disclose any material in their possession, for or against the accused.[131] International courts have amply invoked this principle,[132] and it extends to material that may undermine the credibility of a prosecution witness.

115. The principle of equality of arms has as its important corollary the requirement that the parties be afforded equal opportunities to summon witnesses. This requirement finds its legal basis in Article 14(3) (e) of the ICCPR, wherein everyone charged with a criminal offence may avail of the right of "[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."[133] The right stands as an essential safeguard against the admission of biased evidence.

B. National Legislation

116. The principle of equality in court proceedings in Belarus is set out in the Constitution, "*All shall be equal before the law and entitled without discrimination to equal protection of their rights and legitimate interests*."[134] However, 'equality of arms' is less about inequality emerging from prejudice or discrimination, and concerns more the legal and procedural tools available to both sides at trial. As such, the CPC provides that criminal proceedings shall be

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130 UN HRC, General Comment No. 32, *supra* note 70, §13; see also *Dudko v. Australia*, UN Doc CCPR/C/90/D/1347/2005, 29 August 2007, §7.4.

131 Id. §33, "[T]his access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence (e.g. indications that a confession was not voluntary)." (emphasis added) (footnotes omitted).

132 The International Criminal Court held that "[t]he disclosure of exculpatory evidence in the possession of the prosecution is a fundamental aspect of the accused's right to a fair trial." No.: ICC-01/04-01/06, Situation in the Democratic Republic of the Congo in the Case of the *Prosecutor v Thomas Lubanga Dyilo*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008. Also, in *Orić* the Trial Chamber of the ICTY observed that "The jurisprudence of the Tribunal is clear that, in pursuit of justice, the disclosure of Rule 68 [exculpatory] Material to the Defence is of paramount importance to ensure the fairness of proceedings before this Tribunal." (ICTY, Trial Chamber, The *Prosecutor v Orić*, IT-03-68-T, Decision on ongoing complaints about prosecutorial non-compliance with Rule 68 of the Rules, 13 December 2005, §20).

133 Article 14(3)(e) ICCPR.

134 Constitution of the Republic of Belarus, Article 22

adversarial and shall be conducted based on the principle of equality of arms.[135] The CPC specifically stipulates that "parties to the proceedings shall enjoy equal rights to present and review evidence, to file motions, to state opinions on any issues relevant to the criminal case, [and] to present closing arguments."[136] The law further allows both the prosecution and defence to collect and produce evidence, declare challenges and objections to the evidence produced by the other, file motions, and otherwise participate in the court's investigation of the case file during trial.[137] Yet by enumerating the instances where equality is ensured, the law implies that in other areas they may remain unequal.

117. As in many jurisdictions, the prosecution has an additional burden with respect to gathering evidence, which is to "collect both inculpatory and exculpatory evidence."[138] However, in a departure from strict equality, the CPC entitles the prosecution as well as the court, but not the defence, upon a party's motion or by its own initiative, to conduct interrogations and perform searches and seizures.[139]

118. To prepare the defence, attorneys are expressly entitled to review the case file that was compiled by the prosecutor against their client and copy any information contained therein.[140] In addition, the defence may question any individuals in connection with the case and may also solicit the opinions of "specialists".[141] Further, defence counsel may comment on the "truthfulness and completeness of protocol records."[142]

119. Under the CPC, unlawful acts and decisions of the "body conducting the criminal proceedings" may be appealed, however, not directly to a court. The appeal, rather, is submitted to the prosecutor.[143] The only safeguard against bias in such cases is a prohibition on review of that appeal by the same prosecutor who issued or approved the impugned decision.[144]

120. Both the prosecution and defence are entitled by the CPC to present closing arguments;[145] the prosecution is always the first to speak.[146] Neither party may be limited with regard to the closing argument duration; however, the court is permitted to interrupt the speaker should s/he stray into areas

135 CPC, Article 24.

136 Id., Article 24(4).

137 Id., Article 34(6) and Article 48(1)(8,9, 12, 18); see also Article 135.

138 Id., Article 18(1).

139 Id., Article 103(2).

140 Id., Article 48(1)(5).

141 Id., Article 103(3). So long as the defence is willing to pay for it. However, if the defence wants a specialist or expert to be provided by the state, then they must ask the prosecutor first.

142 Id., Article 48(1)(7).

143 Id., Article 139(1).

144 Id., Article 140(2).

145 Id., Article 345.

146 Id., Article 345(1).

irrelevant to the case.[147] Both the prosecution and defence have the right of response to the other party's closing argument; the last one to respond always being the defence.[148]

121. The so-called "oversight" (last instance) proceedings at the appellate level are held *in camera* without the presence of either the defendant or the counsel.[149] The prosecuting party is, however, represented at the hearing by operation of law.[150] Defence counsel may be invited "as need be." [151]

122. Despite its declaration that the principle of equality of arms is guaranteed in the Belarusian law, the provisions of the CPC provide greater powers to the prosecutor than the defence. Unless these differences are "justified on objective and reasonable grounds," and do not entail "actual disadvantage or other unfairness to the defendant" they run counter to applicable international standards mentioned above. The law also requires the prosecutor to search for exculpatory evidence but it does not specifically require the prosecutor to share all such exculpatory evidence with the defence. Contrary to ICCPR Article 14(3)(b), the prosecutor in Belarus is obliged to share only that material he chooses to include in the case file.[152]

C. Findings and Analysis

123. Many of the monitored cases revealed shortcomings with regard to a genuine procedural equality between prosecution and defence. The shortcomings were felt in the opportunities provided to counsel in presenting their case. These issues are addressed in the respective sections below. Although it is also an equality of arms concern, a separate Chapter is devoted to the reliance on written testimonies of prosecution witnesses and the compatibility of this practice with the principle of adversarial proceedings.[153]

Expertise

124. The CPC treats the prosecution and the defence differently with respect to expert reports. This imbalance is especially apparent at the preliminary investigation stage; it improves as the case goes to court. Whereas both a judge and a prosecutor can order an expert study on their own accord, no such right exists for the defence.[154] While the defence is entitled to solicit so-called "specialists" to provide comments in areas where specialist knowledge is helpful, these specialist reports do not have the weight of an expert study. It is true that when a prosecutor or investigating officer orders an expertise to be undertaken, a defence attorney can submit a request concerning details of the expertise (for example, they can object to the choice of expert or the scope of issues for the study), but that option is available only once a decision to

147 Id., Article 345(3).

148 Id., Article 345(4).

149 Id., Article 411(3).

150 Id., Article 411(2).

151 Id., Article 411(3).

152 UN HRC, General Comment No. 32, *supra* note 70, §33).

153 See also Chapter 8 on the Right to Examine Opposing Witnesses and Evidence.

154 CPC Article 103(2).

conduct an expert study has been made.[155] The defence may submit a motion to the court for conducting expertise,[156] but this is not the same as a prosecutor who can initiate the study by him or herself (ie, *proprio motu*). The same holds true for witnesses that the defence deems important. While defence counsel may attempt to speak with whomever they wish, if the person refuses and the defence want to compel the testimony, it must first ask the opposing side – the prosecutor – rather than a judge.

125. Defence lawyers should not be compelled to seek the permission of their opponent in the proceedings in order to garner evidence. The noted ICCPR principle guarantees everyone the right "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."[157]

Evidence Submitted by the Parties

126. Another equality of arms concern appears during the presentation of evidence at trial. According to the CPC, a judge is to act as gatekeeper for the requests from defence counsel to submit evidence and procure witnesses. In law and in practice, such defence submissions should be deemed relevant and sufficiently probative of some material fact to be accepted into the case file.[158] Ostensibly the same filter of importance and/or relevance should operate for prosecution expertise or witnesses. In practice, however, all prosecution materials and all prosecution witness statements were included in the original file that was transmitted to the court. To the extent there is any filter as to the relevance of these materials, it occurs only after the judge has been exposed to the entirety of its content. Thus, the judge views all of the prosecution material - whether relevant or not - but only views defence material that has been ruled to be relevant at the moment of submission. This structural imbalance can have repercussions when viewed in light of the (quantity of) irrelevant information admitted during trial, some of which may be prejudicial to a defendant.[159]

Video materials

127. Another important area with an impact on the 'equality of arms' concerned the use of video evidence. In every trial, the court relied heavily on video evidence in spite of a number of difficulties with its presentation, both technically and legally:

- The video evidence was not time stamped. Some of the clips had the 'run time' (i.e., how long it played from the start of the film), but not the actual time of day at which the filming occurred.
- The presented videos were frequently a montage of several clips filmed by (presumably) different people throughout the course of the evening of the

155 CPC Article 229.

156 CPC Article 103(2).

157 ICCPR, Article 14(3)(e) (emphasis added).

158 CPC Article 105.

159 See §103 above for an example of irrelevant evidence in the case file that was read out during one trial.

19 December. While there is no (credible) allegation that any of the film presented was fake, the fact of mixing several clips made it difficult to determine the sequence of events. For example, a clip might show a presidential candidate speaking to the assembly on Oktyabrskaya/ Kastrychnitskaya Square with the subsequent clip showing the individuals at the House of Government breaking windows – thus creating the incorrect impression that the two events were closely connected in both time and space.[160]

- There did not appear to be a description of the manner in which the films had been edited, by whom, and why.

128. In most trials, and again upon appeal, the defence submitted motions to exclude the video evidence on the basis of the above-stated concerns; however, these motions were summarily rejected.

129. Monitors also noted that the defence was allowed to see only the video evidence that was presented at the trial of their client. There were requests and motions made during some trials as to whether more video was available than that which was shown, however, these motions were also consistently declined.[161]

130. Other concerns in this vein include:
    - The defence were apparently supplied with the transcript of each video. On several occasions monitoring teams noted defence complaints that the transcript provided did not match what was shown during court on the video.[162] Although such gaps did not appear purposeful, the fact that only the defence was disadvantaged by such gaps, meant this manner of evidence presentation had a negative impact on the equality of arms.

    - In at least one trial, the video was stopped when the relevant parts – whether in favour of the prosecution or the defence – appeared, and the parties were allowed to comment on what they saw.[163] This was, however, the exception. In most cases, the video played from start to finish, and the parties were allowed to comment only at the end. In some instances this meant viewing an hour of video without pause and only at the end the parties could debate about what was said, by whom, to whom, and where that person was at that moment. At times, the judge would allow a video to be replayed as the parties searched for the relevant clip, but without the time stamp, such efforts often resulted in significant time lost. Having had access to all the video materials for as long as needed, this situation played to the prosecution's favour. The prosecution was able to review the entire collection of video, watch it repeatedly, perhaps in slow motion or stopping

160 See for example Sannikau trial, video evidence presented on 4 May 2011, morning session. Statkevich trial, 14 May 2011, afternoon session.

161 See for example, Bondarenko, Statkevich and Lihavid trial reports, on file with ODIHR.

162 For example, see Statkevich trial, 14 May 2011, morning session - video of the interrogation of defendant Klaskouski.

163 Myadvedz trial, 10 March 2011, afternoon session.

as needed, and selecting the most pertinent parts to include in the montage for their case. Defence complaints during trial on this point went unaddressed.[164]

Prosecutorial Obligation to Uncover Exculpatory Evidence

131. As described above, according to Belarusian law the prosecution has an obligation to present both inculpatory evidence, as well as that which is exculpatory. Given the extensive amount of evidence collected – in some cases eight volumes of materials – and lack of access to it, it is impossible for ODIHR to assess the extent to which this obligation was fulfilled. However, the monitors did note one particular instance where the obligation was apparently not fulfilled:

Example from the Statkevich trial - Questions asked by the judge:

Several hours of video were presented. At a point far into a particular clip, the video shows a person approaching those demonstrators who are perpetrating violence against the House of Government. The person is heard to say, among other things, "Sannikau says to stop this, back away." This specific clip was not shown at the Sannikau trial, where it clearly would have been important evidence. In fact, during the Sannikau trial, after a clip showing former candidate Rymaushevski doing exactly that same thing, the judge turned to Mr. Sannikau and asked him, "Did you try to stop this and if not, why not?"

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132. Given that this point appeared of particular interest for the judge, clearly the evidence where one of Sannikau's representatives was in fact trying to stop the crowd's violent behaviour, would have been relevant. The exculpatory clip should have been played during Sannikau's trial.

Multiple Defendants in One Trial

133. In more than half of the cases, multiple defendants were tried together. "Joinder" of defendants is not unusual. However, it raises certain fair trial concerns related to the number of defence counsel and their opportunity to present their case.

134. Appearing at trial one-on-one with the prosecutor implies a level of equality; defence attorneys in cases with multiple accused, however, face a markedly different reality. Putting several defendants on trial together in these cases meant that five, six, and in two instances, seven defence counsel and their clients were all participating in the trial simultaneously. In these instances,

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[164] It must be mentioned in this regard that very few defence counsel complained about a lack of time to prepare their case. But it must also be mentioned that defence counsel were reticent to complain about anything at all, a circumstance undoubtedly linked to the reasons set out in Chapter 6 below.

there was scarcely room for counsel to manoeuvre, crowded as they were onto the defence table.

135. The dynamic created in merger-of-defendants trials was one in which the defence counsel appeared to be at a practical disadvantage. With seven attorneys questioning the same witnesses, making motions and objections, presenting evidence, and giving opening and closing arguments, it is far easier for any individual point to be lost. In the closing hours of the Statkevich trial, for example, every defendant and every lawyer made a speech. It was extremely difficult by the end of that process to keep separate which arguments were made by which person related to which defendant. Concerns with multiple defendants were also felt when different defendants tried to present a different theory of the case, or when a particular line of questioning by one lawyer may have been helpful to his defendant, but harmful to another. This situation was replayed at the appeal when several lawyers made statements in succession and none of the judges or the prosecutor took any notes from the myriad legal and factual points made by the defence.

D. Conclusions and Recommendations

136. The results of the monitoring allow the conclusion that the principle of equality of arms was undermined. In these cases, the prosecution was at a decided advantage when it came to the use of video evidence. Legal divisions between the prosecutor and defence meant the prosecutor, rather than the judge, acted as a gatekeeper to defence's use of experts, searches and compelled testimony. The fact that a prosecutor can order a search or seizure – with no judicial control – also places the prosecutor at an advantage. Added to the fact that the judge reads the entire prosecution case prior to the start of trial – a point which is examined in more detail in Chapter 4 below – means that defence submissions of evidence during trial will always be subject to more scrutiny than those of the prosecution. Structural changes are warranted in Belarus if both sides in a criminal trial are to be equal before the law.

Recommendations:

- To review and amend the relevant provisions of the CPC to equalize the parties' procedural powers, including, but not limited to, stripping the prosecutor of the right to order an expert assessment *proprio motu* and instead, placing the decision on whether expertise is needed in the hands of the court; allowing defence the same right of access to expert studies as enjoyed by prosecution.

- To review and amend the CPC to ensure that the prosecution must deliver all exculpatory evidence in its possession – not only that which will be included in the file - to the defence, with clearly and narrowly defined exceptions (matters of state security, witness protection, etc.). Judges should oversee the redaction of sensitive material and ensure that the remainder is delivered to the defence.

- To review and amend the CPC to ensure that the filter of relevance and probative value with regard to witnesses and evidence is applied without bias.

CHAPTER 4: THE PRESUMPTION OF INNOCENCE

137. The right to be presumed innocent until proven guilty holds an eminent place among fundamental fair trial rights. It demands that those involved in adjudication as well as those in positions of influence engage with the accused not simply from a position of neutrality, but from a position that affords the accused treatment as if he or she were innocent. It demands as well that where multiple interpretations are equally plausible, or where there is doubt as to the correct application of a law or precept, resolution is made in the favour of the accused. The principle applies throughout the criminal justice process, from the stage of criminal investigation through to entry into force of the judgment.

138. ODIHR observed compliance with this principle primarily in the courtroom setting. The task of the monitors was not to evaluate whether the prosecution succeeded to prove beyond a reasonable doubt that the accused were guilty as charged. Such an assessment would have required a substantive review of the evidence as well as access to court verdicts. The former is beyond the scope of this report while the authorities did not grant the latter. Significant concerns over the right to the presumption of innocence in these trials emerged during the monitoring.

A. International Standards

139. The key international human rights instruments, including the UDHR[165] and the ICCPR,[166] enshrine the right of the accused to be presumed innocent until proven guilty in accordance with the law. The 1990 Copenhagen Document of the OSCE includes the presumption of innocence among "*those elements of justice which are essential to the full expression of the inherent dignity of all human beings*."[167] In this vein, it calls for "clarity and precision" in the charges confronting an accused as a necessary element.[168]

140. The UN Human Rights Committee stated the following with respect to the presumption of innocence in the context of the ICCPR:

> *According to article 14, paragraph 2 everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that*

165 UDHR, Article 11(1).

166 ICCPR, Article 14(2).

167 1990 Copenhagen Document, §5.19.

168 Id. at §5.18.

> *persons accused of a criminal act must be treated in accordance with this principle.*
>
> *It is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused. Defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals. The media should avoid news coverage undermining the presumption of innocence.*[169]

141. The HRC thus clarified that the presumption of innocence not only applies to the judiciary and to the conduct of proceedings within court, but also requires other public authorities and state-sponsored media to refrain from prejudging the outcome of a trial. In *Gridin v Russian Federation*, where public statements given wide media coverage were made by high-ranking law enforcement officials portraying the author as guilty, the HRC found a violation of the presumption of innocence.[170] In *Marinich v Belarus*, the Committee also found a violation of the presumption of innocence in circumstances where episodes of the author's interrogation were broadcast in the state-controlled Belarusian TV accompanied by false and degrading comments about the author suggesting that he was guilty.[171]

B. National Legislation

142. The Constitution of the Republic of Belarus does not expressly guarantee the right to be presumed innocent. The closest provision is in Article 26: "*No one may be found guilty of a crime unless their guilt is proven under the procedure specified in law and established by the verdict of a court of law. . . A defendant shall not be required to prove his innocence*."[172]

143. Nevertheless, an express guarantee of the presumption of innocence is found in the CPC where the accused "*shall be considered innocent until his or her guilt has been proved pursuant to the procedure established by this Code and confirmed by a convicting court judgment in force*."[173] The Code prohibits placing the burden of proof on the defendant,[174] entitles the defendant to the benefit of the doubt,[175] and requires that a convicting judgment be based on

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169 UN HRC General Comment No. 32, *supra* note 70, §30.

170 UN HRC, *Gridin v Russian Federation*, Communication 770/1997, UN Doc CCPR/C/69/D/770/1997 (2000), §8.3. See also *Mwamba v Zambia*, Communication 1520/2006, UN Doc CCPR/C/98/D/1520/2006 (2010), §6.5; and *Kulov v Kyrgyzstan*, Communication 1369/2005, UN Doc CCPR/C//99/D/1369/2005 (2010), §8.7.

171 UN HRC, *Marinich v Belarus*, Communication 1502/2006, UN Doc CCPR/C/99/D/1502/2006 (2010), §10.6.

172 Belarus Constitution, Article 26. Unofficial translation by ODIHR.

173 CCP, Article 16(1).

174 Id., Article 16(2).

175 Id., Article 16(3).

the totality of evidence supporting the defendant's guilt.[176] Convictions may not be based on assumption.[177]

144. Belarusian law allows the introduction into evidence of "factors characterizing the defendant's personality."[178] This character evidence, although adduced during trial, is not to be employed by the judge in the determination of guilt or innocence,[179] but rather is to be taken into account at sentencing - along with other mitigating and aggravating circumstances. The inventory of aggravating circumstances under the Criminal Code, which also are admitted during trial, includes the defendant's prior criminal record.[180]

145. Concerning restraint measures during trial, the law authorizes the use of restraints where the defendant engages in disobedience or resistance, or else poses a risk of flight or danger but only where other means of control are impractical.[181] The law does not, however, expressly mention confining metal enclosures (cages), commonly used in Belarusian courtrooms for defendants, as a means of restraint.

146. Belarusian law largely meets the demands in international human rights law with respect to the presumption of innocence. One exception is with the provisions allowing the trial judge to receive the prosecutor's case materials well in advance of the trial. Another has to do with ensuring the prosecutor's burden of proof is not relaxed due to an overly broad definition of criminal intent. These two matters are taken up separately below.

C. Findings and Analysis

147. The monitored trials raised doubts as to whether the defendants were in fact presumed innocent until proven guilty. A number of factors contributed to these doubts, some of which related to the posture of the executive and judicial branches with respect to the trials. Others concern the application of the criminal and criminal procedure codes themselves, while still others concern the treatment of the defendants during the trials.

Statements by Public Officials and State Media

148. State officials and state-sponsored media must adhere strictly to the principle of the presumption of innocence. Monitoring indicated that in a number of instances the sources within the state apparatus portrayed the accused in these cases as guilty.

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176 Id., Article 356. See also CPC Article 19. The court and the prosecution bodies in their assessment of evidence are "*to be guided by law and their innermost conviction, based on thorough, full, and objective investigation of the totality of circumstances of the criminal case.*"

177 Id., Articles 16(4) and 356.

178 Id., Article 89.

179 Id.

180 CC, Article 64. Although the court may, at its discretion and based on the case specifics, refuse to consider prior convictions as an aggravating circumstance.

181 Id., Article 20 and Law of the Republic of Belarus on the Bodies of Interior of the Republic of Belarus, Article 26 and Article 28.

State-sponsored Media

149. The newspaper 'Soviet Belarus',[182] which was founded by the Presidential Administration and continues to be its official media outlet, published in print, online and in video format a collection of materials setting out the case against the opposition candidates and those involved in the 19 December events. Published in the weeks following the events, the materials portrayed several defendants as conspirators to overthrow the President, publishing personal information about them and generally presenting them in highly negative terms. A brief summary of this content is included in Annex 3.

Statements by Public Officials

150. In addition to the video and online materials aired by the state media outlets, information received by ODIHR experts concerning comments made by individual public officials gave further cause for grave concern that the presumption of innocence had been compromised.

Comments by the Head of State

151. On 20 December, the incumbent President, Aleksander Lukashenka, held a multi-hour press conference. The event was broadcast live on television and transcripts remain available online.[183] In his remarks, the President implicated several of the former presidential candidates, in particular U. Nykaleau and V. Rymusheski, in the events of the previous evening and described the criminal activity they allegedly perpetrated. Subsequently the President ordered the security services to "declassify" materials and release them to the public,[184] which was done as described above. Another article[185] reprinted his description of the events of the 19 December, quoting him as having said, "*the opposition was preparing a coup d'etat, that's right - no more and no less. All was planned under tight control of some foreign intelligence services.*" It went on to state, "*Alexander Lukashenko emphasized that his statements are based on fact, some of which have already been published in the press.*"

Comments by a Member of the Supreme Court

152. Statements by judicial professionals working within the court hierarchy are of particular concern – especially when they are within the direct hierarchy of the courts hearing the cases in question. The deputy Chairperson of the Supreme Court is someone who is likely to sit on an appeal panel in these cases. While trials were ongoing, he participated in an interview along with a university professor of criminal law and a representative of the prosecution.[186]

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182 Available both in print and online versions.

183 For example http://www.president.gov.by/press104953.html#doc and http://www.president.gov.by/press107174.html.

184 For details, see Annex 3.

185 http://www.sb.by/post/111738/, accessed 15 July 2011.

186 A transcript of the interview is available at http://www.sb.by/post/114629/ (Published on 31 March, website) Accessed 7 June 2011. The interview is rather lengthy and cannot be reproduced here in its entirety. However, in the opinion of the monitors, it is clear to any reader that Judge Kalinkovich is convinced that what occurred on the square on the night of the 19 December was a riot and fit the definition of the crime in Article 293. That was a key legal question. The following is a small example citation leading to this conclusion, where Mr. Kalinkovich is initially referring to the French Criminal Code: "The [French] law provides for the following: if the participants have among them an armed person and they don't drive him/her away, then the whole assembly is considered to be armed with all

The broader goal of the televised broadcast was to explain the charges connected to the events of the 19 December to the broader public. However, to the extent the guests, and especially the Supreme Court member, opined on the circumstances of these cases and the manner in which the law should be applied – and that those statements operated to the detriment of the defendants – such actions impinge on the defendants' rights to the presumption of innocence.

Comments by the Ministry of Justice

153. In its online publication describing the action taken by the Ministry against a number of lawyers, the following sentence appeared, "*The Board of the Ministry of Justice also reviewed the activities of individual lawyers engaged in the defence of persons involved in the 19 December 2010 events in fulfilment of actions aimed at organizing mass riots*."[187] Here again, an executive branch entity – one which operates as a regulatory (licensing) authority over the legal profession and which is responsible for a significant portion of court operations[188] – provided a public characterization of the events of 19 December. The remark is not neutral, nor does it employ a qualifying descriptor such as "allegedly" or "purportedly." The reader is made aware that the Ministry believes the defendants were indeed organizing mass riots.

154. The above comprise a sample of the numerous statements and materials put into the public sphere after the events in question. They leave little doubt as to the position of the state apparatus with respect to the actions of the accused and the liability such actions entail.

Security Measures and the Use of the Cage

155. The noted international human rights standards prescribe that defendants should normally not be shackled or kept in cages during trials, nor otherwise presented to the court in a manner indicating that they may be dangerous criminals. Care is to be taken to ensure that security measures are applied consistently with the presumption of innocence.

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the ensuing consequences. When the crowd had been forced out from the Independence Square, you probably saw what was left behind them on the asphalt. I don't know of any instances when the participants of the unauthorized demonstration here have driven away people with spades and sticks and handed them over to the law-enforcement bodies." In the original transcript, «Там [во Франции] в законах закреплено такое правило: если участники держат в своих рядах вооруженного человека и не прогоняют его, все сборище считается вооруженным со всеми вытекающими последствиями. Когда с площади Независимости вытеснили толпу, вы, наверное, видели, что там осталось лежать после них на асфальте. Я не знаю фактов, чтобы у нас участники несанкционированного митинга изгоняли из своих рядов людей с лопатами и прутьями и передавали их в руки правоохранительных органов.»

187 See Press Release available at http://www.minjust.by/ru/site_menu/news?id=737 (accessed 15 July 2011). Original text: "Коллегия Министерства юстиции рассмотрела также деятельность отдельных адвокатов, осуществляющих защиту лиц, участвовавших 19 - 20 декабря 2010 года в совершении действий, направленных на организацию массовых беспорядков."

188 V.O. Sukalo, Judicial reform in the Republic of Belarus//Judicial reforms in CIS countries. Minsk, 2005, p.14 (Сукало В.О. Судебная реформа в Республике Беларусь//Судебные реформы в странах СНГ. Минск, 2005.С.14). "Funding, motivation and staffing of courts is vested in the Ministry of Justice."

156. Monitors noted that – with one exception – in all trials where the charges included Article 293, the defendants were kept in the cages throughout.[189] In all but one of the trials where Article 342 was charged, the defendants were not in pre-trial detention and were not in cages during trial.[190] Moreover, the interviewed defence counsel and the Deputy Chair of the Supreme Court indicated that the security measures were applied based on whether the defendant was detained on remand or was at large. Apparently consideration of the individual circumstances of each defendant was not given. Viewed in conjunction with the provisions of the national law allowing detention on remand based solely on the gravity of charges,[191] this circumstance raises concerns related to the presumption of innocence. While security in the courtroom is always a priority, it appears that individual security measures applied to the defendants were not balanced against the need to uphold the presumption of innocence.

Trial judge Exposed to Case File Prior to Trial

157. Monitors observed that the presiding judge appeared to be familiar with the prosecution's case already at the beginning of trial. The CPC foresees the trial judge receiving the entire prosecutor case file at least a week before trial.[192] The purpose of the early arrival is to allow the trial judge to determine jurisdiction, to make any necessary pre-trial rulings, and to schedule the hearing itself. Receiving the entire prosecution case in advance, however, has the unfair effect of exposing the judge at this critical early stage to the prosecution's evidence.[193] In defence of this arrangement, the prosecution service of Belarus indicated that the prosecution's job is to present an "objective" view of the case to the judge, and amongst the materials in the case file then, are not only the inculpatory materials, but also those that are exculpatory.

158. All that is necessary to determine jurisdiction and schedule the hearings is the indictment and personal information about the defendants. Pre-trial motions can similarly be dealt with in a pre-trial hearing, however, both prosecution and defence counsel should be present. To ensure the presumption of innocence is firmly in place when the trial begins, the judge should see the prosecution's evidence – even if that evidence is purportedly balanced – for the first time when it is presented during trial. Only then are both parties

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189 Defendant Uss had been released during the investigation and remained free until his guilty verdict was declared, even though charged with Art. 293. The monitors received only speculative information as to the reasons.

190 Defendant Bandarenka was held in custody throughout the investigative stage and was in the cage throughout the trial although he was charged under Article 342.

191 See Chapter 1, The Right to Liberty and Security of the Person, A. National Legislation

192 Art. 277 of the CPC (judge rules on jurisdiction), Art. 281 CPC (judge sets the trial schedule). The law does not indicate how many days in advance the judge is to receive the case file prior to trial. Because the judge must rule on a number of pre-trial issues and must inform the parties no later than five days in advance, the judge has at least a week to familiarize him or herself with the contents of the case file.

193 The Rome Statute of the International Criminal Court, for instance, prohibits judges involved in pre-trial rulings for sitting in the main trial. Rome Statute, Article 39(4) "[U]nder no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case."

present and in a position to challenge and/or defend the materials.

Statements of Certain Accused Leaked to Media

159. Through the statements of witnesses at trial the monitors were made aware that some evidence pertaining to the cases 'leaked' and was eventually broadcast in the media. Some of this leaked information could only have been in the control of the investigating authorities. For example, an interview with the accused Mikita Likhavid by an investigative officer was broadcast on local television.[194]

160. Another piece of evidence, an intercepted phone call, was leaked to the public. Defendant Statkevich was recorded by state security forces as he stood on Independence Square on the night in question speaking on his cell phone. The caller was apparently an acquaintance of M. Statkevich from Ukraine. According to the evidence at trial, which included playing a recording of the phone call, the acquaintance encouraged M. Statkevich to enter the House of Government and take over the seat of the prime minister.[195] This phone-intercept recording could only have been in the possession of state authorities, one of whom deliberately placed it in the public arena.[196] Irrespective of whether M. Statkevich committed the crime charged, this leaked phone call will have served to provoke a negative public reaction and will have undermined his right to a presumption of innocence.

161. The publication of this conversation was also noted during trial. At one point the judge, in line with requirements of the CPC, asked M. Statkevich whether he wanted the wire-tapped evidence to be read out *in camera* or during the public session. M. Statkevich responded by saying, "It's funny you ask that now – after the conversation has been aired on TV so many times."[197]

Evidence of Prior Convictions

162. Another infringement of the presumption of innocence comes with the reading of the defendant's prior convictions at the start of the trial. Although this practice is permitted by Belarusian law – and did not have notable negative consequences in these trials[198] – the potential for damage is far-reaching. The fact that an accused person has committed crimes in the past may well reflect on the character of that person, but it is not proof the person has committed the crime for which he/she is currently charged. Applicable legal standards require the accused to be convicted only on evidence adduced at trial with respect to the crime charged, not on evidence of other crimes. Prior

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194 http://www.youtube.com/watch?v=CmN18gZfM7E& (visited on 25 June, 2011). Originally aired by http://www.ctv.by.

195 A second difficulty with this evidence being adduced at trial is its irrelevance. M. Statkevich was not charged with treason or with organizing a *coup d'état*. This point is further addressed in Chapter 3, *supra*.

196 This phone call was aired during the film, "Square, Iron Against Glass" described in detail in Annex 3.

197 Statkevich trial, 16 May 2011, afternoon session.

198 With few exceptions, the accused did not have prior criminal convictions that might have led to presumptions as to their propensity for criminal behaviour. In one potential example to the contrary, Defendant Uss was queried about his prior administrative offense during the trial session on 16 May. It turned out that he had failed to pay his hunting license fee in a timely manner. Although unrelated to the trial, this information was entered into evidence.

convictions may, however, be relevant for the purposes of sentencing, once a defendant has been convicted at trial.

The Burden of Proof

163. It was frequently noted that the primary criminal provision in question, Article 293, had not previously been applied in Belarus. From the perspective of the presumption of innocence and the prosecutor's burden of proof, the lack of jurisprudence brought unique challenges for both sides, especially concerning the threshold of relevant evidence sufficient for a conviction. For example, a literal reading of the CC Art. 293 permits the reader to understand that the entire list of negative consequences must be demonstrated by the prosecution in order to reach a conviction.[199] As far as the defence was concerned, so long as at least one item on the list went unproven, their client would be acquitted. In early trials and appeals, this perspective was argued by the defence which adduced evidence to that effect. The prosecution took the opposite position, arguing that it was necessary to prove only one of the listed consequences. Without access to the verdicts, ODIHR was unable to ascertain how the presiding judges dealt with this issue in legal terms, if at all. The guilty verdicts strongly suggest they must have sided with the prosecution.

164. A similar challenge facing the parties contending with Article 293 appeared with respect to the video evidence proffered by the prosecution against the defendants who were presidential candidates. Particularly in the Statkevich and the Sannikau trial, the court viewed several hours of speeches, media events, and interviews in which the candidates presented their election platform, but also called upon the citizens of Belarus to come to the square on the night of the 19th. None of those videos indicated that the candidates were asking the listeners to perpetrate violence or similar behaviour prohibited under Article 293. Such speeches and statements would therefore presumably be irrelevant to a charge of organizing a riot. They may be evidence of organizing an "unauthorized demonstration," but that was not the charge at issue.[200]

165. The above challenges are not exceptional and would be expected in any criminal justice system contending with a provision that had not been previously applied. However, the difficulty in defending the charge extended to other, less expected areas. For example, the prosecutor's burden included proving a subjective "mental" element, ie. that the defendant's criminal

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199 Art 293 CC. "1. The organization of mass riots accompanied by violence against people, pogroms, arsons, destruction of property, armed resistance to representatives of the authority, is punished by 5-15 years of imprisonment." Original text: "1. Организация массовых беспорядков, сопровождавшихся насилием над личностью, погромами, поджогами, уничтожением имущества, вооруженным сопротивлением представителям власти, – наказывается лишением свободы на срок от пяти до пятнадцати лет."

200 It must be borne in mind that the mere fact of the assembly being unauthorized does not strip it of the protection afforded to peaceful assembly under international law. As the OSCE ODIHR Guidelines on Freedom of Peaceful Assembly indicate, *"[i]f the organizer fails or refuses to comply with any requisite preconditions for the holding of an assembly (including valid notice requirements, and necessary and proportionate restrictions based on legally prescribed grounds), they might face prosecution. However, such assemblies should still be accommodated by law enforcement authorities as far as is possible"* (op. cit., §134).

behaviour was intentional.[201] For those charged with "participation," under Article 293(2), proving this subjective element was reasonably straightforward, especially as the judge can infer the intent from the circumstances. Thus, so long as the defendants were present at the scene and "participating" of their own will in the prohibited acts (for example, destroying property or putting up armed resistance to police[202]) most judges would find the subjective, mental element proven to their satisfaction.

166. For those charged with Article 293 (1) "organization," however, the mental element should be substantially harder to prove, and it is unclear whether it was in fact proven in these trials at all. The difficulty is that the prosecutor bears the burden to demonstrate that the defendant (in these cases, the former candidates Sannikau, Statkevich and Uss were so charged) intended to organize others to perpetrate prohibited acts. Articles 21 and 22 of the CPC treat *direct* and *indirect* intent equally – both types of intent being able to support a conviction. With *indirect* intent being defined as something akin to "recklessness," the defendants charged in these cases would be found guilty even if they did not directly intend the consequences (violence, pogrom or arson), but only "acted with indifference" to the possibility of the consequences.[203]

167. If the only Belarusian Commentary on the CC is to be followed, the burden for the prosecutor will have been even more difficult to surmount:

> *Persons who for instance organized an authorized or unauthorized demonstration with legitimate intentions, but who lost control of the crowd cannot be considered as organizers of mass riots.*[204]

168. The Commentary goes on to discuss that the higher standard, *direct intent*, is required for proving the intent to organize a riot. The lower standard, *indirect intent*, applies to the consequences, as just mentioned. Thus, the prosecutor was obliged to prove to the court that the defendant candidates intentionally organized the mass riot – and, separately – that they were indifferent to the specific consequences.[205]

169. ODIHR was unable to note evidence adduced by the prosecution to prove this crucial element. Substantial and convincing evidence tended to show that candidates sought to organize a demonstration, even one they knew would be

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201 CPC Article 21.

202 Article 293 requires a showing of "arson, pogroms, armed resistance to authorities, violence against people, destruction of property."

203 See CPC Article 22, and *Theoretical and Practical Commentary on the Criminal Code of the Republic of Belarus* (ed. by A. V. Barkov and V. M. Khomich, 2nd edition, with amendments and additions), Minsk: State Institute of Management and Social Technologies under the Belarusian State University, 2010, p 687. Научно-практический комментарий к Уголовному кодексу Республики Беларусь; под ред. А. В. Баркова, В.М. Хомича -- 2-е изд., с изм. и доп. -- Минск: ГИУСТ БГУ, 2010. стр. 687.

204 Id. §5, p. 687. "Не могут рассматриваться как организаторы массовых беспорядков лица, например, организовавшие санкционированное или несанкционированное шествие с правовыми целями, но в последующем утратившие контроль над поведением толпы."

205 Stated otherwise, so long as the candidates directly intended a riot to occur, they could be indifferent as to whether pogroms, arson or violence against persons resulted.

considered by the authorities to be illegal. Similarly, substantial evidence was in the record to indicate that violence – at least the destruction of the front doors of the government building and altercations with security forces – occurred. But evidence showing that the candidates deliberately sought others to perpetrate violence was lacking. Moreover, all the evidence that indicated the candidates were organizing something peaceful, albeit illegal, should have served to undermine the prosecution's case. Without access to the verdicts, the monitors could not assess whether the judges dealt adequately with this complex, but critical issue.

D. Conclusions and Recommendations

Monitoring revealed several circumstances where the presumption of innocence was not followed. Recognizing the legitimate need to maintain order in the courtroom, application of security measures to the defendants during the monitored trials appeared to be disproportionate and not based on an individual risk assessment of these defendants. Individual security measures applied to defendants must be balanced with the need to uphold the presumption of innocence. Statements by public authorities, especially those of the head of state and appellate judges, which suggested the guilt of the accused or that gave direction on contested legal matters, are not compatible with the presumption of innocence. Based on what was observed, the prosecution may have failed to meet the substantial burden of proof with regard to the requisite intent under Article 293, while any vagueness in the law should have been interpreted in the defendant's favour. However, having been denied access to verdicts, it is not possible to engage in more detailed analysis.

Recommendations:

- To review and amend the CPC to ensure that detention decisions are founded on a reasonable suspicion that the individual has committed a crime, and subsequently, are based on an individualized assessment of the threat that the detainee will abscond, tamper with evidence or witnesses, or re-offend. The decision to detain someone should articulate specifically the basis for the findings.

- To eliminate the practice whereby the trial judge is exposed to the entire prosecutor's case file, particularly the evidence, prior to the beginning of the trial. The judge's file should include only materials necessary to conduct a preliminary hearing and schedule a trial.

- To separate the adjudicatory and sentencing phases of the trial and not to allow character evidence to be presented prior to sentencing.

- To eliminate the practice of exposing the judge to the defendant's criminal record prior to the determination of guilt or innocence.

- To institute tighter controls over the admission of irrelevant evidence that may have been included in the case file.

- For public officials at all levels, to abstain from public statements affirming the guilt of the accused.

- For the media, to abandon the practice of broadcasting fragments of interrogations or of wire-tapped conversations, especially of persons who have not been found guilty by court.

- To investigate the source of the leaked investigative materials which were publicized in the state media, take appropriate steps to discipline those responsible and set up mechanisms to prevent such leaks in the future.

- To clarify for each criminal code provision, particularly those that reference both actions and consequences/results, the precise mental element (*mens rea*) that the prosecution is required to prove. The provision should indicate whether *direct* or *indirect* intent is required. With regard to Article 293, it should be clarified whether one or all of the listed consequences are to be proven.

- To eliminate the practice of keeping defendants in cages during the trial. Security measures applied to the defendants should be based on individual risk assessments in every case. These measures should safeguard the presumption of innocence and every effort must be made to prevent humiliating and degrading treatment. General security measures to ensure order in the courtroom should not create an impression of guilt of the defendants.

CHAPTER 5: THE RIGHT TO A PUBLIC HEARING

170. Public scrutiny of the court system by the citizenry is the imperative behind the right to a public hearing. It is the transparency involved in observing the proceedings that helps ensure public confidence. The right as set out in the major international instruments includes the right to a publicly pronounced judgment. The right is not absolute; the press and public may only be excluded from all or part of a trial in the interests of morals, public order or national security, or where the interests of juveniles or the protection of the private life mandate so. Even in these cases, however, the judgment must be publicly pronounced.

171. The results of the monitoring indicate that the Belarusian authorities made an effort to ensure the right to a public hearing. Access to the trials for some members of the public and the media was provided in all of the monitored trials. A number of shortcomings are identified in this chapter and they centre on restrictions of access to the court premises which limited public attendance. Poor acoustics and the non-use of technical equipment in a number of courtrooms prevented the public from adequately following the trial proceedings in some instances. Access of the public to written judgements was denied. Moreover, the accused were denied permission to attend their appeal hearings.

A. International Standards

172. The right to a public trial is universally considered a fundamental human right and as such is enshrined in the UDHR[206] and the ICCPR.[207] It is mentioned explicitly in the OSCE Copenhagen Document.[208] The right requires that "*a hearing [. . .] be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons*."[209]

173. The right to a public hearing is a qualified right. Therefore, on occasion it may be necessary to limit the open and public nature of proceedings in order to protect the safety or privacy of witnesses, for reasons of national security, public order, morals, etc. However, on every occasion domestic courts have an obligation to provide well-founded justification as to the existence of legitimate grounds, and to prove that such grounds outweigh the importance of ensuring the public nature of the trial. They must also ensure that any restrictions are narrowly tailored to serve that specific, protective purpose.

174. Public access to court judgments has been found to be implicit in the principle of openness of court proceedings. ICCPR Article 14(1) provides that "*any judgement rendered in a criminal case or in a suit at law shall be made public*

206 UDHR, Article 10.

207 ICCPR, Article 14(1).

208 1989 Vienna Document, §13.9.

209 UN HRC, General Comment 32, *supra* note 70, §29.

except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children" (Emphasis added). While vindication of the right might be considered with a public reading of the verdict in court, the UN HRC has been clear that the rule of publicity also extends to the content of the judgments. In General Comment 32 on the right to equality before courts and tribunals and to a fair trial, the Committee interpreted the right to require that "*[a]ny judgment rendered in a criminal case, including the essential findings, evidence and legal reasoning, shall be made public*,"[210] only permitting restriction of public access to judgments where the interests of a juvenile person so require. Therefore, public knowledge of court decisions cannot be secured by confining information to a limited group of persons, such as the participants of the case or those attending the proceedings. Public scrutiny implies full access to judgments, and the "findings, evidence, and legal reasoning," are not generally part of the public pronouncement.

175. This international standard has also been reflected upon in ODIHR's Kyiv Recommendations: "Transparency shall be the rule for trials. . . To enhance the professional and public accountability of judges, decisions shall be published in databases and on websites in ways that make them truly accessible and free of charge."[211] The Kyiv Recommendations also speak to the recording of the trial proceedings themselves. "To provide evidence of the conduct of judges in the courtroom, as well as accurate trial records, hearings shall be recorded by electronic devices providing full reproduction. Written protocols and stenographic reports are insufficient."[212]

B. National Legislation

176. The right to a public hearing is guaranteed by the Constitution of the Republic of Belarus, which provides that "[t]he trial of cases in all courts shall be open. The hearing of cases in closed court session shall be permitted only in the instances specified in law and in accordance with all the rules of legal procedure."[213] The CPC echoes this guarantee and lays down the permissible grounds for closed-door hearings.[214] Consistent with international standards, a hearing may be held *in camera* in a number of narrowly enumerated circumstances.[215] The law allows either the whole trial or individual sessions thereof to be conducted *in camera* as determined by the judge.[216] In closed

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210 UN HRC, General Comment 32, *supra* note 70, §29. See also UN HRC General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law, 13 April 1984, §6 "It should be noted that, even in cases in which the public is excluded from the trial, the judgement must, with certain strictly defined exceptions, be made public."

211 ODIHR, *Kyiv Recommendations on Judicial Independence, supra* note 70, Recommendation 32.

212 Id.

213 Constitution of the Republic of Belarus, Article 114.

214 CPC, Article 23(1).

215 Id., Article 23(2). A hearing may be held *in camera* in cases involving state secret and other classified information; involving defendants under 16 years of age; concerning sex offenses or where privacy and/or dignity of a participant in the proceedings may be put at risk; as well as where a public hearing would threaten the security of the victim, a witness or another participant in the proceedings, or a family member/loved one of any of those listed.

216 Id., Article 287(4).

cases the disposition of the final judgment is publicly pronounced, but not the rest.[217]

177. Both trial courts and appeal courts review cases in open hearings.[218] As noted in Chapter 2: Equality of Arms, there is no corresponding requirement of openness with regard to the so-called "oversight" (last instance) proceedings, which are held *in camera* and without the presence of the defendant or the attorney.[219]

178. Moreover, hearings to review the lawfulness of detention on remand are conducted *in camera*.[220] Although the defence counsel, the victim and the defendant's legal representative have the right to participate in the hearing, there is no provision whereby the defendant him or herself would be required, or even entitled, to participate.[221]

179. Where the case file includes private correspondence, telephone communications, and/or audio/video recordings of private nature, the law requires that the consent of the parties to the communication be obtained in order that such evidence may be presented in a public hearing. In the absence of such consent, the hearing must be held *in camera*.[222]

180. The court is mandated to prepare written transcripts of hearings,[223] which may be supplemented by audio/video recording.[224] The law also allows those present in a public hearing to take notes and make audio recordings. Photography and video recording may only be done if authorized by the presiding judge and provided the parties to the case consent.[225]

181. Within five days following the pronouncement of the judgment, copies of it must be delivered to the defendant, the defence counsel, and the prosecutor. The victim, any civil plaintiffs, civil defendants, and their representatives are also entitled to receive the judgment – but they have to petition the court.[226] Importantly, the law makes no mention of others having access to the decision. This is despite the Constitution safeguarding the right of citizens of Belarus "to receive, store, and disseminate complete, reliable, and timely information on the activities of state bodies and public associations, on political, economic, and international life, and on the state of the environment."[227]

182. Belarusian law concerning the right to a public trial falls short of international standards on two fronts: the failure to grant public access to judgements and the failure to allow an accused to be present at his or her detention hearing.

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217 Id., Article 23(4).

218 Id., Article 381.

219 Id., Article 411(3).

220 Id., Article 144(2).

221 Id.

222 Id., Article 287(5).

223 Id., Article 308.

224 Id., Article 308(4).

225 Id., Article 287(6).

226 Id., Article 367.

227 Constitution of Belarus, Article 34

C. Findings and Analysis

183. With certain important exceptions that will be set out in more detail below, the defendants' right to a public trial was respected in the cases observed. The public attended the trials, and they were widely reported in the media. Many more people sought to attend the trials than space allowed, meaning that some members of the public were excluded; while no attempt was made to facilitate access to all those who sought to view the proceedings. Decorum in the courtroom was adequately maintained. With minor exceptions, judges were in control of the process, and the parties and the public respected their decisions and orders. The courtrooms were adequately furnished. Media representatives and official visitors, such as ODIHR monitors and embassy representatives, were treated respectfully and the latter were offered priority seating. No official record was made of appellate level hearings.

Audio Recording of the Trial

184. Audio recording was allowed at all hearings attended by ODIHR. Several journalists and NGO representatives appeared to be using tape recorders during proceedings, as did a number of defence counsel. Transparency of this level by the courts was viewed positively by ODIHR.

Access to the Judgements

185. Despite repeated requests to the General Prosecutor, the Supreme Court and the Ministry of Justice, ODIHR was unable to obtain the verdicts in the trials observed. Explanation received from the authorities, particularly the prosecution service, concerning the restriction on public access to judgments appeared to be based upon a concern for the privacy of the persons involved (including the defendant, victims and/or witnesses). This argument was also invoked as a justification to restrict access to indictment bills. However, the oft-cited privacy concern neither conflicts *per se* with the principle of open access to judicial documentation nor supersedes it.

186. Publication of verdicts is the norm across the OSCE area. For example, Spain,[228] Canada,[229] and Russia have implemented laws that offer public access while affording appropriate protection. The law in Russia is based on the principles of transparency and freedom on information, and it guarantees

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228 Spanish law guarantees general publicity of court proceedings. See Organic Law on Spain on Judicial Power, Article 232 ("1. Judicial proceedings shall be public except as provided by the Laws on procedure. 2. Exceptionally, for reasons of public order and protecting the rights and freedoms, judges and courts may, through a reasoned resolution, limit the scope of disclosure and agree to the closed nature of all or part of the proceedings)," and Article 234 ("1. Secretaries and officials of the Judicial Office shall provide interested parties with any information requested on the status of the proceedings, which the requesting parties may peruse and review, unless said information is or has been classified as secret in accordance with law. Access to contents of testimony may also be provided under the terms of this Act. 2. The parties and anyone who proves a legitimate interest shall be entitled to obtain non-certified copies of pleading transcripts and case records, unless classified as secret or confidential.")

229 A study paper commissioned by Canada's Judicial Council concluded, "that the right of the public to open courts is an important constitutional rule, that the right of an individual to privacy is a fundamental value, and that the right to open courts generally outweighs the right to privacy" (Discussion Paper on Open Courts, Electronic Access to Court Records, and Privacy, drafted by the Judges Technology Advisory Committee of the Canadian Judicial Council, May 2003, p. 18, available at http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_OpenCourts_20030904_en.pdf.)

public access to information concerning court activities, including any judicial acts.[230] Normally such laws foresee the removal of clauses containing state secrets and other protected information.[231] Such redaction (removing names, contact details and other information that may be used to identify the individual) is consistent with the relevant international standards.

Courtroom Equipment and Facilities

187. All observed trials were held in courtrooms. In general, the rooms were well furnished and updated. The monitoring teams found that most courtrooms were adequately equipped, as many appeared to have audio-recording or broadcasting equipment. Wired microphones were present in most courtrooms, however this equipment was not used for broadcast to the public. In all instances, courtrooms had or were provided equipment for examination of key video evidence, such as laptop screens and DVD players.

188. The monitors noted that in a number of cases the public was unable to follow court proceedings due to poor acoustics, inaudible responses from the parties and witnesses, or the rapid and unintelligible reading of documents by court officials.[232] Although as mentioned, courtrooms appeared to be equipped with sound-amplifying systems, they were not switched on. This situation was exacerbated as courtrooms were filled to capacity. The inability to hear caused frustration and irritation in the audience.[233] Also, during the screening of video, some parties stood in front of the screen at times blocking the view of the audience.[234] In most other trials, the screens were turned away from the public so that it was not possible for them to view the content.[235] All of this hindered the meaningful exercise of the right to a public hearing.

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230 Federal Law of the Russian Federation on Ensuring Access to Information Concerning Court Activities of December 22, 2008, No 262-FZ, Article 4 ("The fundamental principles of securing access to information on activities of courts shall be: 1) openness and accessibility of information on activities of courts with the exception of instances provided by legislation of the Russian Federation; 2) accuracy of information on activities of courts and timeliness of its release; 3) freedom to seek, obtain, impart and disseminate information on activities of courts by any lawful means; 4) observation of the rights of citizens to inviolability of private life and to personal and family privacy and to defend their good name and business reputation, and of the right of organizations to defend their business reputation; observation of the rights and lawful interests of participants in court proceedings when releasing information on activities of courts; 5) non-interference in judicial process when releasing information on activities of courts."). Article 15, moreover, provides for the publication of judicial acts on the internet.

231 Id., Article 14(5) ("Texts of judicial acts shall not be posted on the Internet should they be on cases: 1) affecting state security; 2) arising from family-law matters including adoption of a child and other cases affecting the rights and lawful interests of minors; 3) concerning crimes against the sexual inviolability and sexual freedom of the individual; 4) restricting or removing the legal capacity of an individual; 5) concerning compulsory committal of an individual to custodial psychiatric care or compulsory psychiatric examination; 6) concerning correction or amendment to civil registers; 7) concerning establishment of facts of legal significance and being examined by courts of general jurisdiction.")

232 For example, in the Likhavid, Loban, et. al., and Myadvedz trials.

233 For example in the Likhavid trial, 22 March 2011, morning session. More than one member of the public spoke out at the hearing participants, insisting that they "speak up." Despite sitting in the front rows, ODIHR monitoring teams also experienced difficulties in hearing participants on occasion.

234 For example in the Myadvedz trial, 10 March 2011, afternoon session.

235 For example in the Sannikau trial, 11 May 2011, morning session.

Security in the Courthouse and Courtrooms

189. The aforementioned presence of security personnel (See Chapter One addressing impartial tribunals) also had its impact on the public nature of the trial. The overt presence involving the individual identification of each entrant, their being filmed, and their conversations inside the courtroom being monitored, will have acted as a deterrent to some sectors of the public. The purpose behind these intrusive measures – even from a security perspective – is unclear and should be the subject of review.

190. For their part, the courthouse guards were generally courteous and professional, with few notable exceptions.[236] Clearly identifiable in uniform and numbering from four to eight people per trial, the courtroom security staff patrolled the public areas as well as the front of the courtroom guarding the defendants in the cage. Their task vis-à-vis the public was to ensure that the rules of decorum were strictly followed.

Defendants' Presence at Appeal Hearings

191. Monitors observed ten appellate proceedings. In all instances where the convicted were in a strict or regular penal regime, they were not permitted to attend the appellate hearings, despite requests by their counsel to do so in several instances. Convicted persons who were in low security regimes were able to attend, and many chose to do so. Notably, no official record is made of appellate proceedings unlike of the first instance proceedings which are recorded in hand-written form by the court secretary.

Public Attendance

192. With one critical exception noted below, members of the public were allowed to attend the trials. Attendance was limited, however, due to a number of objective constraints. First of all, the size of the courtrooms allowed approximately 50-70 people to attend. The public sat on wooden benches, usually six to eight of them in each courtroom, with eight to twelve people accommodated per bench. Normally the first and second rows of benches were reserved for ODIHR monitors, members of the diplomatic community, and victims – or in cases where the defendants were at large, for them and their counsel. The families of the defendants usually were channelled into the next two rows, followed by the media. The operatives mentioned above[237] took a number of seats, and on some occasions law students occupied an entire row or two. The general public, including the NGO community, will have normally had access to only two to three rows, or approximately 15 to 30 seats. Given the significant public interest in these cases, this number was insufficient to accommodate the demand. Monitors were unable to meet with court administration or judges to establish whether larger courtrooms were available or what additional measures might have been taken.[238]

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236 In the Sannikau trial, 29 April 2011, afternoon session, when the crowd had begun to whisper about certain testimony, a guard interrupted the proceedings and admonished the judge in front of everyone, "*Remind the audience about the rules*!" The judge duly complied. See supra Chapter 2, §100.

237 §99.

238 It did appear that the judiciary had at its disposal a larger courtroom. See http://www.rferl.org/content/trial_opens_in_minsk_over_subway_bombing_belarus/24329015.html, par 28, (accessed 17 Sept 2011).

193. It bears noting that at times several trials were ongoing simultaneously. When this occurred, some courtrooms had sufficient space to accommodate the public. However, this was the exception rather than the rule. While ODIHR observed no purposeful effort to exclude the general public at large – save perhaps for the addition of security personnel taking seats that would otherwise have been available to the public – no additional effort was made to accommodate the large numbers. For example, no video screens were set up in the hallways, or proceedings moved to a larger hall, a practice employed by some courts faced with significant public interest.

Exclusion of International NGO Monitors

194. ODIHR was made aware of the attendance at trials of members of an international NGO monitoring effort called "The International Observation Mission of the Committee on International Control over the Situation with Human Rights in Belarus." The Mission comprised NGO representatives from a variety of neighbouring countries and observed the trial procedures alongside other members of the public. It released public statements and reports of its assessment of the trials. In apparent violation of OSCE commitments,[239] these monitors were expelled from Belarus.[240] Not a single member was allowed to remain and attend the hearings.

Inconsistent Access to Materials

195. Monitors noted inconsistencies among the various trials as to the nature of materials and the manner in which they were made public. In some cases, for example, the placement of the TV allowed the public to view the video evidence, in other cases it did not. This variance may have been due to logistical reasons, but it was also because the judges gave priority to the parties to the case over the public. Such situations caused frustration, as the video evidence was crucial in most cases. Notably, one judge accommodated the ODIHR monitor's request to be seated at the side of the courtroom so that the video screen was visible.[241]

196. Also inconsistently applied is the practice of what is actually read out during trial from the prosecutor's case file – a practice which had a negative bearing on the implementation of the principle of orality and immediacy in the examination of evidence.[242] According to the CPC, the prosecutor compiles the evidence against the defendant and – after providing the defence team an opportunity to review the evidence – submits the entire package of evidence to the judge.[243] During trial, the judge reviews this evidence in front of the

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239 See Moscow Document of 1991, §43.2, "endeavour to facilitate visits to their countries by NGOs from within any of the participating States in order to observe human dimension conditions;" 43.3 – "welcome NGO activities, including, inter alia, observing compliance with CSCE commitments in the field of the human dimension;" and 43.4 – "allow NGOs, in view of their important function within the human dimension of the CSCE, to convey their views to their own governments and the governments of all the other participating States during the future work of the CSCE on the human dimension."

240 http://www.rferl.org/content/belarus_expels_russian_observers_of_court_trials/24094418.html. See also http://www.rferl.org/content/belarus_expels_russian_rights_activist/2341685.html.

241 Statkevich trial, 14 May 2011, morning session.

242 CPC, Article 286.

243 CPC Art. 105. See Chapter 4 Presumption of Innocence, for the difficulties this practice creates.

parties. Written materials are usually read out. At times the prosecutor or the judge simply stated what the document was, while at other times its content was read out in full - usually rather quickly making it difficult to follow and to comprehend. There appeared no firm rule. The inconsistency extended to video and other material. For example, the public was permitted to see video footage (if the screen was not turned away) introduced as evidence, but could not see an inspection protocol introduced as evidence. A photograph in the file could be seen by the public if it was in digital format and thus presentable on the video screen, but not if it was in hard copy. The mere fact of inconsistent practice is not *per se* detrimental to a defendant's fair trial rights, so long as the decision as to what is read or seen, is not manipulated in favour of the prosecution's case. However, it has a negative impact on transparency.

D. Conclusions and Recommendations

197. The right to a public trial is crucial in that it provides an important safeguard for the protection of the rights of the individual. Yet public trials are not only a fairness safeguard for the defendant; it is also an important instrument to build and maintain public trust in the administration of justice. It is therefore important that the public have access not only to the hearings, but to judgements, indictments and other court-related information. Similarly, where public interest is high in specific proceedings, attendance by the public should be reasonably accommodated. While the right to a public hearing was largely respected in these cases because hearings were open to at least those members of the public and media who managed to get a seat,[244] an internationally organized coalition of NGO observers was systematically excluded in violation of OSCE commitments. The lack of public access to verdicts also violates the right to a public trial. Neither the suspects nor the public were permitted to be present at remand hearings, and those convicted could not attend their appeal.

198. Assisting the public to exercise their right to access court proceedings should become a core function of the courts in Belarus. Security services should help exercise that function with a vigour equal to that in which they exercise their security – related functions. Resources currently expended on recording the individuals entering the courtrooms might be more judiciously spent recording the proceedings and rendering electronic transcripts. Such practice would enhance compliance with OSCE commitments. In order to maximize judicial independence and minimize the potential for interference, court-related security services should come exclusively under the authority of the Chairperson of the Court.

Recommendations:

- To revise the relevant legislative provisions concerning public access to court judgments and ensure that such access is guaranteed, subject to lawful restrictions on personal data disclosure and matters of national security.

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[244] As mentioned, the diplomatic community and ODIHR monitors were always provided priority seating.

- When significant public interest in a trial is present, to take concrete measures to accommodate the anticipated numbers, for example by setting up video screens or moving to a larger courtroom or facility. Employ sound amplifying equipment.

- To ensure unhindered access for international NGO monitors at public trials.

- To review courthouse security procedures to ensure that the Chairperson of the Court is in charge of security and that this important function is not delegated to those who are not part of the judiciary.

- To ensure that security personnel working in courthouses receive proper training on dealing with the public, wear identification, and respond courteously and respectfully to visitors. Public participants are to be welcomed and their attendance at hearings is to be facilitated - so long as decorum is maintained.

- To end the practice of overtly filming all entrants to the court. Where strictly necessary for security purposes, to consider installing CCTV cameras, and to ensure that, in the absence of recorded illegal acts, all video records are destroyed in a timely manner.

- To officially transcribe all proceedings, including appellate hearings, to ensure a complete and accurate record.

- To amend the provisions of the CPC related to the procedure of conducting hearings regarding detention on remand, and make such hearings open and the defendant's participation mandatory.

- To allow the defendant to be present at his or her appeal hearing.

CHAPTER 6: THE RIGHT TO DEFEND ONESELF OR THROUGH LEGAL COUNSEL OF CHOICE

199. The right to defence is another essential feature of the right to a fair trial. It presumes the opportunity to mount a defence as well as access to effective legal representation. The right is a tacit recognition that in criminal proceedings the state places a person's fundamental rights to life and liberty at risk. The right to legal assistance helps ensure that the state properly meets the obligations imposed by law, and further, has not violated the rights of the individual in the process.

200. ODIHR observed that the exercise of the right to be represented by a counsel of one's own choice was in some instances hampered by license revocations of defence counsel, which is perceived as undue executive interference with the independence demanded of the legal profession as well as the ethical obligations imposed on its members. Some defence counsel were denied access to their clients for prolonged periods.

A. International Standards

201. The UDHR[245] and the ICCPR[246] both set forth the right of a person accused of a crime to defend himself (or herself) in person or by defence counsel. The defendant also has the right to be defended by the counsel of his/her own choosing.[247] This right is prominently reflected in the OSCE commitments.[248] Similarly, the UN Basic Principles on the Role of Lawyers affirm everyone's entitlement to assistance of legal counsel and calls upon states to create efficient procedures to ensure "*effective and equal access to lawyers.*"[249]

202. The concept of fairness enshrined in international law requires that the accused have the benefit of the assistance of a lawyer already at the initial stages of police interrogation. The ICCPR requires "prompt access to counsel"[250]- which means within 48 hours.[251]

> *Upon his or her deprivation of liberty, a person has the right of access to legal counsel without delay and to be able to confer with counsel in private. To have prompt access to a lawyer at an early stage of police*

245 UDHR, Article 11(1).

246 ICCPR, Article 14(3)(b).

247 ICCPR, Article 14(3)(b).

248 See, e.g., 1990 Copenhagen Document, §5.17.

249 UN Basic Principles on the Role of Lawyers (1990), Principles 1-4, Access to Lawyers and Legal Services.

250 UN HRC, General Comment 32, *supra* note 70, §34.

251 UN Basic Principles on the Role of Lawyers (1990), Principle 7*: 'A person who has been detained or arrested must be given prompt access to a lawyer, but no later than forty-eight hours from the time of arrest or detention;.*

investigations may be essential in order to avoid lasting prejudice with regard to the rights of the defence.[252]

203. Counsel should be able to meet their clients in private and to communicate with them in conditions that fully respect their confidentiality. To deny access to a lawyer from the moment of arrest, and certainly within the first 48 hours, is - whatever the justification for such denial - incompatible with the rights of the accused under Article 14(3) of the ICCPR. It also raises concerns in relation to Convention against Torture and other Cruel, Inhuman and Degrading Treatment (UN CAT), which has been interpreted to require the right to counsel immediately upon a deprivation of liberty.[253] The right to be defended is also violated if a detainee is not permitted to correspond with a lawyer. Therefore, as soon as a detainee seeks to prepare a defence with the assistance of counsel, such contact must be permitted.[254]

204. International standards require that indigent defendants be provided with free or state-funded legal assistance when the interests of justice so require. Where deprivation of liberty is at stake, the interests of justice, in principle, call for legal representation. Such representation has to be competent and effective.[255] A violation of ICCPR Article 14(3) may ensue if the court or other relevant authorities "hinder appointed lawyers from fulfilling their task effectively."[256]

205. Under the relevant international standards, the state must allow adequate facilities for the preparation of the defence. Such facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel. The UN Human Rights Committee specifically noted that "*lawyers should be able to counsel and to represent their clients in accordance with their established*

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252 "Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers." Chapter 6, p. 240. Available at www.ohchr.org/Documents/Publications/training9chapter7en.pdf (last accessed 27 June 2011).

253 In its observations on the Russian Federation's third periodic report, the CAT decried the "... lack of adequate access for persons deprived of liberty, *immediately after they are apprehended*, to counsel, doctor and family members..." (Concluding Observations on Russia of 6 June 2002, CAT/C/CR/28/4, at § 6(c) (emphasis added.)). In its Concluding Observations on Kazakhstan of 12 December 2008, the CAT specifically recommended that "[t]he State party should promptly implement effective measures to ensure that a person is not subject to *de facto* unacknowledged detention and that all detained suspects are afforded, in practice, all fundamental legal safeguards during their detention. These include, in particular, *from the actual moment of deprivation of liberty, the right to access a lawyer*" (CAT C/KAZ/CO/2 (2008) at § 9 (emphasis added)).

254 See for example *Kelly v. Jamaica*, Comm. n. 537/1993, HRC views of 17 July 1996, at §9.2: "According to the file … the author, when brought to the police station in Hanover on 24 March 1988, told the police officers that he wanted to speak to his lawyer, Mr. McLeod, but the police officers ignored the request for five days. In the circumstances, the Committee concludes that the author's right, under article 14, §3 (b), to communicate with counsel of his choice, was violated". See also HRC, Concluding observations on the report from Spain, 3 April 1996 (CCPR/C/79/Add.61), at §12, where: "The Committee expresses concern at the maintenance on a continuous basis of special legislation under which persons suspected of belonging to or collaborating with armed groups may be detained incommunicado for up to five days, may not have a lawyer of their own choosing".

255 UN Basic Principles on the Role of Lawyers (1990), Principle 6.

256 ICCPR Art. 14(3). See also UN HRC, General Comment 32, *supra* note 70, §38.

professional standards and judgment without any restrictions, influences, pressures or undue interference from any quarter."[257]

206. The UN Basic Principles on the Role of Lawyers provides for states to "*ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; inter alia, and shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.*"[258] The Principles also require that lawyers "*enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.*"[259]

B. National Legislation

207. The Constitution of Belarus sets forth the right of everyone to legal assistance by providing that *"[e]veryone shall have the right to legal assistance to exercise and defend his rights and liberties, including the right to make use, at any time, of the assistance of lawyers and one's other representatives in court, other state bodies, bodies of local government, enterprises, establishments, organizations and public associations, and also in relations with officials and citizens*."[260] In doing so, it expressly provides for the entitlement to free, state-funded legal assistance in cases specified by law.[261]

208. The CPC further details the right to legal assistance by providing that every suspect or accused in a criminal case has the right to defend him or herself in person or through the legal assistance of a defence counsel, with the ensuing obligation on the part of the criminal proceedings body to explain to the person in question their rights and facilitate the exercise thereof.[262] The Code does not, however, expressly entitle the defendant to representation by a counsel of his or her own choice, although this right may be implied from its provisions.

209. The CPC further affords every suspect and accused the right to unimpeded access to and assistance by their defence counsel from the moment of their detention or indictment, respectively, including the right to communicate with the defence attorney without hindrance.[263] The body conducting the proceedings is expressly banned from recommending a defence counsel.[264] The defendant has the right to invite more than one counsel.[265] The

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257 UN HRC, General Comment 13 on Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14), CCPR/C/GC/13, 13 April 1984, §9.

258 UN Basic Principles on the Role of Lawyers (1990), Principle 16.

259 *Id.*, Principle 20.

260 Constitution of the Republic of Belarus, Article 62.

261 Id. ("In the instances specified in law, legal assistance shall be rendered from public funds.")

262 CPC Article 17(1) and (2), see also Articles 43(1) and 43(2)(5).

263 Id., Articles 41(2)(7) and 43(2)(6), see also the Law of the Republic of Belarus on the Bar, Article 17(5).

264 Id., Article 46(1)(1).

265 Id., Articles 41(2)(6) and 43(2)(5).

defendant's refusal of defence counsel's assistance does not bar him or her from requesting representation by counsel at a later stage. If the defendant requests such representation before the trial, the request cannot be rejected.[266]

210. Although the law does not expressly guarantee one's choice of counsel, the fact that the body conducting the proceedings is expressly banned from recommending a defence counsel[267] may be construed as a safeguard allowing the defendant this choice. Where the defendant does not have a counsel, but wishes to be defended by counsel, counsel will be appointed by the Bar of the Republic of Belarus.[268]

211. If the counsel chosen by or appointed to represent the defendant fails to render his/her services at specified times, the counsel will be replaced.[269] In the case of the replacement, the body conducting criminal proceedings shall propose to the defendant that he or she engage new counsel,[270] but, as noted above, the body is prohibited from recommending any specific attorney.[271]

212. The relevant legislation expressly prohibits interference by third parties with attorneys' lawful professional activities,[272] and it exempts attorneys from criminal liability for statements made in good faith in respect of a party or a participant in the proceedings before a court or bodies of inquiry or investigation.[273]

213. The legislation on the bar provides for some safeguards of quality legal assistance, such as the requirement that a candidate for bar membership have at least three years of legal experience or have completed a six-month internship with the Bar, as well as the requirement that the candidate pass a qualification examination.[274]

214. The legal framework governing the right to counsel in Belarusian law appears to be in line with international standards. The lack of an explicit provision securing the right to the counsel of one's choice is absent. However, the right appears to be provided for through other provisions.

C. Findings and Analysis

215. The monitoring team was not present during the pre-trial stages of the proceedings and obtained only limited information about the circumstances related to the selection of counsel. Instances of denial of access to counsel for those arrested in the aftermath of the 19 December events were recorded by

266 Id., Article 47(4).
267 Id., Article 46(1)(1).
268 Id., Article 46(2).
269 Id., Articles 46(2)(4) and 46(3).
270 Id., Article 46(3).
271 Id., Article 46(1)(1).
272 Law of the Republic of Belarus on the Bar, Article 16.
273 Id., Article 17.
274 Id., Article 7.

different human rights organizations.[275] Some defence lawyers informed ODIHR of difficulties with access to their arrested clients. Each reported case of denial of access to counsel or difficulties with access to clients appeared to involve persons detained in the KGB detention centre. The right to access to counsel appeared to be respected in practice for persons detained in other facilities.

216. The effectiveness of the defence appeared up to professional standards, despite a noticeable hesitancy of lawyers to act zealously in these cases. ODIHR's monitors cannot fully assess the range of factors that may have caused defence attorneys to be extremely cautious. However, it appears highly probable that the fact that some lawyers lost their license to practice law for alleged misconduct connected to these cases will have had a dampening effect on this important advocacy role.

The Counsel of One's Choosing

217. All defendants in observed proceedings were represented by legal counsel. In approximately 80 percent of the cases observed in the first instance, the monitors reported that defendants were represented by counsel they had contracted directly. The remaining 20 percent had counsel appointed and paid for by the state.

218. ODIHR learned of four instances where lawyers defending persons accused in relation to the 19 December events lost their licenses to practice law; one other was disbarred. The Ministry of Justice initiated these sanctions[276] after certain lawyers raised allegations of maltreatment in detention that were widely reported in the media. The Ministry found that the lawyers had made inappropriate public statements and had failed to appear on behalf of or defend their clients.[277] Sanctions were initiated against one lawyer ostensibly for reasons unrelated to their representation of a 19 December client. Monitors sought to attend appeals initiated by these lawyers, but were denied

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275 See for example Human Rights Watch Report, "Shattering Hopes," 14 March 2011, section entitled "Access to Counsel." Available at http://www.hrw.org/en/node/97152/section/6 (Accessed 17 July 2011). See also Committee on International Control over the Situation with Human Rights in Belarus, Analytical Review No.3-1 "Realization of the right to protection and freedom of the legal profession in the light of the events in the Republic of Belarus during December 2010 – January 2011, " 20 January 2011, http://hrwatch-by.org/en/analytical-review-3-1 (Accesses 3 September 2011).

276 The Ministry of Justice is responsible for issuing licenses to lawyers, see *Edict No. 12 of the President of the Republic of Belarus of 3 May 1997* ("On some measures on improvement of lawyers' and notary activity in the Republic of Belarus"). That edict has been amended; see for example *Edict No. 450 of the President of the Republic of Belarus of 1 September 2010* ("On licensing of certain activities"). This relationship of control by the executive branch over the legal profession has been criticized. See, for example, Report of the UN Human Rights Commission's Working Group on Arbitrary Detention, Mission to Belarus, 25 November 2004, E/CN.4/2005/6/Add.3, §79. Cf. also the International Commission of Jurists in their "Submission to the Universal Periodic Review of Belarus", November 2009 (available at humanrightshouse.org/noop/file.php?id=12413, and in another report available in both English and Russian: http://www.icj.org/dwn/database/PR_Belarus120111_ENG[2].pdf). ODIHR did not examine the facts of this matter in detail.

277 See Ministry of Justice Press Release of 29 December, 2010. Available at: http://www.minjust.by/ru/site_menu/news?id=734. See also Ministry of Justice Press Release of 14 February, 2011 http://www.minjust.by/ru/site_menu/news/?id=775. (both pages accessed on 27 June 2011).

permission to do so. Thus, ODIHR was unable to properly examine the basis for these sanctions. The fact of their occurrence is mentioned only with respect to the impact those proceedings had on other counsel involved in these cases. However, it warrants mention that the Ministry of Justice has the power to license lawyers - and to punish them by license revocation - raising concerns in light of the internationally accepted view that licensing of lawyers should be done by an independent body rather than the executive.

219. Both the timing and the gravity of the disciplinary sanctions against lawyers raise concerns. Defence counsel have clear ethical obligations to conduct themselves professionally. They are never to make false or misleading statements to others, including the media, nor to withdraw voluntarily from a case in circumstances that leave the accused without counsel. However, even if the lawyers committed such acts here – which the monitors were in no position to assess[278] - the licensing authorities would do well to consider that being denied access to one's client in situations where the client is otherwise held incommunicado justifies a vigorous response. The timing of these sanctions played a negative role, as did an apparent unwillingness to exercise alternatives to summary de-licensing.[279] Dismissal of one's privately contracted counsel during the important pre-trial phase risks significant, negative consequences for the accused.

220. The monitors learned anecdotally of instances where some defendants, particularly those with a political profile, had difficulties finding a lawyer subsequent to the mentioned de-licensing. Lawyers appeared reluctant to represent these suspects, as the lawyers were aware their actions would be the subject of scrutiny by the domestic licensing authorities. In cases observed, all defendants eventually found representation, but to the extent the accused were deprived of the counsel of their choice because lawyers were afraid to accept their case, this important right has been undermined.[280]

221. Monitors attempted to meet counsel defending those accused in relation to the events of 19 December. Most agreed to meet; others were reluctant, and some refused outright. Several lawyers stated that they needed permission from the head of the Bar Collegium to meet; others said they need their client's permission. During a break in one trial, the monitors asked a lawyer defending an accused if they could meet once the trial ended. The lawyer responded, "*I'm not sure whether I'll still be employed then*." The sentiment was typical of the responses received in this vein and illustrates the pressure some of the lawyers felt. Monitors noted the difficulty confronting lawyers who are worried about their own protection in addition to protecting the interests of their clients.

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278 Again, ODIHR undertook no investigative steps to determine the accuracy of any allegations made in this respect.

279 It is unclear whether alternatives such as warnings, reprimand, probation and similar alternative sanctions were available and, if so, whether they might have been an appropriate response to the alleged misbehaviour.

280 ODIHR is aware of at least one case wherein the lawyer initially accepted to represent the client, then chose to withdraw after other lawyers were sanctioned as described above.

222. When the lawyers and the monitors did meet, with few exceptions, the lawyers did not venture to comment on the functioning of the judicial system, despite the fact that each of them had just lost their case. Several indicated that they were not at liberty to voice criticisms to representatives of foreign organizations lest they run afoul of the Ministry of Justice sanction regime in which their colleagues were caught, or that they might be in violation of Article 369-1 of the Criminal Code – "Discrediting of the Republic of Belarus."

Adequate Opportunity to Mount a Defence

223. Together with their clients, the lawyers received access to the prosecution's case file in advance of the trial. Typically, counsel will have one month to review the file. In these cases, according to the interviewed counsel, that time frame tended to be shorter. However, the monitors queried the lawyers as to whether they had had sufficient time to prepare their defence and each one responded positively. They also noted that they could have asked for additional time had they believed they needed it.

224. Evidence produced by the prosecution in the monitored cases consisted of one or two thick files of written materials per defendant. In addition, there were several hours of video footage. More than half of the cases had multiple defendants; the quantity of materials used at trial being multiplied by the number of defendants. Defence counsel reported that they focussed on their own client's materials and tended either to ignore the rest due to lack of time, or simply glanced through it quickly. Counsel whose clients were in KGB detention were not allowed to photocopy the materials in the file. The reason for this limitation was not shared with the monitors. Given that the prosecution will have had the case file for a significantly longer time, the disparity could well have had an impact.

Access to Counsel During Pre-trial Investigation at KGB Detention Facility

225. ODIHR was made aware of difficulties several lawyers encountered as they attempted to meet their clients. This complaint was also levelled at various points during the trials. The obstacles appeared to emanate almost exclusively from the KGB detention centre. Monitors learned that despite repeated attempts to visit the KGB centre and see their clients, lawyers were denied entry until either an official interrogation occurred, or until the investigation was nearly finished. Typical of KGB detention was a wait of two to three months before the first time a lawyer could meet with his or her client alone, confidentially. The explanation received, including when the lawyers lodged formal complaints, was that the interrogation/meeting rooms were occupied. No effort appears to have been made to accommodate access to counsel under the alleged circumstances. This state of affairs stands in clear contravention of applicable international standards which required access to counsel within 48 hours of arrest, at the latest.

Effectiveness of the Legal Representation

226. The monitors also evaluated the overall performance of the defence. The impression formed was that the quality of counsel varied substantially. Monitors did not assess that any single lawyer was so ineffective that a violation of this fundamental right may have ensued. Still, some lawyers failed to challenge controvertible evidence, failed to submit motions that would have

benefited their clients, and failed to seriously cross-examine prosecution witnesses – particularly when those witnesses were police or otherwise belonged to the state apparatus. It was clear to the monitors that some lawyers felt that if they defended their clients too assertively they might suffer professional repercussions. Other lawyers appeared convinced of their client's guilt (or that they would be found guilty) and that mounting a vigorous defence was of marginal use.

D. Conclusions and Recommendations

227. With certain notable exceptions, the right to defend oneself or through legal counsel of one's choosing was respected in these cases. Every accused was represented at trial by counsel, whether privately hired or state appointed. Most lawyers appeared to be looking out for the interests of their client insofar as the circumstances allowed. None complained of a lack of time to prepare their defence. The denial of access to lawyers for those detained in the KGB detention centre during the early stages of the investigation was of significant concern. It may well have had repercussions on the defendant's choice of whether or not to speak to investigators. Sanctioning defence counsel that had aired allegations of maltreatment and prohibited access had a chilling effect on other lawyers' assertion of their client's rights.

Recommendations:

- To revamp the lawyer licensing regime to comply with the strictures set out in the UN Basic Principles on the Role of Lawyers. Specifically, remove the role of the Ministry of Justice in licensing the legal profession.

- To review and revise the existing procedures in order to ensure prompt access to counsel for those detained in the KGB facility.

- To investigate the alleged denial of counsel to those detained at the KGB facility in the aftermath of the events of 19 December was intentional. Ensure appropriate sanctions are applied for anyone implicated in an intentional denial of counsel.

CHAPTER 7: THE RIGHT TO SILENCE AND THE EXCLUSION OF UNLAWFULLY OBTAINED EVIDENCE

228. As set out in Chapter 3 relating to the presumption of innocence, a core tenet of fair trials is that the obligation to prove a charge rests with the entity that raises it. The person facing the charge must not only be presumed innocent until the charge is proven in a court, but also must not be compelled to assist his or her accuser in any way. Included in this principle is the long-standing right not to be forced, coerced, or deceived into testifying against oneself or one's family. Moreover, it is impermissible under international human rights standards that negative inferences be drawn from a person who chooses to exercise this right not to participate in his or her own defence – ie., the right to silence. The right extends from the moment of detention, into the pre-trial or investigation phase, and throughout the end of the criminal proceedings.

229. This chapter examines whether judges properly assessed the admissibility of certain evidence as required by national and international standards in light of the right to silence. In examining the application of this right, ODIHR also assessed the concomitant prohibition on the state to employ coercive measures, including maltreatment, against detained persons, and then the requirement on justice systems to exclude any evidence obtained illegally.

A. International Standards

230. Concerning the right to remain silent in the face of criminal charges, the ICCPR provides that "*[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: […] (g) Not to be compelled to testify against himself or to confess guilt.*"[281] The OSCE Moscow Document goes further in the protection of detained persons. The text commits the participating States to adopt effective measures *"to provide that law enforcement bodies do not take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, or otherwise to incriminate himself, or to force him to testify against any other person."*[282]

231. Relevant international standards could not be clearer in prohibiting any form of compelled testimony - ranging from torture to other forms of ill-treatment or coercion - to be used at trial. The UN HRC General Comment 20 adopted an inclusive understanding of inadmissible evidence that covers evidence obtained under duress. It requires that domestic law *"prohibit the admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment."*[283] The Committee's General Comment 13 adds

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281 ICCPR, Article 14(3)(g).

282 1991 Moscow Document, §23.1(vii).

283 UN HRC, General Comment 20 concerning prohibition of torture and cruel treatment or punishment (Art. 7), CCPR/C/GC/20, 10 March 1992, §12.

that "*[t]he law should require that evidence provided by[...] any[...] form of compulsion is wholly unacceptable.*"[284]

232. The UN Guidelines on the Role of Prosecutors prohibit the use by prosecutors of evidence "*obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights.*"[285] The UN CAT provides that "*any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.*"[286]

233. Intrinsically related to these prohibitions is the duty upon state authorities to investigate allegations of torture or ill-treatment raised by anyone, but especially criminal defendants. The duty is rooted in a number of international norms, including the ICCPR and the CAT.[287] The law is clear that allegations of torture are enough to trigger the obligation of prompt and impartial examination by competent authorities.[288] Similarly, the OSCE participating States committed themselves, *"to inquire into all alleged cases of torture and to prosecute offenders"*.[289] (emphasis added)

234. Moreover, the CAT places an obligation on state officials who are in a position to react against maltreatment to take reasonable and necessary preventive measures. Instigation or acquiescence in ill-treatment are to be fully investigated by competent, independent and impartial prosecutorial and judicial authorities.[290] As established by the UN, such investigations are to centre around four universal principles: independence, effectiveness, promptness and impartiality.[291]

235. State officials, thus, are not free from international legal obligations simply because they themselves do not commit torture. Officials who do not enforce

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284 UN HRC, General Comment 13 on Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14), CCPR/C/GC/13, 13 April 1984, §14.

285 Guidelines on the Role of Prosecutors, Guideline 16, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

286 CAT, Article 15.

287 ICCPR, Article 2(3); CAT, Article 12. The investigation is triggered when there are "reasonable grounds to believe" that torture may have been committed.

288 CAT Article 13 (emphasis added).

289 1994 Budapest Document, §20.

290 CAT, General Comment 2, Implementation of Article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007), §26.

291 *The Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Supported in General Assembly resolution 55/89 of 4 December 2000. Text available at: http://www2.ohchr.org/english/law/investigation.htm, visited on 20 June 2011. Note that the investigation need not be conducted by a court or even a judicial body. Administrative investigations, where appropriate, may equally comply with the four principles.

the prohibitions on this international crime, irrespective of who committed it, can themselves be found complicit.[292]

236. Finally, no one in the Belarusian state apparatus is shielded by an argument that places the onus of respecting these obligations on some other branch of government. The judiciary must implement the convention irrespective of the actions of the executive, and vice versa.[293]

Wiretapping standards

237. International standards on wiretapping relate to an individual's inherent right to privacy. Article 12 of the UDHR states that "[n]o one should be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks on his honour or reputation. Everyone has the right to the protection of the law against such interferences or attacks." The UDHR language was later codified in Article 17 of the ICCPR.

238. The prohibition against arbitrary interference with privacy presumes that, to be justified, the interference must be in accordance with the law and be narrowly tailored to serve a legitimate aim. The 'lawfulness' element mentioned above concerns not only the existence of a law authorizing the wiretap, but, importantly, also its quality. In General Comment on Article 17, the HRC observed that even interference provided for under the law can be considered arbitrary if undertaken outside "the provisions, aims and objectives of the Covenant."[294] Such invasions of privacy "should be, in any event, reasonable in the particular circumstances."[295]

B. National Legislation

239. The Constitution of Belarus prohibits anyone being "a witness against oneself, members of one's family or next of kin."[296] It also stipulates that "[e]vidence obtained in violation of the law shall have no legal force."[297]

240. The CPC provides for the right of a suspect or accused "to testify or to refrain from testifying."[298] While a witness under Belarusian law bears an obligation to

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292 HRC General Comment 20, *supra* note 283, §§13, 14.

293 UN HRC General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, "The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local – are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility."

294 UN HRC General Comment No. 16 to ICCPR Article 17: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation. HRI/GEN/1/Rev.9 (Vol.I), adopted 8 April 1988.

295 Id.

296 Constitution of the Republic of Belarus, Article 27.

297 Id.

298 CPC, Articles 41(2)(9) and 43(2)(8).

provide truthful testimony,[299] he or she cannot be compelled to testify "against oneself and/or one's family members"[300] – a mirror of the constitutional language. The CPC expressly bans summoning a suspect in a witness capacity.[301]

241. The law requires that anyone arrested on suspicion of committing a crime be given a warning with information about their rights as a suspect.[302] While the article of the CPC that contains this requirement does not expressly mention the right to refuse to testify, the reference it makes to the provisions of the Code elsewhere makes it clear that the right to refuse to testify is included. Similarly, the CPC requires that upon indictment the accused be given a warning similar to the abovementioned.[303]

242. The investigator is required to inform persons that are summoned of the capacity in which he or she will be questioned.[304] That explanation must also set forth the relevant rights, including the right not to testify against him or herself and/or family members. At trial, the CPC mandates the presiding judge to:

> *"explain to the defendant his or her right to testify in connection with the charges and other circumstances of the criminal case and draw the defendant's attention to the fact that anything that he or she says may be used as inculpatory evidence."*[305]

243. In the event that the defendant refuses to testify at trial, but did give a statement during the investigation, his or her previous statement may be read out at the hearing.[306] The decision as to whether to read out the statement is taken by the court on its own initiative or upon a motion by a party to the case.

244. In accordance with the CPC, "where evidence is not obtained in compliance with the procedure stipulated by the [CPC,] it shall have no legal force and cannot serve as a basis for indictment and conviction."[307] The law requires that judges assess all evidence as to its relevance, admissibility, and credibility.[308] In doing so, the code defines as inadmissible any evidence that was obtained in violation of a citizen's constitutional rights.[309]

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299 Id., Article 60(4)(2).

300 Id., Article 60(3)(1).

301 Id., Article 60(2)(1).

302 Id., Article 110(1).

303 Id., Article 243(3).

304 Id., Article 217(2).

305 Id., Article 327(1).

306 Id., Article 328(1)(2). As employed here, "statement" refers to statements made by a witness, victim or suspect in the presence of investigating officers only, of which a signed "protocol" is included in the case file. Opposing counsel will not have been present. For accused, their lawyer's signature should also be present on the protocol if the person has retained counsel.

307 Id., Article 8(3). See also Article 105(5).

308 Id., Article 105(1).

309 Id., Article 105(4).

Legal provisions on wiretapping

245. Concerning the use of evidence gathered via the use of wiretaps, Article 28 of the Constitution guarantees everyone "protection against unlawful interference with one's private life, including encroachments on the privacy of one's correspondence and telephone and other communications, and on one's honour and dignity."

246. The CPC permits the interception and recording of voice communications in cases of "grave or especially grave" crimes where there are "reasonable grounds to believe" that the communications are relevant to the case.[310] The power to authorize interception is vested in the Prosecutor as well as the Minister of Interior and the Chair of the Committee on State Security.[311]

247. The application for an interception order must be substantiated in that it must mention the criminal basis, the grounds for interception, the identities of the individuals whose communications will be intercepted, the time period for interception, and the entity tasked with intercepting it.[312]

248. The Law on Investigative Activity entitles anyone who was subjected to surveillance and in whose respect no criminal proceedings were subsequently instituted, or who has been acquitted, to request access to the information obtained as a result of the said surveillance measures in full volume, save where such access would entail disclosure of information classified as a state secret.[313] A refusal to provide such access is appealable. The Law also provides that any information obtained through surveillance and not relevant to the solution of the crime must be destroyed within three months.[314]

C. Findings and Analysis

249. Throughout the monitoring activities, troubling allegations of torture and ill-treatment by law enforcement officials, particularly in the KGB detention centre, were brought to the attention of ODIHR. At least three different defendants alleged ill-treatment at the hands of law enforcement officers at the time of arrest or during pre-trial detention.[315] In some cases, separate complaints were filed with the prosecutor's office. In addition to physical violence and threats to life, allegations ranged from insults, humiliation and threats, to denial of food and medical assistance and other forms of possibly cruel, inhumane, and degrading treatment.

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310 CPC Article 214.

311 Id., Articles 213(1) and 214(1). See also Law on Investigative Activity, Articles 13 and 13-1.

312 Id., Articles 213(2) and 214(2).

313 Id., Article 6.

314 Id.

315 The most notable allegations were from Ales Mikhalevich (see http://www.bbc.co.uk/news/world-europe-12606265). Alyaksandr Atroshchankau (see http://www.charter97.org/en/news/2011/5/10/38425/, and Andrei Sannikau, who made his allegation during trial in the afternoon session of 13 May 2011. Other defendants also complained during trial of maltreatment either during detention or upon arrest.

250. ODIHR was not in the position to investigate these allegations and so, apart from what information emerged during trial or in the media, remained unaware of the reaction of prosecutors, investigators or detention authorities to the allegations. Internal prosecutorial enquiries reportedly were held in some cases as their occurrence was mentioned at trial. However, they apparently did not result in any public documents or proceedings.

251. The monitors were able to gauge the reactions of judges when such allegations appeared during trial. In some cases, judges relied on pre-trial statements of the defendants which were conflicting with their testimony made during the trial, despite allegations of duress and intimidation. Other judges reacted to an allegation of mistreatment made by a witness or accused by questioning the person further.[316] The judges were generally satisfied upon ascertaining that any statement used at trial had been signed with an attorney present. Only rarely did a judge attempt to gather additional facts concerning the alleged mistreatment. No judge ordered an independent inquiry. Defence motions to exclude evidence based on the alleged maltreatment were ignored or denied.

Improper Response to Allegations of Torture, Maltreatment, and Excessive Force

252. International law and national legislation place an unequivocal obligation on state authorities to investigate allegations of maltreatment by security forces. This obligation was not properly met. The monitors not only heard allegations related to the conduct of law enforcement officials, but also saw instances of what appeared to be excessive force on the video materials shown during trial. Multiple baton blows against demonstrators who were not resisting or who had been subdued were visible. Time and again, defendants told the court that they were beaten by the police and suffered from cruel treatment while in custody. As noted, more than one defendant stated in open court that he had suffered torture or maltreatment and even listed the acts perpetrated against him that he believed amounted to torture.[317] Whether those acts occurred, and even if they did occur, whether they qualified as torture, is beyond the scope of this report. However, to the extent that the authorities - judicial or otherwise - did not respond appropriately, a violation of CAT Article 13 and OSCE commitments may have resulted.

253. According to available information, at least three types of investigation have been conducted with respect to at least some of these allegations. The Chair of the Committee on State Security apparently conducted the first one. Testimony by more than one accused during trial indicated that the KGB superior had visited the centre and spoke to detainees to inquire about the allegations.[318] A second investigation was reported in the press to have been conducted by the Prosecution office.[319] After the trials were over, another investigation was apparently conducted by an officer from the Military Prosecutor's office.[320]

316 For example, Sannikau Trial, 6 May 2011, morning session, questioning of defendant Hnedchyk.

317 Sannikau trial, 13 May 2011, afternoon session.

318 Defendant Sannikau and Defendant Statkevich reported visits by the KGB head.

319 See http://www.charter97.org/en/news/2011/5/10/38425/ (accessed 10 Aug 2011), §4.

320 See http://www.charter97.org/en/news/2011/6/19/39745/ (accessed 10 Aug 2011).

254. The international standards cited above are clear that an investigation must be conducted by an impartial body. In this context the Head of the KGB cannot fulfil this obligation. This is particularly the case for him, as acts for which he "knew of or should have been aware of" would be attributable to him under the "*respondeat superior*" theory of liability. This said, to the extent he was informing himself of the basis for the allegations so that he could take action if necessary, such a measure would be welcome. However his own investigation cannot substitute for the one required under the Convention.[321]

255. The investigation undertaken by the Military Prosecutor's Office shows more promise. If that official is hierarchically within the Ministry of Defence, and not the General Prosecutor's Office, the KGB or the Ministry of Interior, he should be somewhat closer to the independence criteria foreseen under international standards. However, the fact that each of these bodies is subservient to the President of the State under the Constitution,[322] calls into question even that independence.

"Unofficial" Questioning of Suspects by KGB

256. Several interlocutors acknowledged that the defendants in these cases had been questioned in the absence of their attorney by members of the state apparatus. This practice, known as "unofficial" questioning, appears to be accepted by participants in the Belarusian justice system because any statement so obtained may not be used against the accused at trial.

257. ODIHR is concerned that this practice, although not a violation of the letter of the right to remain silent, undermines the protections it offers. This is doubly true when the access to counsel has been unduly delayed.[323] Monitors have understood that in many instances, the questioning of a suspect takes place and an entire statement is taken. Only then, when time comes to sign the statement, is the suspect given access to counsel.[324] Of course the statement can be changed if the counsel objects, but without having discussed the case privately with their client, counsel will be in no position to advocate alterations. Thus, both the role and the purpose of having defence counsel present is undermined.

Example: 'unofficial' questioning of defendant Klaskouski

In the only instance of a pre-trial interrogation being shown to the court during a monitored hearing, the prosecution chose to play a video of defendant Klaskouski being questioned. In the clip, Klaskouski appears to

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321 See also the Report of the UN Working Group on Arbitrary Detention. E/CN.4/2005/6/Add.3, §84(c).

322 The head of each of these entities may be dismissed at will by the President. See Constitution Article 84(7), The President is empowered to "appoint and dismiss the deputy prime ministers, ministers and other members of the Government."

323 See Chapter 6, above.

324 Sannikau trial, 12 May 2011, afternoon session. Defendant stated that his lawyer, with whom he had not yet spoken privately, was only allowed to help him edit the statement. See also the same trial, 6 May 2011.

have been recently arrested as he appears to be somewhat inebriated and is wearing handcuffs. The officials questioning him make a passing reference to lawyers, but do not attempt to explain in clear and comprehensible language the full panoply of rights that inure to someone in Klaskouski's position. The video is substantially edited with sections apparently removed. Klaskouski makes a number of incriminating remarks. He is shown signing a statement at the end. Just prior to signing the officer warns him about the liability for perjury. However the monitors could not make out any warning about the right to silence, or the rights to an attorney.[325]

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258. Both Klaskouski himself and his lawyer objected to this video being played at trial.[326] To the objection that this statement was taken without a lawyer present, the judge responded, "*this is not evidence of an interrogation, we have protocols of all interrogations, this is video evidence*."[327] The lawyer further objected to the fact that she had not seen the video prior to trial and although she had seen a transcript, it differed from the conversation in the actual video. The court rejected all objections.

259. The use of such a statement is acceptable only to the extent that the suspect or accused is informed in clear and comprehensible terms not only that he or she is permitted to have an attorney present, but also that any statement made can be used in court. This video evidence, as viewed by the monitors, was not convincing in this regard. The rights advisory must occur prior to the beginning of the questioning and not after the statement has been given. Also, when dealing with an inebriated suspect, officers must take particular care in delivering the warnings in a comprehensible manner to ensure that the waiver of those important rights is given knowingly.

Wire Tapping Evidence

260. In observing the trials, ODIHR learned from the proffered evidence that every former opposition presidential candidate and many of their representatives[328] had had their communications wiretapped throughout the presidential campaign. Some candidates indicated that they had been tapped well before that.[329] Monitors were unable to assess the bases for any of these warrants ("sanctions") or to view the warrants themselves. When the legality was challenged by a lawyer during trial, one judge simply responded that the "warrants had been authorized."[330]

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325 Statkevich trial, 14 May 2011, morning session.

326 Klaskouski objected by saying, "They interrogated me without my lawyer, that's illegal."

327 Monitors were unable to discern the basis for permitting the video into evidence. However, if the ruling means investigators can bypass the requirement for counsel-signed protocols simply by videoing "unofficial" interrogations and submitting the video, then serious concerns arise.

328 At least those who were charged with criminal offenses. The monitors did not attempt to assess whether former candidates who were not criminally charged also had their phones wiretapped.

329 A. Sannikau stated at trial that the protocol in his case file indicated his phone had been tapped from July 2010.

330 Id. Sannikau trial, 11 May 2011, morning session.

261. Some defendants objected to the content of these wiretaps being aired in the public trial and the judges, upon such motion, properly withdrew *in camera*.

262. Legislation on interception of communications must meet a number of requirements to be viewed as in line with international standards and the body of best practice. First, the standard of proof for authorizing interception must be sufficiently high to serve as a safeguard against arbitrary surveillance. As mentioned above, the standard of proof for authorizing interception of communications in Belarus is that of "reasonable grounds to believe," which is roughly equivalent to the standard of probable cause and as such in line with the international best practice. It is, however, recommended that the Law on Investigative Activity, which, as it stands, is silent on the standard of proof, incorporate the mention of "reasonable grounds to believe" to ensure better consistency across the array of relevant legislation. It should also make clear that mere suspicion is insufficient to authorize such a warrant.

263. Second, in order to ensure that interception be "necessary in democratic society," the law must make an express provision prohibiting interception where other investigative techniques are available. However, as it stands now, the CPC does not expressly require that interception of communications be used only if other investigative techniques have failed or are unlikely to yield evidence.

264. Third, under Belarusian law it is the prosecutorial (or equivalent) rather than judicial bodies that have the power to authorize interception of communications. This creates a prosecutorial bias in the authorization procedure and a susceptibility to overuse due to the prosecutor's vested interest in the outcome of the case. Although not conclusive, the cases at hand are illustrative. The wiretap against A. Sannikau appears to have been authorized in July 2010, although no charges were brought against the targeted person for any activity between July and October 2010. It must be noted that monitors were excluded from hearing portions of the tapped evidence that was presented at trial.

265. Fourth, even though the Belarusian law entitles an acquitted person (or an individual against whom no criminal proceedings were instituted) full access to records concerning surveillance measures implemented, there is no corresponding requirement for a criminal defendant, their defence counsel, and/or any interlocutor intercepted in the defendant's communications, to obtain access to such records once the pre-trial investigation has been completed and the surveillance measure closed. It is, therefore, exceedingly difficult, if not altogether impossible, to obtain access to such records, especially if, for some reason, these were not chosen for inclusion in the case file.

D. Conclusions and Recommendations

266. Serious accounts of police brutality, maltreatment, and even torture at the hands of law enforcement personnel were presented during trial. The allegations appear not to have been followed up in the manner required by international standards. This state of affairs warrants serious and effective

measures. Judges (and prosecutors) should have a clear obligation to refer all incidents that come to their attention to an independent authority that has a mandate to investigate such incidents. The independent authority must be able to refer for prosecution those reasonably believed to have committed violations.

267. The CPC should also be amended to tighten the prohibition of relying on the evidence obtained through unnecessary invasions of privacy. Change in practice will only come when courts begin to routinely deny admissibility to tainted evidence.

Recommendations:

- To undertake an independent investigation into the allegations of maltreatment raised by the suspects in these cases. As part of the investigation, review the entire collection of available video material.[331] Ensure the investigation meets the standards set out by the UN in "*The Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*".

- To undertake an independent investigation into the propriety of wiretaps as authorized in these cases. In particular assess whether the taps were "necessary" and whether they were sufficiently substantiated under a "reasonable basis for suspicion" standard connected to a "grave or exceptionally grave" crime.

- To amend the CPC and the Law on Investigative Activity as follows:
  - To permit only judges to authorize wiretapping and similar investigative measures that violate privacy; follow up the amendment with appropriate training on evaluating such requests in light of international standards and best practices;
  - To preclude wiretapping and similarly intrusive forms of privacy invasion unless other investigative procedures have been tried and failed or they reasonably appear to be too dangerous or unlikely to succeed if tried;

- To set out in the Law on Investigative Activity the same legal standard for authorizing wiretapping and similar investigative measures that violate privacy as currently exists in the CPC;

- To amend the Law on Investigative Activity to permit those who have been the subject of a privacy invasion, upon the close of the measure, rather than only in the case of acquittal or non-institution of criminal proceedings, to learn a) why they have been tapped, b) for how long, and c) by what means, and d) to receive evidence that the information gathered during the tap has been destroyed.

- To amend the CPC so that all statements admitted at trial, whether by video or in writing, have appropriate documentation attesting that all the appropriate rights were explained to the person providing the statement. Especially for defendants

[331] For example, a video available at http://www.youtube.com/watch?v=mwZCE2UaNHs, at minute 10, or http://www.youtube.com/watch?v=iNr4yxyjNWM&feature=related, at minute 1:26, clearly show riot policemen on the night in question clubbing protestors who are offering no resistance.

who retract at trial a previously provided written testimony, these testimonies should be excluded from the evidence and not relied upon by the court.

CHAPTER 8: THE RIGHT TO EXAMINE OPPOSING WITNESSES AND EVIDENCE

268. The international human rights framework includes the right of an accused to examine opposing witnesses - also known as the right to confrontation. The right is premised upon the rationale that a face-to-face confrontation between the accuser and accused assists the truth-seeking function of the court. A physical confrontation permits the fact-finder the opportunity to view the demeanour of the witness in front of the accused, the latter often being the only person who knows whether the witness is being truthful. Without confrontation the defendant, who is not compelled to provide evidence in his/her defence, is denied an important opportunity to challenge the evidence proffered by the accuser. The right ensures that the defendant has the opportunity not only to view the accuser, but also to question him/her.

269. The national and international standards imply that every reasonable effort should be made to ensure the attendance of witnesses at trial as exclusive reliance on their pre-trial affidavits[332] runs counter to these standards. The monitoring results indicate that the practice in several trials gave rise to concerns in this regard.

A. International Standards

270. The ICCPR guarantees the right to confront witnesses in the context of criminal proceedings. Its Article 14(3) states the right in the following terms:

> *In the determination of any criminal charges against him, everybody shall be entitled to the following minimum guarantees, in full equality: (…) (e) To examine, or have examined, the witnesses against him . . .*[333]

271. The right of the defendant to call and examine witnesses is not absolute; it is subject to the condition that it be applied *"under the same conditions as witnesses against him"*.[334] The formulation of Article 14(3)(e) indicates that the legal tools available to the prosecution to procure witnesses serves as the benchmark for the defence's right to do the same.[335] In short, summoning witnesses must function under the same procedure and under the same standards for prosecutors and defence.

272. Domestic law can lay down conditions for the admission of witnesses, and courts can, and indeed should, refuse witnesses if the testimony they would

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332 As employed in this report, "affidavit" refers to statements made by a witness, victim or suspect in the presence of one party, for example investigating officers, but outside the presence of the other party.

333 ICCPR Art 14 (3).

334 Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (1993), p. 261 Nr. 52.

335 Id., Nr. 53

bring is irrelevant. The defendant therefore has to establish that the failure to hear a witness would prejudice his or her case.

273. In addition, Art 14 (3) (e) ICCPR has been interpreted to mean that the prosecution must inform the defence of the witnesses it intends to call to trial within a reasonable time prior to the trial so that the defendant may have sufficient time to prepare the defence. Conversely, the defence should inform the prosecution about its witnesses prior to trial.[336]

274. The applicable international standards indicate that when a witness is unavailable at trial, the court should not base a conviction on the evidence extracted from that witness's affidavit, except under very narrow circumstances. However, where the defendant is given an opportunity to challenge the affidavit at the pre-trial stage or if the defendant is present during the taking of the affidavit and was able to put questions, admission of the evidence will not in itself run counter to the provisions of ICCPR Art. 14(3)(e). Where a conviction is based '*solely or to a decisive degree*' on affidavits given by a witness that the defendant cannot confront, whether at the pre-trial or trial stage, in ODIHR's view the defence will have been put at a disadvantage that is incompatible with international law.

275. The U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, while providing that the states should allow "the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected," specifies that this should be done "without prejudice to the accused and consistent with the relevant national criminal justice system."[337] A number of international standards, including the abovementioned U.N. Declaration, the Council of Europe Recommendation (1985) II on the Position of the Victim in the Framework of Criminal Law and Procedure[338] and the Framework Decision of the Council of the European Union on the standing of victims in criminal proceedings,[339] reflect the growing recognition of the rights of victims in criminal proceedings. The imperative is to ensure that the consideration of victims' interests be consistent with the right to a fair trial.

B. National Legislation

276. The Constitution of Belarus does not expressly guarantee the defendant in a criminal trial the right to confront and cross-examine witnesses against him or her. Neither does the CPC, in enumerating the defendant's rights, include a specific clause permitting the accused a right to confrontation.[340] However, as a

336 Lawyers Committee for Human Rights, What is a Fair Trial? A Basic Guide to Legal Standards and Practice, March 2000

337 UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34, 29 November 1985, §6(b).

338 Council of Europe, Recommendation (1985) II on the Position of the Victim in the Framework of Criminal Law and Procedure, 28 June 1985.

339 Council of the European Union, Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, 2001/220/JHA.

340 CPC, Article 43.

rule all relevant evidence must be reviewed at trial,[341] and the defence does avail of the right to question all witnesses that appear at trial.

277. The CPC permits reading out affidavits that were made during the pre-trial investigation phase by victims and/or witnesses where (a) the testimony given at trial contradicts the testimony given at the pre-trial stage; (b) the victim or witness in question is unavailable to attend the trial; or (c) safety concerns preclude the attendance by victim or witness. The decision to read out the pre-trial affidavit is made either by the initiative of the court or upon a motion by one of the parties to the proceedings.[342]

278. Under the Belarusian law, victims are recognized not merely as participants in the proceedings, but independent parties with an interest in the outcome of the case. Article 50 of the CPC affords the victim the right to testify and to be present at court hearings, as well as to express opinions and objections. The CPC in fact requires that the victim participate in the trial. In the event that he or she fails to attend, the court has to decide whether the trial may proceed in the victim's absence.[343] A victim may move the court to allow him or her not to be present throughout the trial, in which case the victim will only be summoned to testify.[344] While Article 314 of the Code requires that witnesses be excluded from the courtroom until they are called in to testify, no corresponding provision exists for victims. However, Article 220, which concerns the procedure of questioning of victims and witnesses at the pre-trial stage, contains a provision prohibiting contacts among victims and/or witnesses prior to taking their affidavits.

279. Because Belarusian law does not insist on the right to confrontation, and in fact permits affidavits to be entered into evidence in situations where the defence has not been able to question the declarant, the provisions fall short of international standards. The prominent status and collection of rights afforded to victims in criminal proceedings under the law is to be positively viewed in that they afford more protection to victims than required under international standards.

C. Findings and Analysis

280. In the monitored trials, testimony from victims of the alleged crimes came in the form of 29 police officers who had deployed on the night of 19 December. A number of them testified in each of the 10 trials. In more than one trial, defence counsel went to significant lengths to show that their client had not injured or attacked any of the police victims who testified. Not a single police officer was able to identify one of the defendants in any trial as the person who had injured him. Issues also arose concerning their status as victims, their testimony, especially where many did not appear even though called, and the protection of their rights. Moreover, other witnesses were either not called, or did not appear

341 Certain exceptions may be made, for example if the defendant pleads guilty and the judge has made sure that the guilty plea was not coerced, in which case only the evidence expressly referred to by the parties is reviewed. See Id., Article 326(1). These exceptions do not apply where the defendant is a minor or may be sentenced to a custodial sentence of over 10 years or to the death penalty (id. Article 326(2)).

342 Id., Article 330.

343 CPC, Article 296(2).

344 Id., Article 296(3).

if called. If they had previously provided an affidavit, it was usually read out - thus denying the defendant the right to confrontation.

Unavailable Witnesses

281. In light of this right to examine witnesses, the use of pre-trial affidavits in lieu of live testimony is an issue that merits close attention. Monitors noted several occasions where reading such affidavits occurred to the detriment of the defendant's right to examine the witnesses against him.[345] Judges readily and repeatedly relied on written protocols of interrogations of witnesses taken during the pre-trial stages of the proceedings. In the case of one important witness[346] the fact that he had a heavy workload was deemed a valid reason for his failure to appear in court in all of the three trials to which he was called.[347] In all instances, the judges read out his written affidavit given to investigators prior to trial, but with no one present representing the interests of the defence when that statement was taken. ODIHR notes that if the testimony is deemed sufficiently important to support the conviction, the witness should have been compelled to attend or the trial delayed until the witness became available. The right enshrined in ICCPR's Article 14(e) would otherwise require the affidavit to be removed from the file and not considered in the judgement.

Victim-witnesses Absent in Trials with Weak Justification

282. Throughout the trials a substantial number of police victims/witnesses failed to testify because they were on training exercises, were ill, or had a similar excuse. In one case the police officer was apparently away on business trip.[348] In many of those instances the defence would seek to resend the summons or put the trial on hold until the witnesses were available. In no instance did the judge deem the witnesses important enough to stay the trial, although on several occasions the judges agreed to re-send the summons. Thereafter, the judge would give up and the pre-trial statement would be read out - thus depriving the defence of its right to confront this witness.

Example from the Statkevich trial

During trial affidavits were read out of three teachers who had attended a campaign event where Statkevich and Uss made speeches. The teachers' affidavits attested to the fact that defendant Statkevich had invited the attendees to go to Minsk on the night of the elections. After the reading, the defence observed that the three statements were essentially identical – appearing to have been cut and paste from the same original text. The defence then moved the court to call the witnesses so they could be cross-examined. The prosecution objected. The motion was rejected.[349]

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345 Note that the issue of affidavits being read out in court in order to "correct" inconsistent in-court testimony is addressed below.

346 Karziuk, Chief of the Traffic Police of Minsk. Sannikau trial, 6 May 2011, afternoon session.

347 The chief was called to the Sannikau, Nykaleau and Statkevich trial, but appeared at none of them.

348 Sannikau trial, 6 May 2011, afternoon session; discussion continued on 10 May 2011, morning session, regarding witnesses Karziuk and Vernikovsky.

349 Statkevich trial, 16 May 2011, afternoon session.

283. ODIHR notes that the domestic law provision that prohibits contacts among witnesses or victims prior to giving their affidavits does not appear to have been scrupulously followed in this instance.[350]

The Use of Affidavits to Bolster Weak Testimony

284. An equally important and related issue concerns how the pre-trial affidavits are used when a prosecution witness (or victim-witness) appears at trial, but falters upon taking the witness stand. As already noted, all such witnesses called by the prosecution had their affidavit in the file.[351] At trial, when a prosecution witness recanted, forgot, or otherwise changed his/her testimony vis-à-vis the previous statement, the previous statement was read out. This occurred almost as a matter of course, and the court nearly always accepted the previous version as the more credible of the two.[352]

285. This practice placed the prosecution at a unique advantage. Irrespective of whether a prosecution witness completely denies what he said previously when confronted by the defence – the court appeared always to consider the previous affidavit. When a previous statement is given equal, or in fact more weight, than the testimony at trial, the right of confrontation is rendered meaningless as is the purpose of in trial testimony.

286. This imbalance is exacerbated by the fact that the defence does not have a procedural power to conduct interrogations[353] – and therefore to obtain pre-trial affidavits. If a defence witness falters on the stand, there is nothing that can be read out which the court will consider as presumptively more reliable.

Victims Present During Testimony of Others

287. A serious problem occurred with the practice that allowed victims, who would later testify, to be present in the courtroom throughout the hearing. As mentioned, domestic law allows this practice with respect to "victims," while witness on the other hand are excluded from the courtroom until the moment they are called. Witness exclusion pursues the legitimate aim of preventing witnesses from being exposed to others' testimony and potentially adjusting

350 CPC Article 220.

351 See Chapter 3 Equality of Arms, *supra*. See also CPC, Article 103(2). Note that to the extent the investigating officer agreed to interrogate defence-proposed witnesses prior to trial, their affidavits would also be in the file.

352 For example, Myadvedz trial, 10 March 2011, morning session. Monitors recorded four police witnesses in a row where, after the previously obtained, written statement was read out in trial, the judge asked the witness which version was more accurate and why. The response was almost always the same, "the earlier version, as it was closer to the events." A similar exchange took place in numerous trials with many of the 29 police officers.

353 See Chapter 3, above.

their own testimony. In the Sannikau trial[354] the non-exclusion of victims created a particular problem when defence, on a number of points, caught out one such victim. The remaining victim-witnesses carefully avoided that error.

288. Even though it is understood that the victims' continued presence in the courtroom is intended to protect their rights as victims (for instance, by affording them the opportunity to react promptly to any statements made by the alleged perpetrator(s); to put questions; or to opine on motions), the victims in these cases were frequently absent from the courtroom.[355] Moreover, in the latter trials, the victims did not appear at all until their presence was required for testimony - in some cases several days after the trial started. Then they left immediately after testifying. Not on one of these occasions did anyone advise the victims that by choosing to be absent they waive a number of important rights. Nor did the court demonstrate any concern that by having been absent for the first few days of the trial, their rights, for example to question witnesses, will have been significantly curtailed. Bringing in the victims on the day of their testimony and then having them leave shortly thereafter demonstrated either a serious disregard for their rights as victims, or undermined that status altogether.

D. Conclusions and Recommendations

289. The right of a defendant to examine opposing witnesses was employed in these trials. Although serious problems also resulted. Prosecution witnesses who failed to appear at trial but whose affidavits were read out deprived the defendant of the right to confrontation. Those statements will not have been subject to examination by someone representing the interests of the defence. The monitors observed that the judges were rather liberal in granting excuses for prosecution witnesses who did not want to attend trial. When witnesses did appear, in the observed trials the judges were often inclined to rely on their pre-trial affidavits rather than the examination of their oral testimonies given in court, especially when such testimonies were inconsistent. Numerous police officers were afforded the status of victims at trial, meaning they were entitled to a series of important rights – one of which resulted in them hearing each other's testimony.

Recommendations:

- To compel the in-court testimony of important witnesses, especially those deemed necessary by the defence, as a means of safeguarding the fundamental right to confrontation. If their attendance cannot be compelled, remove their affidavit from the case file.[356]

- To ensure that the role victims and witnesses in criminal proceedings is not conflated thereby undermining the special status afforded to victims or interfering with the right to a fair trial.

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354 Sannikau trial, 6 May 2011, morning session.

355 For example, in the Statkevich trial, 16 May 2011, morning session, a victim, a riot policeman, was absent due to a "business trip of indefinite duration."

356 Subject to the normal exceptions, such as the death of the witness, small children, etc.

ANNEX 1: TABLE OF ACCUSED AND SENTENCES

Defendant's name	Sentence prosecutor requested	Sentence delivered	Possible sentence (range)
Uladzimir Niakliayeu	3 yrs prison suspended for 2 years	2 yrs prison suspended for 2 years	Fine – max of 3 years prison (art. 342)
Vital Rymasheuski	2 years conditional sentence suspended for 2 years	2 years conditional sentence suspended for 2 years	Fine – max of 3 years prison (art. 342)
Andrei Sannikau	7 yrs prison	5 yrs prison	5-15 yrs prison (p.1 art. 293)
Mikalai Statkevich	8 yrs prison	6 yrs prison	5-15 yrs prison (p.1 art. 293)
Aliaksandr Atroshchankau	5 yrs prison	4 yrs prison	3-8 yrs prison (p.2 art. 293)
Dzmitry Bandarenka	3 yrs prison	2 yrs prison	Fine – max of 3 years prison (art. 342)
Andrei Dzmitryieu	3 years conditional sentence suspended for 2 years	2 years conditional sentence suspended for 2 years	Fine – max of 3 years prison (art. 342)
Aliaksandr Fiaduta	2 years of conditional sentence suspended for 2 years	2 years of conditional sentence suspended for 2 years	Fine – max of 3 years prison (art. 342)
Pavel Seviarynets	3 years restricted freedom	3 years restricted freedom	Fine – max of 3 years prison (art. 342)
Siarhei Vazniak	2 years restricted freedom	2 years conditional sentence	Fine – max of 3 years prison (art. 342)

	suspended for 2 years	suspended for 2 years	
Anastasiya Palazhanka	1 year and 6 months conditional sentence suspended for 1 year	1 year conditional sentence suspended for 1 year	Fine – max of 3 years prison (art. 342)
Dmitry Uss	7 yrs prison	5 years and 6 months of prison	5-15 yrs prison (p.1 art. 293)
Iryna Khalip	2 yrs prison suspended for 2 years	2 yrs prison suspended for 2 years	Fine – max of 3 years prison (art. 342)
Artyom Breus	fine (500 basic units)	fine (300 basic units)	3-8 yrs prison (p.2 art. 293)
Ivan Gaponov		fine (300 basic units)	3-8 yrs prison (p.2 art. 293)
Vasil Parfyankau	6 yrs prison	4 yrs prison	3-8 yrs prison (p.2 art. 293)
Zmitser Myadvedz	4 yrs prison	3 years restricted freedom	3-8 yrs prison (p.2 art. 293)
Zmitser Drozd	3 years and 6 months of prison	3 yrs prison	3-8 yrs prison (p.2 art. 293)
Siarhei Kazakou	4 yrs prison	3 yrs prison	3-8 yrs prison (p.2 art. 293)
Aliaksandr Klaskouski	8 years and 6 months of prison	5 yrs prison	3-8 yrs prison (p.2 art. 293)
Siarhei Martsaleu	2 yrs prison suspended for 2 years	2 years conditional sentence suspended for 2 years	Fine – max of 3 years prison (art. 342)
Aliaksandr Malchanau	5 yrs prison	3 yrs prison	3-8 yrs prison (p.2 art. 293)
Zmitser Bulanau	4 yrs prison	3 yrs prison	3-8 yrs prison (p.2 art. 293)
Andrei Fedarkevich	3 years and 6 months prison	3 years and 6 months prison	3-8 yrs prison (p.2 art. 293)

Artsiom Hrybkou	4 yrs prison	4 yrs prison	3-8 yrs prison (p.2 art. 293)
Uladzimir Khamichenka	3 yrs prison	3 yrs prison	3-8 yrs prison (p.2 art. 293)
Ales Kirkevich	4 yrs prison	4 yrs prison	3-8 yrs prison (p.2 art. 293)
Aliaksandr Kviatkevich	4 yrs prison	3 years and 6 months prison	3-8 yrs prison (p.2 art. 293)
Mikita Likhavid	4 yrs prison	3 years and 6 months prison	3-8 yrs prison (p.2 art. 293)
Uladzimir Loban	3 years and 6 months prison	3 yrs prison	3-8 yrs prison (p.2 art. 293)
Fiodar Mirzayanau	3 yrs prison	3 yrs prison	3-8 yrs prison (p.2 art. 293)
Zmitser Novik	5 yrs prison	3 years and 6 months prison	3-8 yrs prison (p.2 art. 293)
Andrei Pazniak	4 yrs prison	2 years restricted freedom	3-8 yrs prison (p.2 art. 293)
Illya Vasilevich	3 yrs prison	3 yrs prison	3-8 yrs prison (p.2 art. 293)
Pavel Vinahradau	4 yrs prison	4 yrs prison	3-8 yrs prison (p.2 art. 293)
Uladzimir Yaromenka	3 yrs prison	3 yrs prison	3-8 yrs prison (p.2 art. 293)
Aleh Hnedchyk	4 yrs prison	3 years and 6 months of prison	3-8 yrs prison (p.2 art. 293)
Evgeniy Sakret	4 yrs prison	3 yrs prison	3-8 yrs prison (p.2 art. 293)
Zmitser Daronin	4 yrs prison	3 years and 6 months prison	3-8 yrs prison (p.2 art. 293)
Andrey Pratasenya	3 yrs prison	3 yrs prison	3-8 yrs prison (p.2 art. 293)
Vital Matsukevich	4 yrs prison	3 yrs prison	3-8 yrs prison (p.2 art. 293)

ANNEX 2: COMPARATIVE CONVICTION RATES[357]

	Number of Individuals tried in criminal cases	Number of Individuals Convicted	Conviction Rate
2006			
Belarus	85117[358]	78238	**0,92**
Germany	932352	751387	**0,81**
Kazakhstan	55090	32585	**0,59**
Russia	1341525	937667	**0,70**
2007			
Armenia	4110	3520	**0,86**
Belarus	77778[359]	70996	**0,91**
Germany	1111589	897631	**0,81**
Kazakhstan	56187	35497	**0,63**
Russia	1295251	935237	**0,72**
2008			
Armenia	4094	3080	**0,75**
Belarus	72944[360]	68531	**0,94**
Germany	1087840	874691	**0,80**
Kazakhstan		36351	
Russia	1264194	943004	**0,75**
2009			
Belarus	64763[361]	62064	**0,95**
2010			
Belarus	65676[362]	61054	**0,94**

357 If otherwise not mentioned, the info is taken from the UNODC http://www.unodc.org/unodc/en/data-and-analysis/crimedata.html (Accessed 7 June, 2011).

358 2006 figures taken from: http://supcourt.by/cgi-bin/index.cgi?vm=d&vr=stat&vd=1.

359 2007 figures taken from: http://supcourt.by/cgi-bin/index.cgi?vm=d&vr=stat&vd=2.

360 2008 figures taken from: http://supcourt.by/cgi-bin/index.cgi?vm=d&vr=stat&vd=3.

361 This figure is not provided on the website. It was derived herein by adding the number of convicted (62064) with the number acquitted (187), together with the number of cases stopped and the number of convictions overturned on appeal (2699), the latter figures were provided. If only the number of acquitted is compared (187), to the number of convicted (62064), a 99.7 percent conviction rate results.

362 This figure not provided on the website. It was derived herein by adding the number of convicted (61054) with the number of acquitted (217), together with the number of cases stopped and the number of convictions overturned on appeal (4405), the figures of which were provided. If only the number of acquitted (217) is compared with the number of convicted (61054), a 99.6 percent conviction rate results.

ANNEX 3: SUMMARIES OF ARTICLES IMPACTING ON THE PRESUMPTION OF INNOCENCE

"Behind the Scenes of a Conspiracy"

i. http://www.sb.by/post/111079/[363]

The above URL contains the first article in a series entitled, "Behind the Scenes of a Conspiracy," which was released in both print and online media. The article beings with the caption: *"Sent as directed by the Head of State for publication in the "SB" declassified documents about the events of 19 December*."[364] The text was published three weeks after the events. It describes "plots" by the opposition, funded by Western sources ("notably Germany and Poland"). The text paints the accused A. Feduta and U. Nyaklyaeu's "Tell the Truth" campaign in this light. Also implicated are Statkevich,Milinkevich, Romanchuk, Sannikau and Kozulin. All are portrayed not as interested in actually running for the presidency, but as soliciting Western money by leading the funders to believe they would work for the downfall of A. Lukashenka's presidency – a story the Westerners were construed as eager to support. The text reveals seized emails, Skype chats, phone calls, and other materials that set out the financial matters in which each of the "movements" were allegedly involved.

ii. http://www.sb.by/post/111131/[365]

The second in the "Behind the Scenes of a Conspiracy" series. It was released in newspapers and online on 15 January 2011. The release lists the names and certain personal information of 20 persons that would later be criminally charged. It describes in a few sentences the actions that they allegedly perpetrated both on the night in question and in the lead up to the election. The article also publishes ample materials allegedly seized during investigations, the most notable of which are wire-tapped phone calls of conversations between western diplomats and opposition candidates and their proxies. The text also describes a number of "foreign operatives" and their attempts to gain entry to Belarus with various weapons and drugs – and connects those attempts with the opposition leadership.

iii. http://www.sb.by/post/111406/[366]

The third article in the series. It begins with a similar caption, "*December 20 at a press conference the President ordered the intelligence agencies to declassify and transfer to the central mass media publications some of the materials that shed light on the events preceding the assault on the Government House*." Published one week after the above, this "declassified text" is a copy of a "Strategy for Victory" document allegedly prepared by Andrei Sannikau and his wife, Irina Khalip. The text has the flavour of a project proposal, as it includes a

363 Accessed 15 July 2011.

364 Unofficial translation by ODIHR.

365 Accessed 15 July 2011.

366 Accessed 15 July 2011.

number of outputs and strategies, together with a sizeable budget. It describes a more than 18-month process at the end of which, Mr. Sannikau would be the President of Belarus. Notably, the text is devoid of any calls to violence or other riot-inducing actions, although "sustained strikes" (work stoppages) are mentioned as a potential course of action. The article's commentary on the text criticizes it as pandering for Western money. The article ended with the phrase, "to be continued," as did each of the above three, however there were no further releases under the, "Behind the Scenes" series.

"Square: Iron Against Glass"

On January 9, 2011, TV-First[367] aired the film "*Square: Iron Against Glass*". The 30-minute, documentary-style film purportedly describes both the background to the events as well as what happened on the night of 19 December. The film contained a number of video clips, many of which were later used at trial. The film's narrator provided the names of the individuals shown in the films together with any political association they may have had. The content of wire-tapped phone calls also appeared in the film with transcripts.[368] In particular, the film unequivocally claimed that the rally organizers' intention was violent overthrow of the government. Also, although no charges were ever brought in this respect, the film showed clips of police discovering weapons caches allegedly linked to the opposition.[369]

367 Channel of Belteleradiocompany (Belarusian state broadcaster).

368 Two calls in which the defendant Statkevich appears is referenced elsewhere in this report.

369 One clip portrayed a police detail entering a storage garage in the outskirts of Minsk. The police uncovered an arsenal that included hand grenades, pistols, flammable materials and knives, all of which was – according to the narrator – stored in preparation for the events of 19 December.

ANNEX 4: RELEVANT UNIVERSAL PERIODIC REVIEW RECOMMENDATIONS ACCEPTED BY BELARUS

From the Report if the Working Group on the Universal Periodic Review, A/HRC/15/16 of 21 June 2010.

97.9. Continue cooperation with the United Nations and other international organizations to promote human rights in Belarus (Palestine);

97.13. Increase cooperation with the United Nations treaty bodies and special procedures, in particular in implementing their recommendations and decisions (Lithuania);

97.14. Extend full cooperation to the United Nations special procedures, and ensure that overdue reports to the United Nations treaty bodies are submitted as a matter of priority (Norway);

97.15. Respect the provisions of the International Covenant on Civil and Political Rights and the Convention against Torture, and the recommendations of intergovernmental human rights mechanisms, and also cooperate with special procedures (Switzerland);

97.16. Agree on the dates for the visit of eight special mandate holders invited by the Government (Hungary);

97.17. Engage with other mandate holders, especially with the special rapporteurs on the right to freedom of expression, on human rights defenders and on torture (Hungary);

97.19. Continue its cooperation with the Office of the United Nations High Commissioner for Human Rights, in particular with a view to implementing accepted recommendations made during the universal periodic review (Russian Federation);

97.28. Ensure fair trials and strictly respect the absolute prohibition of torture, including ensuring that confessions or information obtained as a result of torture and other ill treatment must not be used as evidence (Austria);

97.31. Ensure that all prisoners or detainees have access to legal counsel and relatives (Austria);

ANNEX 5: RELEVANT OSCE COMMITMENTS

Vienna 1989 (Questions Relating to Security in Europe: Principles)

(13) (…) [the participating States] will

(13.9) - ensure that effective remedies as well as full information about them are available to those who claim that their human rights and fundamental freedoms have been violated; they will, *inter alia,* effectively apply the following remedies:

• the right of the individual to appeal to executive, legislative, judicial or administrative organs;

• the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal, including the right to present legal arguments and to be represented by legal counsel of one's choice;

• the right to be promptly and officially informed of the decision taken on any appeal, including the legal grounds on which this decision was based. This information will be provided as a rule in writing and, in any event, in a way that will enable the individual to make effective use of further available remedies.

(23.2) - ensure that all individuals in detention or incarceration will be treated with humanity and with respect for the inherent dignity of the human person;

(23.3) - observe the United Nations Standard Minimum Rules for the Treatment of Prisoners as well as the United Nations Code of Conduct for Law Enforcement Officials;

(23.4) - prohibit torture and other cruel, inhuman or degrading treatment or punishment and take effective legislative, administrative, judicial and other measures to prevent and punish such practices;

(23.5) - consider acceding to the Convention against Torture and other Cruel, Inhuman or
Degrading Treatment or Punishment, if they have not yet done so;

(23.6) - protect individuals from any psychiatric or other medical practices that violate human rights and fundamental freedoms and take effective measures to prevent and punish such practices.

Copenhagen 1990

(2) [The participating States] are determined to support and advance those principles of justice which form the basis of the rule of law. They consider that the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression.

(5) They solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are the following:
(…)

(5.7) - human rights and fundamental freedoms will be guaranteed by law and in accordance with their obligations under international law;

(5.12) - the independence of judges and the impartial operation of the public judicial service will be ensured;

(5.13) - the independence of legal practitioners will be recognized and protected, in particular as regards conditions for recruitment and practice;

(5.14) - the rules relating to criminal procedure will contain a clear definition of powers in relation to prosecution and the measures preceding and accompanying prosecution;

(5.15) - any person arrested or detained on a criminal charge will have the right, so that the lawfulness of his arrest or detention can be decided, to be brought promptly before a judge or other officer authorized by law to exercise this function;

(5.16) - in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone will be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law;

(5.17) - any person prosecuted will have the right to defend himself in person or through prompt legal assistance of his own choosing or, if he does not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(5.18) - no one will be charged with, tried for or convicted of any criminal offence unless the offence is provided for by a law which defines the elements of the offence with clarity and precision;

(5.19) - everyone will be presumed innocent until proved guilty according to law;

(12) The participating States, wishing to ensure greater transparency in the implementation of the commitments undertaken in the Vienna Concluding Document under the heading of the human dimension of the CSCE, decide to accept as a confidence building measure the presence of observers sent by participating States and representatives of non-governmental organizations and other interested persons at proceedings before courts as provided for in national legislation and international law; it is understood that proceedings may only be held in camera in the circumstances prescribed by law and consistent with obligations under international law and international commitments.
(…)

(16.2) - intend, as a matter of urgency, to consider acceding to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, if they have

not yet done so, and recognizing the competences of the Committee against Torture under articles 21 and 22 of the Convention and withdrawing reservations regarding the competence of the Committee under article 20;

(16.3) - stress that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture;

(16.4) - will ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment;

(16.5) - will keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under their jurisdiction, with a view to preventing any cases of torture;

(16.6) - will take up with priority for consideration and for appropriate action, in accordance with the agreed measures and procedures for the effective implementation of the commitments relating to the human dimension of the CSCE, any cases of torture and other inhuman or degrading treatment or punishment made known to them through official channels or coming from any other reliable source of information;

(16.7) - will act upon the understanding that preserving and guaranteeing the life and security of any individual subjected to any form of torture and other inhuman or degrading treatment or punishment will be the sole criterion in determining the urgency and priorities to be accorded in taking appropriate remedial action; and, therefore, the consideration of any cases of torture and other inhuman or degrading treatment or punishment within the framework of any other international body or mechanism may not be invoked as a reason for refraining from consideration and appropriate action in accordance with the agreed measures and procedures for the effective implementation of the commitments relating to the human dimension of the CSCE.

Moscow 1991

(21) The participating States will

(21.1) - take all necessary measures to ensure that law enforcement personnel, when enforcing public order, will act in the public interest, respond to a specific need and pursue a legitimate aim, as well as use ways and means commensurate with the circumstances, which will not exceed the needs of enforcement;

(21.2) - ensure that law enforcement acts are subject to judicial control, that law enforcement personnel are held accountable for such acts, and that due compensation may be sought, according to domestic law, by the victims of acts found to be in violation of the above commitments.
(…)

(23.1) The participating States will ensure that

> no one will be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law;
>
> anyone who is arrested will be informed promptly in a language which he understands of the reason for his arrest, and will be informed of any charges against him;
>
> any person who has been deprived of his liberty will be promptly informed about his rights according to domestic law;
>
> any person arrested or detained will have the right to be brought promptly before a judge or other officer authorized by law to determine the lawfulness of his arrest or detention, and will be released without delay if it is unlawful;

(…)

(vi) any person arrested or detained will have the right, without undue delay, to notify or to require the competent authority to notify appropriate persons of his choice of his arrest, detention, imprisonment and whereabouts; any restriction in the exercise of this right will be prescribed by law and in accordance with international standards;

(vii) effective measures will be adopted, if this has not already been done, to provide that law enforcement bodies do not take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, or otherwise to incriminate himself, or to force him to testify against any other person;

(viii) the duration of any interrogation and the intervals between them will be recorded and certified, consistent with domestic law;

(ix) a detained person or his counsel will have the right to make a request or complaint regarding his treatment, in particular when torture or other cruel, inhuman or degrading treatment has been applied, to the authorities responsible for the administration of the place of detention and to higher authorities, and when necessary, to appropriate authorities vested with reviewing or remedial power;

(x) such request or complaint will be promptly dealt with and replied to without undue delay; if the request or complaint is rejected or in case of inordinate delay, the complainant will be entitled to bring it before a judicial or other authority; neither the detained or imprisoned person nor any complainant will suffer prejudice for making a request or complaint;

(xi) anyone who has been the victim of an unlawful arrest or detention will have a legally enforceable right to seek compensation.

BUDAPEST 1994 (Towards a Genuine Partnership in a New Era: The Human Dimension)

Paragraph 20 Prevention of Torture

20. The participating States strongly condemn all forms of torture as one of the most flagrant violations of human rights and human dignity. They commit themselves to strive for its elimination. They recognize the importance in this respect of international norms as laid down in international treaties on human rights, in particular the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. They also recognize the importance of national legislation aimed at eradicating torture. They commit themselves to inquire into all alleged cases of torture and to prosecute offenders. They also commit themselves to include in their educational and training programmes for law enforcement and police forces specific provisions with a view to eradicating torture. They consider that an exchange of information on this problem is an essential prerequisite. The participating States should have the possibility to obtain such information. The CSCE should in this context also draw on the experience of the Special Rapporteur on Torture and other Cruelly Inhuman or Degrading Treatment or Punishment established by the Commission on Human Rights of the United Nations and make use of information provided by NGO

Ljubljana 2005 (Decision No. 12/05 Upholding Human Rights and the Rule of Law in Criminal Justice Systems)

The Ministerial Council,

Recognizing that full respect for human rights and fundamental freedoms and the development of societies based on pluralistic democracy and the rule of law is a prerequisite for achieving a lasting peace, security, justice and stability,

Reaffirming the rule of law commitments contained in the 1975 Helsinki Final Act, the 1989 Concluding Document of Vienna, the 1990 Copenhagen Document, and the 1991 Moscow Document, those undertaken at the 1994 OSCE Summit in Budapest, and other relevant OSCE commitments and recalling relevant international obligations, including the International Covenant on Civil and Political Rights and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Reiterating that the activity of the government and the administration as well as that of the judiciary will be exercised in accordance with the system established by law and in line with relevant OSCE commitments and international obligations of the participating States, and that respect for that system must be ensured,

Considering that the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression,

Recognizing that rule of law must be based on respect for internationally recognized human rights, including the right to a fair trial, the right to an effective remedy, and the right not to be subjected to arbitrary arrest or detention,

Recognizing that an impartial and independent judiciary plays a vital role in ensuring due process and protecting human rights before, during and after trials,

Recognizing that defence lawyers play a critical role in ensuring the right to a fair trial and in the furtherance and protection of other human rights in the criminal justice system,
Underlining the need to speak out publicly against torture, and recalling that all forms of torture and other cruel, inhuman or degrading treatment or punishment are and shall remain prohibited at any time and in any place whatsoever and can thus never be justified, and stressing the need to strengthen procedural safeguards to prevent torture as well as to prosecute its perpetrators, thereby preventing impunity for acts of torture, and calling upon participating States to give early consideration to signing and ratifying the Optional Protocol to the Convention against Torture,

Decides to:

> Increase attention to and follow up on the issues of the rule of law and due process in criminal justice systems in 2006, *inter alia,* by encouraging participating States to improve the implementation of existing commitments, also drawing on the expertise of the ODIHR, and in close co-operation with other relevant international organizations in order to avoid unnecessary duplication;

Tasks the ODIHR and other relevant OSCE structures to:

> Assist the participating States to share with one another successful examples, expertise and good practices to improve criminal justice systems;
>
> Assist the participating States upon their request to strengthen the institutional capacity of defence lawyers to protect and defend the rights of their clients.

Brussels 2006 (Brussels Declaration on Criminal Justice Systems)

We, members of the Ministerial Council, reaffirm the commitments related to the administration of criminal justice, especially those contained in the Helsinki Final Act (1975), the Vienna Final Document (1989), the Copenhagen Document (1990), the Charter of Paris for a New Europe (1990), the Moscow Document (1991), the Budapest Document (1994), and the Charter for European Security (1999).

We recall Ministerial Council Decisions No. 3/05 on combating transnational organized crime and No. 12/05 on upholding human rights and the rule of law in criminal justice systems (Ljubljana, 2005).

We further recall the proceedings of the Human Dimension Seminar on Upholding the Rule of Law and Due Process in Criminal Justice Systems (Warsaw, May 2006).

We also recall relevant UN instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

We recall the commitment of the participating States to ensure the independence of the judiciary.

We recognize that nothing in this document shall undermine or diverge from participating
States' existing commitments or obligations under international law, while we also acknowledge that each participating State, consistent with its legal tradition, determines the appropriate ways to implement them in its national legislation.

We consider that:

Judicial independence is a prerequisite to the rule of law and acts as a fundamental guarantee of a fair trial;

Impartiality is essential to the proper discharge of the judicial office;

Integrity is essential to the proper discharge of the judicial office;

Propriety, and the appearance of propriety, are essential to the performance of all the activities of a judge;

A guarantee of equality of treatment to all before the courts is essential to the due performance of the judicial office;

Competence and diligence are prerequisites to the due performance of the judicial office.

We consider that:

Prosecutors should be individuals of integrity and ability, with appropriate training and qualifications;

Prosecutors should at all times maintain the honour and dignity of their profession and respect the rule of law;

The office of prosecutor should be strictly separated from judicial functions, and prosecutors should respect the independence and the impartiality of judges;

Prosecutors should, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

We consider that:

Law enforcement officials should at all times fulfil the duty imposed upon them by

law, by serving the public and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession;

In the performance of their duty, law enforcement officials should respect and protect human dignity and maintain and uphold the human rights of all persons;

Law enforcement officials should use force only to the extent necessary and appropriate to accomplish their mission and to ensure the safety of the public;

Law enforcement officials, as members of the broader group of public officials or other persons acting in an official capacity, should not inflict, instigate, encourage or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment;

No law enforcement official should be punished for not obeying orders to commit or conceal acts amounting to torture or other cruel, inhuman or degrading treatment or punishment;

Law enforcement officials should be cognizant and attentive to the health of persons in their custody and, in particular, should take immediate action to secure medical attention whenever required.

We consider that:

All necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyer, without discrimination and without improper interference from the authorities or the public;

Decisions concerning the authorization to practice as a lawyer or to join the profession should be taken by an independent body. Such decisions, whether or not they are taken by an independent body, should be subject to a review by an independent and impartial judicial authority;

Lawyers should not suffer or be threatened with any sanctions or pressure when acting in accordance with their professional standards;

Lawyers should have access to their clients, including in particular to persons deprived of their liberty, to enable them to counsel in private and to represent their clients according to established professional standards;

All reasonable and necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the rule of law;

Lawyers should not be refused access to a court before which they are qualified to appear and should have access to all relevant evidence and records when defending the rights and interests of their clients in accordance with their professional standards.

We consider that the enforcement of custodial sentences and the treatment of prisoners

must take account of the requirements of safety, security and discipline, while also ensuring prison conditions which do not violate human dignity and which offer meaningful occupational activities and appropriate treatment programmes to inmates, thus preparing them for their reintegration into society.

We call on the participating States to fully implement their commitments and international obligations to ensure fair and effective operation of their criminal justice systems.

Helsinki 2008 (Further Strengthening the Rule of Law in the OSCE Area)

The Ministerial Council,

Reaffirming the OSCE participating States' commitments to the rule of law and to the Principles Guiding Relations between participating States in the 1975 Helsinki Final Act, as well as to the fulfilment in good faith of obligations under international law and reiterating the OSCE participating States' determination to foster strict respect for these principles,

Recalling the OSCE documents adopted in Vienna 1989, Copenhagen 1990, Moscow 1991, Budapest 1994 and Istanbul 1999 and Ljubljana Ministerial Council Decision No. 12/05 on Upholding human rights and the rule of law in criminal justice systems,

Recalling also the Universal Declaration of Human Rights and taking note of the International Covenant on Civil and Political Rights,

Recalling also other relevant United Nations documents affirming, inter alia, the need for universal adherence to and implementation of the rule of law at both the national and international levels, the commitment to an international order based on the rule of law and international law,

Underlining the importance we attach to human rights, the rule of law and democracy, which are inter-linked and mutually reinforcing,

Underlining also the importance of the rule of law as a cross-dimensional issue for ensuring the respect for human rights and democracy, security and stability, good governance, mutual economic and trade relations, investment security and a favourable business climate as well as its role in the fight against corruption, organized crime and all kinds of illegal trafficking including in drugs and weapons as well as trafficking in human beings, thus serving as a basis for political, economic, social and environmental development in the participating States,

Underlining also the importance of the rule of law in the implementation of OSCE decisions and documents in the politico-military sphere,

Taking into account activities related to the rule of law of relevant OSCE executive structures, in particular, the Secretariat, the ODIHR and the OSCE field operations, to assist participating States to enhance rule of law capacities, and taking also into account

the role of the OSCE Parliamentary Assembly to promote respect for the rule of law in the OSCE area,

Taking into account relevant OSCE events concerning rule of law, in particular the 2008 OSCE Human Dimension seminar on the issue of Constitutional Justice as well as relevant Supplementary Human Dimension Meetings,

Taking into account participating States' ongoing and envisaged bilateral activities regarding the rule of law,

Underlining the importance of providing the OSCE with a legal personality, legal capacity, privileges and immunities and thus strengthening the legal framework of the OSCE,

1. Calls on the OSCE participating States to honour their obligations under international law and to observe their OSCE commitments regarding the rule of law at both international and national levels, including in all aspects of their legislation, administration and judiciary;

2. Calls on participating States to contribute, where appropriate, to OSCE projects and programmes supporting the rule of law;

3. Encourages the relevant OSCE executive structures, in accordance with their mandates and within existing resources, in cooperation with relevant international organizations, to further identify and use synergies in assisting participating States, upon their request, in strengthening of the rule of law;

4. Encourages participating States, with the assistance, where appropriate, of relevant OSCE executive structures in accordance with their mandates and within existing resources, to continue and to enhance their efforts to share information and best practices and to strengthen the rule of law, inter alia in the following areas:

- Independence of the judiciary, effective administration of justice, right to a fair trial, access to court, accountability of state institutions and officials, respect for the rule of law in public administration, the right to legal assistance and respect for the human rights of persons in detention;
- Honouring obligations under international law as a key element of strengthening the rule of law in the OSCE area;
- Adherence to the principle of peaceful settlement of disputes;
- Respect for the rule of law and human rights in the fight against terrorism according to their obligations under international law and OSCE commitments;
- Prevention of torture and other cruel, inhuman or degrading treatment or punishment, including through co-operation with the applicable intergovernmental bodies;
- Efficient legislation and an administrative and judicial framework in order to facilitate economic activities, trade and investments in participating States and between them;
- Respect for the rule of law with regard to the protection of the natural environment in the OSCE area;

- Awareness-raising for issues related to the rule of law in courts, law enforcement agencies, police and penitentiary systems as well as in training for legal professionals;
- Education on the rule of law as well as interaction and exchange opportunities for legal professionals, academics and law students from different participating States in the OSCE region;
- The role of constitutional courts or comparable institutions of the participating States as an instrument to ensure that the principles of the rule of law, democracy and human rights are observed in all state institutions;
- The provision of effective legal remedies, where appropriate, and the access thereto;
  The observation of rule of law standards and practices in the criminal justice system;
- The fight against corruption;

5. Tasks the relevant OSCE executive structures, in close consultation and co-operation with participating States and within existing resources, to organize a seminar focussing on rule of law in 2009 which could serve as a platform for exchanging best practices between the participating States on issues related to the rule of law.

Astana 2010 (Astana Commemorative Declaration)

6. […] We value the important role played by civil society and free media in helping us to ensure full respect for human rights, fundamental freedoms, democracy, including free and fair elections, and the rule of law.

7. […] Respect for human rights, fundamental freedoms, democracy and the rule of law must be safeguarded and strengthened. […]