

A large, stylized illustration in shades of brown and tan occupies the left side of the cover. It depicts a hand holding a scale of justice, with a leaf sprouting from the top. At the bottom of the illustration, there are three strands of barbed wire. The background of the entire cover is a light tan color.

# Belarus v. Viktor Dmitrievich Babariko

October 2021

*Covington & Burling LLP*

**TRIALWATCH FAIRNESS REPORT**  
A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE

## ABOUT THE AUTHORS

**Covington & Burling LLP** is an international law firm. The authors are lawyers in the firm's international arbitration, litigation and white collar criminal defense practice groups, based in London, Washington and New York.

## ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE

The **Clooney Foundation for Justice (CFJ)** advocates for justice through accountability for human rights abuses around the world. **TrialWatch** is an initiative of the Clooney Foundation for Justice. Its mission is to expose injustice, help to free those unjustly detained, and promote the rule of law around the world. TrialWatch monitors criminal trials globally against those who are most vulnerable — including journalists, protesters, women, LGBTQ+ persons and minorities — and advocates for the rights of the unfairly convicted. Over time, TrialWatch will use the data it gathers to publish a Global Justice Ranking exposing countries' performance and supporting advocacy for systemic change.

*The legal assessments and conclusions expressed in this report are those of the authors and not necessarily those of the Clooney Foundation for Justice.*

# EXECUTIVE SUMMARY



## **Covington & Burling LLP assigned this trial a grade of D:**

On July 6, 2021, the Supreme Court of the Republic of Belarus convicted Viktor Dmitrievich Babariko, a leading opponent of incumbent Belarusian President Lukashenko during the 2020 Belarusian elections, of bribery and money laundering offenses. He was sentenced to a 14-year prison term, plus other penalties.

The monitoring of Mr. Babariko's trial was impeded by confidentiality restrictions imposed by the Belarusian authorities. The reasons for these restrictions have not been explained by the Belarusian authorities. However, in view of the international condemnation of the Belarusian Government's actions against various prominent opposition leaders — including Mr. Babariko — we think it is reasonable to infer, in the absence of a credible contrary explanation, that these restrictions are likely to be intended to prevent foreign governments and other observers from monitoring the extent to which Belarus is complying with its international treaty obligations. Even if that is not the express intention of the Belarusian authorities, it is the undeniable practical effect of the measures imposed by those authorities.

Notwithstanding these limitations, based on TrialWatch monitoring of the case and other public sources, we conclude that Mr. Babariko's pre-trial detention and trial were marred by several violations of applicable international standards. The aggregate series of violations are likely to have had an adverse effect on the fairness of Mr. Babariko's trial — and, ultimately, could have been a material factor in his conviction. For this reason, we have given the trial a grade of "D" under the grading methodology outlined in the Annex to this report.

In particular, immediately following his detention and during the pre-trial period, Mr. Babariko was repeatedly denied access to his defense counsel. In addition, there were several instances in which members of Mr. Babariko's defense team were targeted for disciplinary or other sanctions. Further, the precise factual allegations and legal arguments upon which Mr. Babariko's indictment was based were not properly articulated. At the outset of the case, Mr. Babariko told the court that he did not understand the charges against him, but the court failed to take any remedial action. Mr. Babariko's ability to prepare a defense was fundamentally impaired by these violations of applicable fair trial standards. Then, after the trial commenced, Mr. Babariko was caged without good reason, he continued to have insufficient access to his defense team, despite repeated requests, and his right to call and examine witnesses appears to have been curtailed in several important respects.

Finally, the specter of Lukashenko's influence overshadowed the entire proceeding, as various senior government officials and the state news agency issued statements critical of Mr. Babariko, notwithstanding their legal duty to treat him as innocent until proven

guilty. The political context, combined with the violations outlined above, lead us to have very serious concerns that Mr. Babariko's prosecution and trial were driven by improper motives, and therefore constituted an abuse of process.

# BACKGROUND INFORMATION

## A. POLITICAL AND LEGAL CONTEXT

Belarus has been ruled by Aleksandr Lukashenko since 1994.<sup>1</sup> He has claimed victory in six presidential elections, but most of these elections have been widely criticized by the international community and the Belarusian opposition for failing to meet conditions for free and fair elections.<sup>2</sup> Lukashenko has maintained power in Belarus partly through a combination of repression and coercion.<sup>3</sup> Human rights organizations have documented how the Lukashenko government has systematically suppressed political opponents and critics, including by using arbitrary arrest and detention, legal proceedings based on fabricated or exaggerated charges, and violence.<sup>4</sup>

The latest presidential election took place on August 9, 2020, and represented the most significant threat to Lukashenko's position as President since he took office.<sup>5</sup> This prompted the authorities to significantly tighten restrictions in Belarus on freedom of expression, freedom of association, and freedom of peaceful assembly, as the regime sought to suppress growing political opposition and civic activism to consolidate its position.<sup>6</sup> Lukashenko claimed a landslide victory in the election, although the validity of this result has been strongly disputed by several states, independent election monitors, and Lukashenko's political opponents.<sup>7</sup> For example, in the aftermath of the election, the United States and the European Union (EU) issued separate statements asserting that they did not recognize the results of the election.<sup>8</sup>

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<sup>1</sup> *Human Rights Watch Report: Belarus — Events of 2020*, Human Rights Watch (2021), <https://www.hrw.org/world-report/2021/country-chapters/belarus>.

<sup>2</sup> *Id.*; *2001 Presidential Election in the Republic of Belarus Report*, International Limited Election Observation Mission (September 10, 2001), <https://www.oscepa.org/en/documents/election-observation/election-observation-statements/belarus/statements-4/1383-2001-presidential/file>; *Presidential Election, Republic of Belarus — 19 March 2006*, International Election Observation Mission (March 20, 2006), <https://www.osce.org/files/f/documents/c/a/18487.pdf>.

<sup>3</sup> For additional details on the situation in Belarus, see the TrialWatch reports on 15 Post-Election Trials and on the case of Katsiaryna Andreyeva and Daria Chultsova.

<sup>4</sup> *'Hundreds of protesters arrested' in Belarus*, BBC (December 20, 2010), <https://www.bbc.co.uk/news/world-europe-12037486>; *Amnesty International Report 2020/2021 — The State of the World's Human Rights — Belarus*, Amnesty International (2021), <https://www.amnesty.org/en/countries/europe-and-central-asia/belarus/report-belarus/>; *Alexander Lukashenko, Belarus' brutal president*, Financial Times (May 28, 2021), <https://www.ft.com/content/7689a473-4bbd-46e8-95d0-ab98321778ec>.

<sup>5</sup> *The Guardian view on Belarus: 'Europe's last dictator' loses his grip*, The Guardian (August 2020), <https://www.theguardian.com/commentisfree/2020/aug/10/the-guardian-view-on-belarus-europes-last-dictator-loses-his-grip>.

<sup>6</sup> UNHRC, *Report of the Special Rapporteur on the situation of human rights in Belarus*, A/HRC/47/49, (May 4, 2021), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/101/82/PDF/G2110182.pdf?OpenElement>.

<sup>7</sup> *Id.*; *Amnesty International Report 2020/2021 — The State of the World's Human Rights — Belarus*, Amnesty International (2021).

<sup>8</sup> *EU, US refuse to recognize Lukashenko as Belarus president*, Daily Sabah (September 24, 2020), <https://www.dailysabah.com/world/europe/eu-us-refuse-to-recognize-lukashenko-as-belarus-president>.

Viktor Babariko is one of several opposition figures and politicians to have faced arrest and trial in the context of the latest presidential election. In May 2020, Sergei Tikhanovsky, a Belarusian blogger who also intended to run for president, was subjected to 15 days' administrative detention, which prevented him from registering as a candidate, prompting his wife, Svetlana Tikhanovskaya, to run in his place.<sup>9</sup> On May 29, 2020, Mr. Tikhanovsky was arrested during a campaign event for his wife in Hrodna and subsequently charged with various offenses, including organizing actions that grossly violate public order and inciting social hostility.<sup>10</sup> If found guilty, he faces up to 15 years' imprisonment.<sup>11</sup> Proceedings against him have been closed to the public.<sup>12</sup> Further, following the election, Ms. Tikhanovskaya was briefly detained by Belarusian authorities before fleeing to Lithuania.<sup>13</sup>

In September 2020, Belarusian authorities abducted political figure Maria Kolesnikova and instructed her to leave the country or face imprisonment.<sup>14</sup> Ms. Kolesnikova had formerly been a member of Babariko's election campaign until his arrest, and had then worked with Svetlana Tikhanovskaya on her election campaign. Ms. Kolesnikova also became a member of the Coordination Council, an initiative of Ms. Tikhanovskaya's to facilitate the transfer of power from Lukashenko.<sup>15</sup> Following her abduction, Ms. Kolesnikova refused to leave Belarus and was subsequently charged with various offenses, including creation of an extremist group and conspiring to seize state power in an unconstitutional way.<sup>16</sup> She was convicted by a Belarusian court on September 6, 2021 and sentenced to 11 years imprisonment.<sup>17</sup>

In addition to Lukashenko's targeting of political opponents, in 2020 and 2021, the state tightened its control over the media.<sup>18</sup> State-controlled printing houses refused to print

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<sup>9</sup> *Amnesty International Report 2020/2021 — The State of the World's Human Rights — Belarus*, Amnesty International (2021).

<sup>10</sup> *Ultimate charges filed against Syarhei Tsikhanouski. He may face up to 15 years in prison*, Belsat (March 11, 2021), <https://belsat.eu/en/news/11-03-2021-ultimate-charges-filed-against-syarhei-tsikhanouski-he-may-face-up-to-15-years-in-prison/>.

<sup>11</sup> *Id.*

<sup>12</sup> *Court should reconsider closure of trial of Belarusian blogger and activist*, Clooney Foundation for Justice (July 1, 2021), <https://cfj.org/wp-content/uploads/2021/06/Court-Should-Reconsider-Closure-of-Trial-of-Belarusian-Blogger-and-Activist.pdf>.

<sup>13</sup> *Belarus election: Opposition leader Tikhanovskaya left for 'sake of her children'*, BBC (August 12, 2020), <https://www.bbc.co.uk/news/world-europe-53733330>.

<sup>14</sup> *Amnesty International Report 2020/2021 — The State of the World's Human Rights — Belarus*, Amnesty International (2021).

<sup>15</sup> Resolution of the Coordination Council (August 19, 2020), <https://rada.vision/en/resolution>.

<sup>16</sup> *Activist Maryia Kalesnikava charged under three articles. She may face up to 12 years in jail*, Belsat (May 13, 2021), <https://belsat.eu/en/news/13-05-2021-activist-maryia-kalesnikava-charged-under-three-articles-she-may-face-up-to-12-years-in-jail/>.

<sup>17</sup> *Belarus opposition leader jailed in Lukashenko 'purge'*, The Guardian (September 6, 2021), <https://www.theguardian.com/world/2021/sep/06/belarus-opposition-leader-maria-kalesnikava-jailed-in-lukashenko-purge>.

<sup>18</sup> UNHRC, *Report of the Special Rapporteur on the situation of human rights in Belarus*, A/HRC/47/49 (May 4, 2021), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/101/82/PDF/G2110182.pdf?OpenElement>.

editions of newspapers containing criticism of the Lukashenko regime, and the state sought to prevent outlets covering the widespread protests about the election, including by suspending the media credentials of such outlets.<sup>19</sup> Further, between May and October 2020, local monitors reported over 400 instances of independent journalists being targeted by authorities, with some being arrested and tortured.<sup>20</sup> One example of such a case is that of Katsiaryna Andreyeva and Daria Chultsova, which is documented in a separate TrialWatch report.

The Lukashenko regime has also taken steps to pursue its critics outside of Belarus. On May 23, 2021, the Belarusian state diverted a plane travelling from Greece to Lithuania and arrested and detained two passengers: Raman Pratasevich, a Belarusian journalist and prominent critic of Lukashenko, who had been living in exile in Lithuania, and his girlfriend, Sofia Sapega, a Russian citizen.<sup>21</sup>

Like the media, the Belarusian judiciary is subject to interference from the authorities. In a report published in 2020, the United Nations Special Rapporteur on the situation of human rights in Belarus reported that the independence of the judiciary in Belarus is a “serious concern” and that the current procedures for the appointment, tenure, and removal of judges undermine judicial independence and conflict with the principles of the separation of powers and rule of law.<sup>22</sup> The Special Rapporteur reported that, for example, Lukashenko retains absolute discretion to appoint and remove judges.<sup>23</sup> The Special Rapporteur also noted that the independence and integrity of Belarusian prosecutors is compromised by excessive state control.<sup>24</sup> Similarly, the Special Rapporteur’s most recent report confirms that, in politically sensitive cases, “judges are apparently expected to implement the requests of the General Prosecutor, whose role is to implement the executive’s repressive policy of harshly punishing dissent.”<sup>25</sup>

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<sup>19</sup> *Amnesty International Report 2020/2021 — The State of the World’s Human Rights — Belarus*, Amnesty International (2021).

<sup>20</sup> *Id.*

<sup>21</sup> *How Roman Protasevich became one of Lukashenko’s prized targets*, Financial Times (May 24, 2021), <https://www.ft.com/content/c17b05a5-aab0-4f9a-b08a-95a69e12130a>; *Roman Protasevich: House arrest for man seized in Ryanair Belarus jet drama*, BBC (June 25, 2021) <https://www.bbc.co.uk/news/world-europe-57607580>.

<sup>22</sup> UNHRC, *Report of the Special Rapporteur on the situation of human rights in Belarus*, A/75/173 (July 17, 2020), <https://undocs.org/A/75/173>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> UNHRC, *Report of the Special Rapporteur on the situation of human rights in Belarus* (May 4, 2021).

## B. CASE HISTORY

### Mr. Babariko's Career and Potential Presidential Campaign

Mr. Viktor Babariko is a Belarusian banker and politician who intended to become a candidate in the 2020 Belarusian presidential election.<sup>26</sup>

Between July 25, 2000 and May 12, 2020, Mr. Babariko was the chair of the board of joint Belarusian-Russian open joint stock company Belgazprombank (“BGPB”), and chair of the asset and liability management committee of BGPB from October 03, 2001 to March 16, 2015.<sup>27</sup>

On May 12, 2020, Mr. Babariko voluntarily resigned as chair of the BGPB board, and declared his intention to become a candidate in the 2020 Belarusian presidential election.<sup>28</sup> According to public sources, Mr. Babariko's poll rating significantly exceeded the poll rating of the incumbent, President Lukashenko.<sup>29</sup>

### Mr. Babariko's Arrest

On June 11, 2020, reputable international media outlets reported that Belarusian government authorities had raided BGPB, allegedly in connection with an investigation into tax evasion.<sup>30</sup> On June 12, 2020, Belarusian authorities arrested around 15 BGPB employees.<sup>31</sup>

Mr. Babariko was not detained as part of this initial group. However, on June 18, 2020, he was arrested by the Department of Financial Investigations of the State Security Committee (the “Belarusian KGB”) along with his son, Mr. Eduard Babariko, who was leading his presidential campaign.<sup>32</sup> The U.S. State Department has reported that Mr. Babariko and his son were detained “while on their way to submit the necessary signatures to register his presidential candidacy with the Central Election Commission.”<sup>33</sup>

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<sup>26</sup> Viktor Babaryka Biography, <https://babariko.vision/en/viktar-babaryka-biography>.

<sup>27</sup> *Id.*

<sup>28</sup> *Banker and philanthropist Babaryka may stand in 2020 presidential election*, Belsat (May 5, 2020), <https://belsat.eu/en/news/banker-and-philanthropist-babaryka-may-stand-in-2020-presidential-election/>.

<sup>29</sup> *Belarusian opposition leader on trial as Lukashenko continues his crackdown*, Politico (February 17, 2021), <https://www.politico.eu/article/belarus-viktor-barbariko-opposition-leader-trial-alexander-lukashenko-continues-crackdown/>.

<sup>30</sup> *Belarus unit of Gazprombank raided as Lukashenko cracks down on election opponents*, Reuters (June 11, 2020), <https://www.reuters.com/article/us-belarus-election/belarus-unit-of-gazprombank-raided-as-lukashenko-cracks-down-on-election-opponents-idUSKBN2311UG>.

<sup>31</sup> *Belarus: Crackdown on Political Activists, Journalists*, Human Rights Watch (July 30, 2020), <https://www.hrw.org/news/2020/07/30/belarus-crackdown-political-activists-journalists>.

<sup>32</sup> *Potential Belarusian Presidential Challenger Remanded In Custody*, Radio Free Europe/Radio Liberty (June 30, 2020), <https://www.rferl.org/a/potential-lukashenka-challenger-remanded-in-custody-as-belarus-election-nears/30698959.html>.

<sup>33</sup> U.S. Department of State, *2020 Country Reports on Human Rights Practices: Belarus*, <https://www.state.gov/wp-content/uploads/2021/03/BELARUS-2020-HUMAN-RIGHTS-REPORT.pdf>, page 40.

On June 12, 2020, the head of the Belarusian KGB announced the following basis for the arrests:

“According to the facts, the Financial Investigations Department opened a number of criminal cases under Art. 243 (evasion of taxes and fees in a particularly large amount), Art. 235 (legalization of funds obtained by criminal means), Art. 210 (theft in a particularly large amount), Art. 209 (fraud), as well as Art. 430 (receiving a bribe) and Art. 431 (giving a bribe). We detained about 20 people directly involved in illegal activities, including Babariko[.]”

“Babariko was detained due to being the direct organizer and leader of illegal activities, trying to influence the testimonies of witnesses, attempting to hide the traces of the crimes committed and literally the other day took a large amount of money from accounts controlled by him[.]”<sup>34</sup>

The U.S. State Department reports that Belarusian authorities subsequently declined to register Mr. Babariko as a candidate “after his campaign team gathered more than 400,000 valid signatures, citing inconsistencies in his income and property declaration as well as the ‘participation of a foreign organization in his election campaign.’”<sup>35</sup>

### **Mr. Babariko’s Charge and Pre-Trial Detention**

According to monitoring information and public statements issued by Mr. Babariko’s defense team, as well as coverage in the public domain:

- On June 18, 2020, Mr. Babariko was taken to the Belarusian KGB’s Department of Financial Investigations, where a personal search was conducted.<sup>36</sup> During that personal search, Mr. Babariko requested to see his lawyers.<sup>37</sup>
- Two of Mr. Babariko’s lawyers were prevented from meeting with Mr. Babariko, despite the fact they were outside the Department of Financial Investigations facility when Mr. Babariko’s detention order was issued, and requested to see Mr. Babariko. Mr. Babariko’s lawyers apparently were denied entry to the building on the basis that “training” was in progress.<sup>38</sup>
- On June 19, 2020, Mr. Babariko met with his lawyers at an interrogation in the office

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<sup>34</sup> *Belarus authorities accuse opposition leader Babariko of \$430mn worth of money laundering*, IntelliNews (June 22, 2020), <https://www.intellinews.com/belarus-authorities-accuse-opposition-leader-babariko-of-430mn-worth-of-money-laundering-185854/>.

<sup>35</sup> U.S. Department of State, *2020 Country Reports on Human Rights Practices: Belarus*, page 40.

<sup>36</sup> Monitoring information.

<sup>37</sup> U.S. Department of State, *2020 Country Reports on Human Rights Practices: Belarus*, page 40.

<sup>38</sup> Monitoring information; see also *Criminal Prosecution of Viktor Babaryka in The Republic of Belarus: Statement of Facts*, Babariko Vision, undated, [https://babariko.vision/wp-content/uploads/2020/07/viktar\\_babaryka\\_criminal\\_prosecution.pdf](https://babariko.vision/wp-content/uploads/2020/07/viktar_babaryka_criminal_prosecution.pdf).

of the Belarusian KGB.<sup>39</sup> On the same day, the Prosecutor General of Belarus, Mr. Alexander Konyuk, commenting on the Belgazprombank criminal case to the state-owned BelTA news agency, stated that the defendants “created a real threat to the national security interests of our country in the financial and other spheres.”<sup>40</sup>

- On June 28, 2020, the Belarusian KGB and riot police officers detained at least 52 prominent businessmen, political figures, Mr. Babariko’s supporters and campaign staff, as well as independent journalists who gathered outside the Belarusian KGB building to file requests for Mr. Babariko’s release.<sup>41</sup> Some of these individuals were offering to act as personal guarantors for Mr. Babariko.<sup>42</sup>
- Mr. Babariko was ordered detained. Alternatives such as house arrest apparently were not considered, despite the fact that before and after his arrest Mr. Babariko announced his readiness to appear before investigative bodies.<sup>43</sup>
- In the first days after the arrest, Mr. Babariko did not have a bed; he slept on the floor of his cell. The light in his cell remained on 24 hours a day, and there was insufficient drinking water.<sup>44</sup> Subsequently, Mr. Babariko’s lawyers were denied access to the detention facility from August 11 to 14, 2020.<sup>45</sup>

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<sup>39</sup> *Id.*

<sup>40</sup> *Minsk court declines appeal against prospective presidential candidate Babariko's arrest*, Interfax (June 30, 2020), <https://interfax.com/newsroom/top-stories/69171/>.

<sup>41</sup> U.S. Department of State, *2020 Country Reports on Human Rights Practices: Belarus*, page 9.

<sup>42</sup> Monitoring information.

<sup>43</sup> Criminal Prosecution of Victor Babariko, *Babariko Vision*, page 2, [https://babariko.vision/wp-content/uploads/2020/07/viktar\\_babaryka\\_criminal\\_prosecution.pdf](https://babariko.vision/wp-content/uploads/2020/07/viktar_babaryka_criminal_prosecution.pdf).

<sup>44</sup> *Id.*, page 4.

<sup>45</sup> *Id.*

## Mr. Babariko's Trial

Mr. Babariko's trial opened on February 17, 2021 before the Supreme Court of the Republic of Belarus in Minsk. The presiding judge was Mr. Igor Lyubovitsky, who was accompanied by two assessors (laypersons who are drawn from citizens in the community). The trial lasted approximately 19 weeks, concluding on July 6, 2021 with Mr. Babariko's conviction. Mr. Babariko was confined in a metal cage for the duration of the courtroom proceedings.

Mr. Babariko was tried alongside his co-defendants: Messrs. Zadoiko, Baday, Shaban, Kuzmich, Ilyasyuk, Dobrolet, and Kobyak. Mr. Babariko's co-defendants all pleaded guilty. However, the testimony of a number of the co-defendants, including Messrs. Zadoiko, Baday, Kobyak and Kuzmich, apparently contained contradictions and discrepancies between the pre-trial and trial phases. For example, during his interrogation, co-defendant Baday apparently denied entering into any criminal conspiracy, but admitted at trial that he was part of an organized criminal group.<sup>46</sup>

Mr. Babariko pleaded not guilty to all charges against him.<sup>47</sup>

Mr. Babariko's defense counsel were given permission to make oral arguments towards the end of the trial, on June 22 and 23, 2021.

## Judgment

On July 6, 2021, the court issued its judgment, finding Mr. Babariko guilty of bribery and money laundering offences while he was the head of BGPB.

Mr. Babariko was sentenced to imprisonment for 14 years in a high security correctional facility.<sup>48</sup> In addition, he was fined 145,000 Belarusian rubles (approximately US \$60,000), and ordered to pay a further 45 million Belarusian rubles (approximately US \$18.6 million) for damages caused by his alleged crimes.<sup>49</sup> He was also banned from occupying positions related to the performance of organizational, managerial, and administrative and economic obligations for a period of five years.<sup>50</sup>

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<sup>46</sup> Monitoring information.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

# METHODOLOGY



## A. THE MONITORING PHASE

The Clooney Foundation for Justice monitored the case through a variety of means. To protect the safety of sources, we refer in this report to “monitoring information” in generic terms, without revealing the specific nature or format of the information that was provided.

## B. THE ASSESSMENT PHASE

To evaluate the trial’s fairness and arrive at a grade, Covington reviewed the information provided by the Clooney Foundation for Justice, and conducted factual research in the public domain.

Confidentiality restrictions that we understand to have been imposed by the Belarusian authorities have limited access to court documents. This has impeded Covington’s ability to independently verify some of the information. Wherever possible, the conclusions stated in this report are based on the information provided by the Clooney Foundation for Justice, or other publicly available sources.

# ANALYSIS



## A. APPLICABLE LAW

This report assesses the fairness of Mr. Babariko's prosecution and trial against the international human rights standards set out in:

- the International Covenant on Civil and Political Rights ("ICCPR"), a multilateral treaty adopted by the United Nations General Assembly in 1966, which is part of the International Bill of Human Rights<sup>51</sup>; and
- jurisprudence from the United Nations Human Rights Committee (the "UNHRC" or the "Committee"), which is tasked with monitoring implementation of the ICCPR.

Belarus acceded to the ICCPR in 1973.<sup>52</sup>

We also have taken into account relevant United Nations principles and guidelines such as the United Nations Basic Principles on the Role of Lawyers,<sup>53</sup> and the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.<sup>54</sup> While not legally binding, those materials establish best practices in the field of professional or prosecutorial ethics and offer further guidance for fulfilling a State's international human rights commitments.

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<sup>51</sup> *International Covenant on Civil and Political Rights* (Dec. 16, 1966), S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171, <https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>.

<sup>52</sup> On September 30, 1992, Belarus notified the U.N. Secretary-General of its decision to withdraw its declaration regarding Article 48(1) made upon signature and confirmed upon ratification, which read: "The Byelorussian Soviet Socialist Republic declares that the provisions of [...] paragraph 1 of article 48 of the International Covenant on Civil and Political Rights, under which a number of States cannot become parties to these Covenants, are of a discriminatory nature and considers that the Covenants, in accordance with the principle of sovereign equality of States, should be open for participation by all States concerned without any discrimination or limitation."

UNITED NATIONS TREATY COLLECTION, STATUS OF TREATIES, CHAPTER IV(4): [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=en)

<sup>53</sup> *United Nations Basic Principles on the Role of Lawyers, 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*, Office of the United Nations High Commissioner for Human Rights ("OHCHR"), <https://www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx>. (One of the "universal instruments relating to human rights," these principles "contribute to [...] understanding, implementation and development" of international human rights law.)

<sup>54</sup> UN Working Group on Arbitrary Detention, *United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, (May 4, 2015). According to the OHCHR, these guidelines are "based on international law, standards and recognized good practice, and are intended to provide States with guidance on fulfilling their obligation to avoid the arbitrary deprivation of liberty." OHCHR, <https://www.ohchr.org/EN/Issues/Detention/Pages/WGADIndex.aspx>. The Working Group, which is mandated to investigate cases of arbitrary or unlawful deprivation of liberty, refers to the Basic Principles in its opinions. See, e.g., *Opinions adopted by the Working Group on Arbitrary Detention at its seventy-eighth session* (19-28 April 2017), Opinion No. 15/2017 concerning Ahmed Mahloof (Maldives), A/HRC/WGAD/2017/15 (16 June 2017), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/165/12/PDF/G1716512.pdf?OpenElement>, ¶ 84.

The report additionally references relevant provisions in the Constitution of Belarus and the Code of Criminal Procedure of Belarus (the “CCP”).

Belarus is not a party to the European Convention on Human Rights (“ECHR”). Nonetheless, the report includes occasional references to jurisprudence from the European Court of Human Rights, to the extent relevant to the interpretation of rights similar to those guaranteed under the ICCPR, or helpful to show convergence of views among different international judicial bodies relating to the interpretation and implementation of such rights.

## **B. INVESTIGATION AND PRETRIAL STAGE VIOLATIONS**

### **Right of Access to Counsel Before Trial**

Article 14(3)(b) of the ICCPR guarantees a defendant the right to “communicate with counsel of his own choosing” “[i]n the determination of any criminal charge against him.”<sup>55</sup> This right extends to cover suspects before they have been formally charged, including when they are arrested or first questioned as a suspect, as well as at the trial.

The UNHRC has noted that the right to communicate with counsel “requires that the accused is granted prompt access to counsel,” explaining that “lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognized professional ethics without restrictions, influence, pressure or undue interference from any quarter.”<sup>56</sup>

In *Kelly v. Jamaica*, the UNHRC concluded that the right under Article 14(3)(b) was violated where police officers ignored the complainant’s request to speak to a lawyer for the first five days he was in custody.<sup>57</sup> In *Lyashkevich v Uzbekistan*, the Committee concluded that denying a suspect’s access to the legal counsel of his choice for one day and interrogating him and conducting other investigative acts with him during that time constituted a violation of Article 14(3)(b).<sup>58</sup>

Widely accepted guidelines and principles similarly recognize the right to prompt access to legal assistance. The UN Working Group on Arbitrary Detention, for instance, has

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<sup>55</sup> ICCPR, Art. 14(3)(b).

<sup>56</sup> UNHRC, *General Comment No. 32*, U.N. Doc. CCPR/C/GC/32 (August 23, 2007), <https://www.refworld.org/docid/478b2b2f2.html>, ¶ 34; see also UNHRC, *General Comment No. 35*, U.N. Doc. CCPR/C/GC/35, December 16, 2014, <https://www.refworld.org/docid/553e0f984.html>, ¶ 35 (“States parties should permit and facilitate access to counsel for detainees in criminal cases from the outset of their detention.”).

<sup>57</sup> UNHRC, *Kelly v. Jamaica*, U.N. Doc. CCPR/C/57/D/537/1993 (July 17, 1996), <http://hrlibrary.umn.edu/undocs/session41/253-1987.html>, ¶ 9.2.

<sup>58</sup> UNHRC, *Lyashkevich v Uzbekistan*, U.N. Doc. CCPR/C/98/D/1552/2007 (May 11, 2010), <https://www.refworld.org/cases,HRC,4c19d9412.html>, ¶ 9.4.

stated that all persons “deprived of their liberty have the right to legal assistance by counsel of their choice, at any time during their detention, including immediately after the moment of apprehension.”<sup>59</sup> The UN Basic Principles on the Role of Lawyers likewise state that “Governments shall [...] ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.”<sup>60</sup> Further, “[a]ll arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality.”<sup>61</sup>

Belarusian law also protects the accused’s right to counsel. The right of the suspect and the accused to communicate freely with his lawyer, in private and confidentially, without limitation to the number and duration of conversations, is enshrined in Articles 41 and 43 of the CCP.

Oral submissions made by Mr. Babariko’s defense counsel in the present case stated that Mr. Babariko’s unambiguous written requests to speak to his lawyers (“I demand my defense counsel.”) were rejected after he was taken into custody for questioning to a facility of the Belarusian KGB’s Department of Financial Investigations on June 18, 2020. In addition, the submissions stated that, at the time of detention, Mr. Babariko already had contracts with three criminal defense lawyers: Messrs. Laevsky, Matskevich, and Pylchenko. The submissions noted that two of those lawyers — Messrs. Pylchenko and Laevsky — were outside the Department of Financial Investigations building requesting to see Mr. Babariko when Mr. Babariko’s detention order was issued. The explicit requests from the lawyers apparently were denied, ostensibly on the basis that “training” was taking place.<sup>62</sup>

While Mr. Babariko met his lawyers the next day, on June 19, 2020, at an interrogation in the office of the Belarusian KGB investigative department, there is no indication that he was allowed opportunities, time, or facilities to consult with the lawyers confidentially, before or during the initial interrogation. According to oral submissions made by defense counsel at trial, Mr. Babariko continued to be denied access to counsel for a week following his detention at the Belarusian KGB pre-trial detention facility, which proved to be a recurring issue.<sup>63</sup>

Mr. Babariko’s defense counsel were able to conduct some meetings with Mr. Babariko

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<sup>59</sup> UN Working Group on Arbitrary Detention, *United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court* Principle 9, ¶ 12.

<sup>60</sup> *United Nations Basic Principles on the Role of Lawyers, 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*, Principle 7.

<sup>61</sup> *United Nations Basic Principles on the Role of Lawyers*, Principle 8.

<sup>62</sup> Monitoring information; see also U.S. Department of State, *2020 Country Reports on Human Rights Practices: Belarus*, page 40.

<sup>63</sup> Monitoring information.

at the Belarusian KGB's pre-trial detention facility, and those meetings apparently occurred on a confidential basis. However, further restrictions were imposed from December 2020 to January 2021, due to the imposition of quarantine restrictions relating to the COVID-19 pandemic.

Covington has not been able to independently verify the number of occasions on which Mr. Babariko requested access to his defense counsel following his detention, the number of occasions on which such requests were denied, the reasons for any such denials, or the conditions in which Mr. Babariko met with his defense counsel prior to the trial. However, the rejection of Mr. Babariko's request for access to counsel immediately following his detention and prior to his initial interrogation, and the subsequent restrictions on meetings with defense counsel at the pre-trial detention facility, violated Mr. Babariko's right of prompt access to counsel.

### **Right to be Informed of Charges**

Article 14(3) of the ICCPR entitles every person charged with a criminal offense "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him."<sup>64</sup> The UNHRC has confirmed that the accused must be informed of "both the law and the alleged general facts on which the charge is based."<sup>65</sup>

The ECHR also protects a defendant's right to be informed of the charges against him. The European Court of Human Rights has said that the right to be informed of charges includes the right to receive "sufficient information as is necessary to understand fully the extent of the charges",<sup>66</sup> and the right to be told the "legal characterisation given to those acts" on which the prosecution is based.<sup>67</sup>

Similar principles are reflected in Belarusian law. Article 43 of the CCP provides that a defendant has the right to a defense and to be informed of the charges against them.<sup>68</sup> Further, Article 241 of the CCP provides that an indictment, or a decision to prosecute a defendant, must include a description of the alleged facts which underpin the charge, including the time and place of the offense. The indictment or decision to prosecute must also set out the relevant law on which the charge is based.<sup>69</sup>

Monitoring information suggests that the information provided in the indictment failed to meet Article 14(3) of the ICCPR and Articles 43 and 241 of the CCP. Monitoring

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<sup>64</sup> ICCPR, Article 14(3)(a).

<sup>65</sup> UNHRC, *General Comment No. 32*, ¶ 31.

<sup>66</sup> European Court of Human Rights, *Mattoccia v. Italy*, App. no. 23969/94 (July, 25 2000), <http://hudoc.echr.coe.int/eng?i=001-58764>, ¶ 60.

<sup>67</sup> European Court of Human Rights, *Pélissier and Sassi v. France*, App. No. 25444/94 (March 25, 1999), <http://hudoc.echr.coe.int/eng?i=001-58226>, ¶ 51.

<sup>68</sup> CCP, Article 43.

<sup>69</sup> CCP, Article 241.

information further indicates that Mr. Babariko was not given an adequate explanation of the alleged facts on which the charges against him were based.<sup>70</sup> For example:

- In relation to the bribery charges, monitoring information suggests that the indictment did not set out the dates on which the alleged bribes were paid to Mr. Babariko, the amounts of the bribes, or the actions Mr. Babariko allegedly took in exchange for such bribes.<sup>71</sup> According to that information, the indictment also failed to explain how the bribes were allegedly paid to Mr. Babariko.<sup>72</sup>
- In relation to the money laundering charges, monitoring information suggests that the indictment failed to set out which financial transactions constituted money laundering, the amount of money allegedly laundered by Mr. Babariko, or the prosecution's basis for alleging that certain of the funds were of criminal origin (where the origin of such funds was never investigated by the prosecution).<sup>73</sup>
- In addition, when the Supreme Court asked Mr. Babariko on March 21, 2021 whether the facts underlying the charges were clear to him, Mr. Babariko indicated that they were not.<sup>74</sup> Notwithstanding Mr. Babariko's statement, the court failed to take any steps to clarify the charges against him. Instead, when defense counsel raised objections on the basis that Mr. Babariko's right to a defense was being violated, the court noted that the objection was premature and would be considered at an appropriate time.

Additionally, according to monitoring information, several other motions filed by the defense requesting specific details regarding the cause and nature of the charges were denied.<sup>75</sup>

As noted above, confidentiality restrictions imposed by the Belarusian authorities limit access to the indictment, which has, in turn, prevented Covington from reviewing the indictment and independently assessing whether the indictment adequately informed Mr. Babariko of the charges against him. However, independent monitoring information separately confirms that Mr. Babariko informed the Supreme Court that he did not understand the allegations against him at the outset of the trial.

In the circumstances, we believe that it is reasonable to assume that the indictment was indeed vague in several respects. Based on the evidence available, we conclude that the conduct of this case is likely to have involved a violation of Mr. Babariko's right to be informed of the charges against him. As it is difficult for a defendant to prepare an

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<sup>70</sup> Monitoring information.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

effective defense if he does not understand the specific factual or legal basis for the charges, the violation of Mr. Babariko's right to be informed of the charges is likely to have had a material impact on the outcome of the trial.

## C. VIOLATIONS AT TRIAL

### Right to be Tried by a Competent, Independent and Impartial Tribunal

Article 14(1) of the ICCPR requires that "in the determination of any criminal charge against him, [...] everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."<sup>76</sup> Part of the guarantee of a public hearing is that, "[e]ven in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children."<sup>77</sup> According to the UNHRC, "the requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception."<sup>78</sup> In the present case, there are several circumstances suggesting that the tribunal may have lacked independence or impartiality.

#### Independence

According to the UNHRC, independence calls for the protection of judicial officers from any form of political influence in their decision-making, including any threat to their term of office, security, remuneration, or conditions of service. In its General Comment No. 32, the Committee notes that:

"The requirement of independence refers . . . [to] the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making."<sup>79</sup>

Accordingly, a "situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is *incompatible with the notion of an independent tribunal*."<sup>80</sup>

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<sup>76</sup> ICCPR, Art. 14(1).

<sup>77</sup> UNHRC, *General Comment No. 32*, ¶ 29.

<sup>78</sup> UNHRC, *General Comment No. 32*, ¶ 19.

<sup>79</sup> UNHRC, *General Comment No. 32*, ¶ 19.

<sup>80</sup> See UNHRC, *General Comment No. 32*, ¶ 19 (emphasis added); see also UNHRC, *Oló Bahamonde v. Equatorial Guinea*, U.N. Doc. CCPR/C/49/D/468/1991 (November 10, 1993), <http://hrlibrary.umn.edu/undocs/html/vws468.htm>, ¶ 9.4.

In this respect, there have been serious concerns about judicial independence in Belarus. As the Special Rapporteur on the situation of human rights in Belarus recently observed:

“[T]he President retains absolute discretion to appoint and remove judges. Upon examining candidates for judges to be appointed or reappointed, the Office of the President consults the National Security Council, an interdepartmental body established on 15 November 1991 with a mandate to ensure the security of Belarus. The Council is allowed to involve special services in verifying candidates’ credentials and approving their appointment. It is of particular concern that judges are nominated and appointed during closed sessions. Even though there are general requirements for candidates listed in article 76 of the Code of the Judicial System and the Status of Judges, the criteria applied by the President and the National Security Council while examining the candidates and making other decisions regarding judges remain undisclosed to candidates and the public. However, according to the information received, one of the main criteria in the selection of candidates is whether a judge has or has not made rulings that suited the National Security Council. The Special Rapporteur is concerned that persisting procedures for the appointment and removal of judges are not consistent with judicial independence and pose obstacles to the transparency and objectivity of judicial processes. The independence of the judiciary from the executive branch of power is essential for the functioning of democracy and the promotion and protection of human rights.”<sup>81</sup>

The Special Rapporteur further notes that the President has substantial control and discretion over the reappointment, removal, remuneration, and disciplinary measures concerning judges.<sup>82</sup> As the UNHRC has noted that executive control or direction over the judiciary is “incompatible with the notion of an independent tribunal,”<sup>83</sup> it is likely that these systemic flaws in the Belarusian justice system potentially could have impeded any defendant’s right to an independent and impartial tribunal. However, the particular circumstances of this case — the fact that Mr. Babariko was seeking to challenge the incumbent president in the forthcoming election, the fact that he was arrested shortly prior to his registration as an official candidate, and the fact that several other opposition leaders were also targeted by the government — strongly suggest that Mr. Babariko was at particular risk of being tried by a tribunal acting as an arm of the executive, rather than independently and impartially.

Further, in the present case, there are indications both in the monitoring information and in public sources that the prosecution and government officials, including Lukashenko himself, were making public statements expressing views about Mr. Babariko’s case.

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<sup>81</sup> UNHRC, *Report of the Special Rapporteur on the situation of human rights in Belarus*, A/75/173 (July 17, 2020), ¶ 21.

<sup>82</sup> UNHRC, *Report of the Special Rapporteur on the situation of human rights in Belarus*, A/75/173 (July 17, 2020), ¶¶ 22-24.

<sup>83</sup> See UNHRC, *General Comment No. 32*, ¶ 19; see also UNHRC, *Oló Bahamonde v. Equatorial Guinea*, ¶ 9.4.

Again, this suggests that undue political influence may have been exerted on the court.<sup>84</sup>

Whether or not these concerns, standing alone,<sup>85</sup> would be sufficient to find a violation of the right to be tried by an independent tribunal, they form part of the backdrop against which more specific concerns regarding impartiality should be assessed, and are relevant to the analysis with respect to the right to be presumed innocent, discussed further below.

## Impartiality

According to the UNHRC, “[t]he requirement of impartiality has two aspects. First, judges must not allow their judgment to be influenced by personal bias or prejudice, or have preconceived ideas about the matter under study, or act in a manner that improperly promotes the interests of one of the parties to the detriment of the other. Second, the Tribunal must also appear impartial to a reasonable observer.”<sup>86</sup>

In *Iskandarov v. Tajikistan*, for instance, the UNHRC found violation of Article 14(1), among other provisions, based on the uncontested complaint in the case that:

“[T]he court was biased and acted in an accusatory manner, and [...] several of the lawyers’ requests were not given due consideration. [...] [T]he court has failed to ensure the presence and the questioning of important witnesses; the court also failed to take into consideration the fact that Mr. Iskandarov was kept unlawfully isolated at the premises of the Ministry of Security and confessed guilt under threats of physical reprisals there, in the absence of a lawyer, and that his complaints on this subject were disregarded. [...]”<sup>87</sup>

In *Khostikoev v. Tajikistan*, the Committee similarly took note of certain “irregularities” identified in the complaint — e.g., not allowing defense counsel to study the case file prior to the beginning of the court trial, preventing, without sufficient justification, the lawyer from taking part in the initial stage of the court trial, ignoring defense counsel’s objections on the issue of statute of limitation, and refusing to allow the possibility for the defense to adduce relevant evidence.<sup>88</sup> Noting Tajikistan’s failure to refute those specific allegations,

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<sup>84</sup> See, e.g., Лукашенко сообщил о начавшем давать показания Бабарико, RBC (July 19, 2020), <https://www.rbc.ru/politics/19/07/2020/5f149bcf9a7947c72ea06e87> (in which Lukashenko is quoted as commenting on the case and saying, among other things, “a thief should be in prison”).

<sup>85</sup> UNHRC, *Leonid Sudalenko v. Belarus*, U.N. Doc. CCPR/C/113/D/1992/2010 (May 13, 2015), <http://hrlibrary.umn.edu/undocs/1992-2010.html>, ¶ 7.5 (“The author also claims that the Belarusian courts are, in general, neither independent nor impartial. [...] However, in the absence of further information or evidence in support of those claims, the Committee finds them insufficiently substantiated for purposes of admissibility, and declares this part of the communication inadmissible, under article 2 of the Optional Protocol.”); see also UNHRC, *Pinchuk v. Belarus*, U.N. Doc. CCPR/C/112/D/2165/2012 (October 24, 2014), <http://hrlibrary.umn.edu/undocs/2165-2012.html>, ¶¶ 3.5, 7.4.

<sup>86</sup> UNHRC, *General Comment No. 32*, ¶ 21.

<sup>87</sup> UNHRC, *Iskandarov v. Tajikistan*, U.N. Doc. CCPR/C/101/D/1499/2006 (April 28, 2011), [https://digitallibrary.un.org/record/704291/files/CCPR\\_C\\_101\\_D\\_1499\\_2006-EN.pdf](https://digitallibrary.un.org/record/704291/files/CCPR_C_101_D_1499_2006-EN.pdf), ¶ 6.6.

<sup>88</sup> UNHRC, *Khostikoev v. Tajikistan*, U.N. Doc. No. CCPR/C/97/D/1519/2006 (December 3, 2009),

the Committee concluded that such irregularities sufficiently demonstrated a violation of Article 14(1).<sup>89</sup>

In the present case, the monitoring information suggests that there were several potential irregularities in Mr. Babariko's trial. For example, there are instances where the court moved to strike or otherwise limit defense counsel's questions to witnesses based on its determination that the same questions had already been asked by the prosecution. For example, the court interrupted Mr. Babariko's defense counsel multiple times when cross-examining co-defendant Mr. Kuzmich, on the ostensible basis that particular questions had already been answered. On one occasion, defense counsel told the court that no answer had been given, but the court told defense counsel to refrain from making such statements.

Similarly, during the cross-examination of co-defendant Mr. Dobrolet, the court interrupted Mr. Babariko's defense counsel repeatedly. When defense counsel started to ask Mr. Dobrolet about the detailed decision-making process to offer lending to an institution, the court interrupted to warn that any redundant questions would be struck from the record, and did, in fact, strike several questions. The court also declined a request from defense counsel to check his notes for certain information before asking a question.<sup>90</sup>

As a practical matter, such an intervention interrupts the examination of witnesses by the defense — an impediment that the prosecution did not need to deal with during its examination of witnesses. In addition, it is unfeasible to reliably verify in real-time whether a particular question was asked earlier, particularly if there are no live transcription facilities, and it is not possible to fully assess whether any previous questions by the prosecution or answers thereto were sufficient.

In addition, monitoring information identifies instances where the court often found in favor of the prosecution and against the defense when presented with procedural motions or requests relating to review of interrogation records. On March 24, 2021, for instance, Mr. Babariko's defense counsel requested to watch a video recording of pre-trial interrogations, suggesting that there was testimony to exonerate Mr. Babariko that had not been read out by the prosecution. The court denied the request, noting that the footage (or equipment) was not instantly available. On March 31, 2021, Mr. Babariko's defense counsel reiterated the request to examine the interrogation materials, including by watching the video recordings. The court again denied the request, suggesting to revisit the issue at a later stage. On April 1, 2021, Mr. Babariko's defense counsel once again repeated its request to review the video footage, but the court denied the request, suggesting to revisit the issue at a later stage. The court granted the request only on April 6, two weeks after the request was first made.

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[https://digitallibrary.un.org/record/672990/files/CCPR\\_C\\_97\\_D\\_1519\\_2006-EN.pdf](https://digitallibrary.un.org/record/672990/files/CCPR_C_97_D_1519_2006-EN.pdf), ¶ 7.2.

<sup>89</sup> *Id.* ¶¶ 7.2–7.3.

<sup>90</sup> Monitoring information.

The elements discussed above raise serious concerns under Article 14(1), especially when viewed in tandem with the strong executive influence over the judiciary, as explained in the first part of this section, and other irregularities observed during the investigation and trial, addressed in other sections of this report.

## Right to be Presumed Innocent

The right of an accused to be presumed innocent until proven guilty is well-established under international, regional, and local standards. The Universal Declaration of Human Rights, adopted in 1948 by the General Assembly of the United Nations, which also gave rise to a number of international human rights treaties, provides that “[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”

Under Article 14(2) of the ICCPR, “everyone charged with a criminal offense shall have the right to be presumed innocent until proven guilty according to law.” Similarly, the UNHRC has declared that, “[t]he 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 the doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle.”<sup>91</sup>

In this same vein, Article 6(2) of the ECHR mandates that “everyone charged with a criminal offense shall be presumed innocent until proved guilty according to law.” Like Article 14(2) of the ICCPR, Article 6(2) requires that the relevant judicial authority not predetermine the outcome of the case. Such impermissible predetermination may be inferred from the presence of “some reasoning suggesting that the court or the official regards the accused as guilty” before the verdict is rendered.<sup>92</sup>

Belarusian law similarly guarantees the right of an accused to be presumed innocent. Under Article 26 of the Belarus Constitution, “[n]o one may be found guilty of a crime unless his guilt is proven under the procedure specified in law and established by the verdict of a court of law that has acquired legal force. A defendant shall not be required to prove one's innocence.”<sup>93</sup> Article 16 of the CCP provides similar guarantees.<sup>94</sup>

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<sup>91</sup> UNHRC, *Saidova v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015 (September 20, 2018), <https://undocs.org/en/CCPR/C/122/D/2680/2015>, ¶ 9.4.

<sup>92</sup> European Court of Human Rights, *Garycki v. Poland*, App. No. 14348/02 (February 6, 2007), <http://hudoc.echr.coe.int/eng?i=001-79352>, ¶ 66.

<sup>93</sup> Constitution of the Republic of Belarus.

<sup>94</sup> CCP, Article 16. (“(1) Person accused of crime execution is considered innocent until his guilt in crime execution is proved in the procedure provided by this Code and will be established by the court verdict which took legal effect. (2) The person accused shall not prove the innocence. The criminal prosecution authority, court has no right to shift proof obligation onto the person accused. (3) Doubts in justification of the brought charge are interpreted for benefit of the person accused. (4) The sentence cannot be based on

The record of Mr. Babariko's trial indicates that Belarusian authorities failed to afford him the benefit of the doubt, suggesting that his indictment, prosecution, and eventual verdict were all a foregone conclusion in retaliation for his presidential campaign.

First, the prosecution and other Belarusian authorities, upon numerous occasions, publicly declaimed the government's belief of Mr. Babariko's guilt before his conviction. Following Mr. Babariko's detention, various government officials declared that he engaged in criminal acts. For instance, the former General Prosecutor publicly stated that Mr. Babariko created a criminal enterprise within the BGPB to "systematically receive illegal monetary payments."<sup>95</sup> By way of further example, Ivan Tertel, the Chairman of the State Control Committee which heads the system of state security agencies, publicly announced that Mr. Babariko was detained because he was the leader of an "organized criminal group" who had also attempted to influence the testimony of witnesses and conceal evidence.<sup>96</sup> In addition, on the first day of the trial, General Prosecutor Andrei Shved announced to the media that the trial of Mr. Babariko and his co-defendants concerned "criminality in its purest form," and that he was convinced the court decision would "confirm" that the defendants are "run-of-the-mill bribe-takers" as well as "scoundrels who used their official position for personal gain."<sup>97</sup> State media likewise suggested he was guilty.<sup>98</sup>

The UNHRC explained that public statements "affirm[ing] the guilt of the accused" — such as the ones discussed above — are in fact contrary to the duty of the Belarusian authorities to "refrain from prejudging the outcome of a trial" under ICCPR Article 14(2).<sup>99</sup>

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assumptions.")

<sup>95</sup> *The Prosecutor General's Office Sent a Criminal Case to the Court on Charges of Corruption Crimes Against Belgazprombank Top Managers* (Генпрокуратура направила в суд уголовное дело по обвинению топ-менеджеров Белгазпромбанка в коррупционных преступлениях), Belarus Segodnya (January 21, 2021), <https://www.sb.by/articles/genprokuratura-napravila-v-sud-ugolovnoe-delo-po-obvineniyu-top-menedzherov-belgazprombanka-v-korrupt.html>.

<sup>96</sup> *Details of Unlawful Activities of Ex-head of Belgazprombank Viktor Babariko Released* (Обнародованы подробности противоправной деятельности экс-главы Белгазпромбанка Виктора Бабарико), Belarus Segodnya (June 18, 2020), <https://www.sb.by/articles/obnarodovany-podrobnosti-protivopravnoy-deyatelnosti-eks-qlavy-belgazprombanka-viktora-babariko.html>.

<sup>97</sup> *Prosecutor General Andrei Shved Answered the Question of How Scrupulously the Investigation Was Carried Out in the Case of the Top Management of Belgazprombank* (Генеральный прокурор Андрей Швед ответил на вопрос, насколько скрупулезно проведено следствие по делу топ-менеджмента Белгазпромбанка), Belarus Segodnya (February 17, 2021), <https://www.sb.by/articles/generalnyy-prokuror-andrey-shved-otvetil-na-vopros-naskolko-skrupulezno-provedeno-sledstvie-po-delu-.html>.

<sup>98</sup> UNHRC, *Saidov v. Tajikistan*, Communication No. 964/2001 (August 20, 2004), [http://www.worldcourts.com/hrc/eng/decisions/2004.07.08\\_Saidova\\_v\\_Tajikistan.htm](http://www.worldcourts.com/hrc/eng/decisions/2004.07.08_Saidova_v_Tajikistan.htm), ¶ 6.6 ("The author further claimed that her husband's right to be presumed innocent until proved guilty has been violated, due to the extensive and adverse pre-trial coverage by state — directed media which designated the author and his co-charged as criminals, thereby negatively influencing the subsequent court proceedings. In the absence of information or objection from the State party in this respect, the Committee decides that due weight must be given to the author's allegations, and concludes that Mr. Saidov's rights under article 14, paragraph 2, have been violated.")

<sup>99</sup> UNHRC, *General Comment No. 32*, ¶ 30; see also UNHRC, *Gridin v. Russian Federation*, Communication No. 770/1997 (June 27, 1996), [http://www.worldcourts.com/hrc/eng/decisions/2000.07.20\\_Gridin\\_v\\_Russian\\_Federation.htm](http://www.worldcourts.com/hrc/eng/decisions/2000.07.20_Gridin_v_Russian_Federation.htm), ¶¶ 3.5, 8.3.

For instance, the UNHRC found in *Gridin v. Russian Federation* that the Russian authorities “failed to exercise the restraint that article 14, paragraph 2, requires of them” with respect to certain “public statements made by high ranking law enforcement officials portraying [Gridin] as guilty which were given wide media coverage.”<sup>100</sup> Likewise, the European Court of Human Rights has held that the right to be presumed innocent under the ECHR was breached when high-ranking police officers referred to a defendant, “without any qualification or reservation, as one of the instigators of a murder and thus as an accomplice to that murder,” on the basis that this “encouraged the public to believe [the defendant] guilty” and “prejudged the assessment of the facts by the competent judicial authority.”<sup>101</sup> The Belarusian government officials should have similarly exercised restraint in Mr. Babariko’s case to avoid influencing judicial opinion on the outcome of Mr. Babariko’s case.

*Second*, the record shows that the way in which Mr. Babariko and his co-defendants were physically presented at trial suggested to the public that they may be dangerous criminals, further undermining the presumption of innocence. Throughout the duration of the trial, Mr. Babariko and the other defendants were kept in a cage and brought to and from the cage in handcuffs. The UNHRC has stated that “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.”<sup>102</sup> That Mr. Babariko and his co-defendants were presented in this manner when the cage was not necessary to physically restrain him or to prevent him from absconding<sup>103</sup> constitutes a violation of his right to the presumption of innocence.

### **Rights to Adequate Time and Facilities for the Preparation of a Defense and to Counsel**

Article 14(3) of the ICCPR guarantees that any person charged with a criminal offense should have adequate time and facilities to prepare their defense — a right that applies throughout the criminal proceedings.<sup>104</sup> Defendants must have the opportunity to organize their defense, to put all relevant defense arguments before the trial court, and thus to influence the outcome of the proceedings. The right to adequate facilities is closely linked to the right of a defendant to the assistance of legal counsel and to communicate with counsel of their own choosing on a confidential basis.<sup>105</sup> Indeed, the UNHRC has stated that defendants should be able to meet with defense counsel in private and communicate with them in conditions that fully respect the confidentiality of

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<sup>100</sup> UNHRC, *Gridin v. Russian Federation*, ¶ 8.3.

<sup>101</sup> European Court of Human Rights, *Alenet de Ribemont v. France*, Appl. No. 15175/89, ¶ 41.

<sup>102</sup> UNHRC, *General Comment No. 32*, ¶ 30.

<sup>103</sup> European Court of Human Rights, *Svinarenko and Slyadnev v. Russia* [GC] - 32541/08 and 43441/08, Judgment (July 17, 2014), <http://hudoc.echr.coe.int/eng?i=001-145817>.

<sup>104</sup> ICCPR, Art. 14(3)(b).

<sup>105</sup> UNHRC, *General Comment No. 32*, ¶ 34.

their lawyer-client communications.<sup>106</sup>

What constitutes “adequate time” for the preparation of a defense will require an assessment of the circumstances of each case.<sup>107</sup> According to the UNHRC, as part of the right to adequate time, courts are obligated to grant any reasonable request for an adjournment made by a defendant — particularly when the defendant is charged with a serious criminal offense and additional time for the preparation of a defense is necessary.<sup>108</sup> The UNHRC has indicated that a court’s failure to explain its reason(s) for refusing a request for an adjournment may suggest that an adjournment should have been granted which, in turn, could constitute a violation of the right to adequate time.<sup>109</sup> Similarly, under the Belarusian CCP, Article 17 affords defendants the basic right to prepare a defense and Article 43 provides that defendants must be allowed to communicate with defense counsel in private and on a confidential basis without the court imposing any limit on the frequency or duration of such communications.<sup>110</sup>

In violation of the ICCPR and CCP rights to adequate time and facilities for the preparation of a defense, and to communicate with counsel on a confidential basis during criminal proceedings, we understand that Mr. Babariko was repeatedly denied the right to communicate confidentially with his lawyers during the proceedings. Mr. Babariko’s defense counsel petitioned the court for adjournments on a number of occasions during the proceedings to enable Mr. Babariko to communicate confidentially with his lawyers.<sup>111</sup> For example, on May 3, 2021, Mr. Babariko’s defense counsel submitted a petition for an adjournment in which they stated that trial hearings had taken place every day for over four weeks and that it was not possible for them to communicate confidentially with Babariko in the court room. They argued that, because of the visitor restrictions in place at the detention center where Mr. Babariko was held, which only permitted visits on weekdays between 9 a.m. and 6 p.m. — when trial hearings were taking place — the trial schedule effectively denied Mr. Babariko his right to confidential communications with his counsel.<sup>112</sup> However, the court rejected or ignored each of Babariko’s petitions for an adjournment.<sup>113</sup>

The UNHRC has identified violations of fair trial rights in cases where defendants were permitted only a few moments each day during the trial to communicate with counsel.<sup>114</sup>

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<sup>106</sup> *Id.*

<sup>107</sup> UNHRC, *Smith v Jamaica*, Comm. no. 282/1988 (March 31, 1993), <http://hrlibrary.umn.edu/undocs/html/vws282.htm>, ¶ 10.4.

<sup>108</sup> UNHRC, *General Comment No. 32*, ¶ 32; see also UNHRC, *Kulov v. Kyrgyzstan*, Comm. no. 1369/2005 (July 26, 2010), <http://hrlibrary.umn.edu/undocs/1369-2005.html>, ¶¶ 3.8, 8.7.

<sup>109</sup> UNHRC, *Sirageva v. Uzbekistan*, Comm. no. 907/2000 (November 1, 2005), [http://www.worldcourts.com/hrc/eng/decisions/2005.11.01\\_Sirageva\\_v\\_Uzbekistan.htm](http://www.worldcourts.com/hrc/eng/decisions/2005.11.01_Sirageva_v_Uzbekistan.htm), ¶ 6.3.

<sup>110</sup> CCP, Article 43.

<sup>111</sup> Monitoring information.

<sup>112</sup> Monitoring information.

<sup>113</sup> Monitoring information.

<sup>114</sup> UNHRC, *Rayos v. Philippines*, Comm. no. 1167/2003 (July 27, 2004), <http://hrlibrary.umn.edu/undocs/html/1167-2003.html>, ¶ 7.3.

During Mr. Babariko's trial, it is clear that there were significant violations of his right to such communications, which is part of his broader right to put on a defense. Indeed, there were long periods of time during the proceedings in which Mr. Babariko's ability to communicate with his counsel confidentially was severely restricted and, on several occasions, Mr. Babariko's lawyers highlighted this issue to the court and requested adjournments to enable such communications. The court's failure to grant these adjournments is likely to have adversely affected Mr. Babariko's ability to organize his defense and to put all relevant defense arguments before the court, thus compromising his ability to influence the outcome of the proceedings. The combination of this violation and the violation of his right to be informed of the charges is likely to have severely undermined his ability to prepare an effective defense to the case against him.

### **Right to Call and Examine Witnesses**

Under Article 14(3)(e) of the ICCPR, all persons accused of a crime are entitled "to examine, or have examined, the witnesses against [them] and to obtain the attendance and examination of witnesses on [their] behalf under the same conditions as witnesses against [them]."

This provision is based on the principle of equality of arms and is a fundamental element of the right to a defense. It reinforces the presumption of innocence, enhances the likelihood that a verdict will be based on all relevant evidence, and ensures that such evidence is properly scrutinized and tested.

Article 14(1) of the ICCPR provides that all parties in a judicial proceeding have the right to be treated equally. This right to equality of arms requires that "the procedural conditions at trial and sentencing must be the same for all parties. It calls for a 'fair balance' between the parties, requiring that each party should be afforded a reasonable opportunity to present the case under conditions that do not place her/him at a substantial disadvantage vis-à-vis the opponent."<sup>115</sup>

In criminal cases, adherence to the principle of equality of arms between the state and the accused is essential to prevent the repressive use of criminal law.<sup>116</sup> The Constitution of Belarus refers to similar principles.<sup>117</sup>

The UNHRC has noted that the right to call and examine witnesses "is important for ensuring an effective defence by the accused and their counsel and thus guarantees the

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<sup>115</sup> ICCPR, Article 14(1)

<sup>116</sup> UNHRC, *Bondar v. Uzbekistan*, U.N. Doc. CCPR/C/101/D/1769/2008 (April 28, 2011), <https://docstore.ohchr.org/>, ¶ 7.5; UNHRC, *Nazarov v. Uzbekistan*, U.N. Doc. CCPR/C/81/D/911/2000 (August 19, 2004), <http://hrlibrary.umn.edu/undocs/html/911-2000.html>, ¶ 6.3.

<sup>117</sup> Article 115, Constitution of Belarus. This provision provides that: "Justice shall be administered on the basis of the adversarial proceedings and equality of the parties involved in the trial." (Unofficial translation.)

accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.”<sup>118</sup> In past decisions, the UNHRC has determined that states have violated fair trial rights and Article 14 of the ICCPR in the following circumstances: (i) admission of evidence from an absent witness without adequate justification or safeguards; (ii) declining to provide reasons for its refusal to allow the defense to call and examine witnesses; (iii) cutting short the defense’s cross-examination of a key prosecution witness; and (iv) witnesses being inaudible.<sup>119</sup> In the sub-sections below, we address these decisions in the context of the present case.

### **Admission of Evidence from Absent Witnesses, and Declining to Provide Reasons for Refusal to Call Absent Witnesses**

Article 14(3)(e) does not establish an absolute right to call and examine witnesses, but it has been interpreted as conferring a right to call witnesses who are relevant,<sup>120</sup> if proposed in a timely manner and in compliance with procedural requirements.<sup>121</sup> For example:

- In *Allaberdiev v. Uzbekistan*, defense counsel requested to call, among others, individuals involved with the investigation whom the accused alleged had been involved in the offenses in question.<sup>122</sup> Although these witnesses were central to the defense theory that the case was fabricated, the court rejected the request, deeming the proposed testimony irrelevant.<sup>123</sup> The UNHRC found a breach of Article 14(3)(e).<sup>124</sup>
- Similarly, in *Saidov v. Tajikistan*, the UNHRC found a violation of Article 14(3)(e) where the court prevented the accused from calling 11 witnesses, “stating that the witnesses requested were too close to the accused and were interested in the outcome.”<sup>125</sup>
- Further, in *Litvin v. Ukraine*, the UNHRC has held that Article 14(3)(e) was violated where there was no reason adduced for denying a defense request to call witnesses.<sup>126</sup>

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<sup>118</sup> UNHRC, *General Comment No. 32*, ¶ 39.

<sup>119</sup> See citations to individual UNHRC decisions for each principle in the sub-sections below.

<sup>120</sup> UNHRC, *Saidov v. Tajikistan*, ¶ 9.6.

<sup>121</sup> UNHRC, *Johnson v. Spain*, U.N. Doc. CCPR/C/86/D/1102/2002 (March 27, 2006), [http://www.worldcourts.com/hrc/eng/decisions/2006.03.27\\_Johnson\\_v\\_Spain.htm](http://www.worldcourts.com/hrc/eng/decisions/2006.03.27_Johnson_v_Spain.htm), ¶ 6.5; UNHRC, *General Comment No. 32*, ¶ 39.

<sup>122</sup> UNHRC, *Allaberdiev v. Uzbekistan*, U.N. Doc. CCPR/C/119/D/2555/2015 (March 21, 2017), [CCPR C 119 D 2555 2015 25877 E.pdf](http://www.unhcr.org/refugees/doc/55000000), ¶ 3.5.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* ¶¶ 8.8-8.9.

<sup>125</sup> UNHRC, *Saidov v. Tajikistan*, ¶ 9.6.

<sup>126</sup> UNHRC, *Litvin v. Ukraine*, U.N. Doc. CCPR/C/102/D/1535/2006 (September 15, 2011), <http://hrlibrary.umn.edu/undocs/1535-2006.html>, ¶ 10.4.

Similarly, the European Court of Human Rights has stated that the admission of evidence from an absent witness, whom the defense has not had an opportunity to question, should be a measure of last resort.<sup>127</sup>

In the present case, the prosecution was permitted to rely on out-of-court statements by two key witnesses, Mr. Aleksejs Stepanovs and Mr. Aleksandrs Rostovs.<sup>128</sup> Mr. Babariko's defense counsel moved to call the absent witnesses on three occasions.<sup>129</sup> On February 22, 2021, the court refused one petition on the grounds that, "according to the information provided by the [Belarusian] General Prosecutor's Office, the Republic of Latvia refused to fulfil the request of the Republic of Belarus for international legal assistance sent from the KGB at the preliminary investigative stage."<sup>130</sup> The defense counsel argued that the possibilities for summoning and interrogating the absent witnesses had not been exhausted, and that the requests submitted to the Latvian authorities were procedurally deficient.<sup>131</sup> However, the court refused each of the defense counsel's petitions to call these witnesses, citing the impossibility of calling the witnesses without the cooperation of the Latvian authorities.<sup>132</sup>

Evidence of the requests made by the Belarusian authorities to their Latvian counterparts, or the Latvian responses, was not available, so we have not been able to independently verify the assertions made by Mr. Babariko's defense counsel about the procedural deficiencies in the requests for mutual legal assistance. Given the Latvian Government's well-publicised criticism of the 2020 Belarusian election,<sup>133</sup> we cannot discount the possibility that — even if a procedurally proper request were submitted by the Belarusian authorities to the Latvian authorities — the Latvian authorities may have been inclined to refuse any such request to avoid any perception of complicity in the prosecution of Mr. Babariko or other Belarusian opposition leaders. However, assuming that the defense counsel's characterization of the mutual legal assistance requests is accurate, the court's decision to allow the prosecution to rely on the absent witnesses' evidence, without making valid requests to the Latvian authorities or allowing the defense counsel alternative opportunities to test the reliability of that evidence, violates Mr. Babariko's rights under Article 14(3)(e).

In addition, the court in the present case refused the defense counsel's motion to play a recording of a co-defendant's interrogation that contained, according to the defense

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<sup>127</sup> European Court of Human Rights (Grand Chamber), *Al-Khawaja and Tahery v. United Kingdom* (26766/05 and 22228/06) (2011), <http://hudoc.echr.coe.int/eng?i=001-108072>, ¶ 125.

<sup>128</sup> Monitoring information.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> See, e.g., *Latvian Saeima declares: Lukashenko is not a legitimate president of Belarus*, Baltic News Network, (October 2, 2020), <https://bnn-news.com/latvian-saeima-declares-lukashenko-is-not-a-legitimate-president-of-belarus-217396>.

counsel, “testimony to exonerate Babariko.”<sup>134</sup> On at least two occasions, the request for the recording was denied and subsequently ignored.<sup>135</sup> The court ultimately granted the request on April 6, 2021.

### **Cutting Short Defense Cross-Examination of Prosecution Witness**

Violations of Article 14(3)(e) also can occur where a court excessively curtails defense questioning of witnesses.<sup>136</sup> In *Larranaga v. The Philippines*, the UNHRC ruled that a court violated Article 14(3)(e) by cutting short the defense team’s cross-examination of a key prosecution witness.<sup>137</sup>

In the present case, monitoring information suggests that the court often interrupted and prevented defense counsel from making their full arguments, and curtailed further questioning of the prosecution’s witnesses and untested evidence, ostensibly because the questions were repetitive.<sup>138</sup> The court placed no such restrictions on the prosecution. The persistent efforts to cut short cross-examination constitutes a further indication that Mr. Babariko’s rights under Article 14(3)(e) were violated.<sup>139</sup>

### **Witnesses Inaudible**

Finally, as noted above, violations of Article 14(3)(e) can occur where witnesses are inaudible to the participants in a trial. According to monitoring information, witnesses (as well as the judge) in the present case were often inaudible to the defense counsel, and there were ongoing problems with the sound system in the courtroom.<sup>140</sup> This is a further indication that Mr. Babariko’s rights under Article 14(3)(e) were violated.

When taken together, the evidence suggests that the court violated the right to call and examine witnesses, and the principle of equality of arms, in Article 14 of the ICCPR.

## **D. OTHER FAIRNESS CONCERNS**

### **Disciplinary Actions Against Babariko’s Defense Counsel**

Prior to and during Mr. Babariko’s trial, his defense counsel were subject to a series of

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<sup>134</sup> Monitoring information.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> UNHRC, *Larranaga v. The Philippines*, U.N. Doc. CCPR/C/87/D/1421/2005 (July 24, 2006), [https://www.un.org/ga/search/view\\_doc.asp?symbol=CCPR/C/87/D/1421/2005](https://www.un.org/ga/search/view_doc.asp?symbol=CCPR/C/87/D/1421/2005), ¶ 7.7.

<sup>138</sup> Monitoring information.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

disciplinary actions against them, which further undermined Mr. Babariko's rights guaranteed under Article 14(3)(b) of the ICCPR. Interpreting the guarantees of Article 14(3)(b), the UNHRC has explained that "lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognized professional ethics without restrictions, influence, pressure or undue interference from any quarter."<sup>141</sup>

The UN Basic Principles on the Role of Lawyers likewise require, in relevant part, that "Governments [...] ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; [...] and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics."<sup>142</sup>

On September 9, 2020, one of Mr. Babariko's defense lawyers, Mr. Maxim Znak, was taken into custody on charges related to representation in the electoral process.<sup>143</sup> Mr. Znak continued to be in custody for several months, until his trial began about a year later in August 2021. Like Maria Kolesnikova, he was charged with "creation of an extremist organization" for being a member of the Coordination Council, as well as conspiracy to seize state power, and calls for actions aimed at causing harm to national security. His lawyers reportedly faced the threat of disciplinary measures if they discussed the case publicly.<sup>144</sup> On September 6, 2021, Mr. Znak was found guilty and sentenced to 10 years imprisonment.<sup>145</sup>

In October 2020, another member of Mr. Babariko's defense counsel team, Alyaksandr Pylchenka, was disbarred by the Ministry of Justice Qualification Commission.<sup>146</sup> The disbarment was reportedly based on statements Mr. Pylchenka made in an interview "in which he called for legal measures to be taken by the prosecutor general to hold security forces accountable for the severe abuses of detainees arrested during postelection

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<sup>141</sup> UNHRC, *General Comment No. 32*, ¶ 34.

<sup>142</sup> *UN Basic Principles on the Role of Lawyers*, ¶ 16; CLOONEY AND WEBB, *The Right to a Fair Trial in International Law* (Feb. 2021), pages 368-369 (collecting cases of international human rights bodies finding a violation of the right to counsel when state authorities took measures to intimidate counsel, including in cases where defense counsel received threats of arrest or were arrested, detained, or disbarred), <https://opil.ouplaw.com/view/10.1093/law/9780198808398.001.0001/law-9780198808398>.

<sup>143</sup> Monitoring information; U.S. Department of State, *2020 Country Reports on Human Rights Practices: Belarus*, page 11 ("Lawyers asserted that Znak was arrested in retaliation for his August 21 filing of a compliant with the Supreme Court calling for the August 9 presidential election results to be invalidated due to the widespread allegations of electoral fraud.")

<sup>144</sup> *Belarus Protests: Trial of Opposition Figures Begins*, BBC News (August 4, 2021), <https://www.bbc.com/news/world-europe-58083672>.

<sup>145</sup> *Belarus jail terms for opposition figures Kolesnikova and Znak*, BBC News (September 6, 2021), <https://www.bbc.com/news/world-europe-58395120>.

<sup>146</sup> American Bar Association, Center for Human Rights, *Belarus: Preliminary Report on the Disbarment of Alexander Pylchenko* (December 20, 2020), [https://www.americanbar.org/groups/human\\_rights/reports/belarus-disbarment/](https://www.americanbar.org/groups/human_rights/reports/belarus-disbarment/).

peaceful protests.”<sup>147</sup>

Just days after Mr. Babariko’s trial began, on March 24, 2021, the Council of the Minsk City Bar Association initiated disciplinary proceedings against yet another member of Mr. Babariko’s defense counsel, Mr. Laevsky.<sup>148</sup> The disciplinary action was based on Mr. Laevsky’s Facebook post on March 11, 2021, discussing the influence the Ministry of Justice has on the law faculty of the Belarussian State University. On April 12, the Bar Association found that Mr. Laevsky violated professional ethics and ordered a reprimand for committing a disciplinary offense, i.e., the dissemination of information with incorrect and discrediting statements.<sup>149</sup>

The series of criminal and disciplinary proceedings against Babariko’s defense counsel are not isolated events.<sup>150</sup> Rather, such actions fit into a well-documented pattern of intimidation of lawyers representing opposition figures in Belarus since the recent elections.<sup>151</sup> In this regard, the Special Rapporteur on the situation of human rights in Belarus, Anaïs Marin, expressed concerns about:

“[...] the pressure under which lawyers, especially those who defend opposition politicians, human rights defenders and critical journalists or bloggers, have to operate. Such defendants have access to a limited number of lawyers as a result of the authorities’ efforts to disbar or intimidate lawyers who would be ready to defend them.”<sup>152</sup>

The UNHRC has found Belarus violated Article 14 where similar factual circumstances

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<sup>147</sup> U.S. Department of State, *2020 Country Reports on Human Rights Practices: Belarus*, page 11.

<sup>148</sup> Decree No. 5/2021 of the Council of the Minsk City Bar Association, on compliance of the statements of attorney D.V. Laevsky on the activities of attorneys and heads of legal consultations with the Rules of Professional Ethics of the Lawyer (March 24, 2021); see also UNHRC, *Report of the Special Rapporteur on the situation of human rights in Belarus* (July 17, 2020), ¶¶ 31-34 (expressing concerns about “broad control” the Belarusian government has over bar associations, in particular to target those defending political oppositions).

<sup>149</sup> *Decree of the Disciplinary Commission of the Minsk City Bar Association* (April 8, 2021).

<sup>150</sup> On October 12, Ms. Matskevich, another of Mr. Babariko’s defense lawyers, was suspended from practicing as a lawyer by the Ministry of Justice in connection with a “disciplinary action” against her allegedly related to her defense of Mr. Babariko. See *Ministry of Justice suspends Tsikhanouski’s key lawyer Natallia Matskevich*, Viasna (October 13, 2021), <http://spring96.org/en/news/105331>; *The Ministry of Justice began disciplinary proceedings against lawyer Natalya Matskevich because of the defense of Viktor Babariko* (Минюст начал дисциплинарное производство в отношении адвоката Натальи Мацкевич из-за защиты Виктора Бабарико), Media Zona (October 13, 2021), <http://mediazona.by/news/2021/10/13/matskevich>.

<sup>151</sup> See U.S. Department of State, *2020 Country Reports on Human Rights Practices: Belarus*, page 11; *International Bar Association, IBAHRI and CFJ condemn the revocation of legal licences in Belarus and call for their reinstatement*, International Bar Association (March 2, 2021), <https://www.ibanet.org/article/E0B7D120-1E19-46F8-A462-A65CC7FA0C8B> (strongly condemning “the new wave of repression against the legal profession in Belarus that has seen at least four lawyers deprived of their licence to practise, including Lyudmila Kazak, lawyer for Belarusian Opposition leader Maria Kolesnikova”).

<sup>152</sup> UNHRC, *Report of the Special Rapporteur on the situation of human rights in Belarus* (July 17, 2020), ¶ 35.

were established:

“The Committee also notes the author’s claim that [...] he was not allowed to meet with his lawyers or to communicate with them confidentially during the conduct of investigative actions. The Committee further notes the author’s assertion that his initial lawyer was disbarred by the Minsk City Bar Association and had his licence withdrawn by the Ministry of Justice, allegedly after he publicly raised concerns about the author’s “horrendous” condition and the Government’s mistreatment of him during his pretrial detention. In the absence of comments from the State party to counter the author’s allegations, the Committee concludes that the facts before it constitute a violation of [article 14] of the Covenant.”<sup>153</sup>

The series of disciplinary actions toward Mr. Babariko’s lawyers, in tandem with the risk that other lawyers would be deterred from taking up Mr. Babariko’s case for the fear of retaliatory actions as well as the initial denial of access to counsel while in custody, substantially undermined Mr. Babariko’s right to counsel of his choice, in violation of Article 14(3)(b) of the ICCPR.

### **Abuse of Process**

Article 18 of the ECHR provides that permitted restrictions to the rights and freedoms outlined in the treaty “shall not be applied for any purpose other than those for which they have been prescribed.” Although Belarus is not a signatory to the ECHR, the interpretation of Article 18 by the European Court of Human Rights provides helpful guidance on the circumstances in which judicial proceedings may be regarded as an unlawful abuse of process. In particular, past decisions confirm that rights cannot be restricted for improper or ulterior purposes, including intimidation or the suppression of dissent.<sup>154</sup>

For purposes of determining whether a prosecution has been motivated by improper or

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<sup>153</sup> UNHRC, *Andrei Sannikov v. Belarus*, CCPR/C/122/D/2212/2012 (May 14, 2018), <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsjvfljqil84ZFd1DNP1S9EIlPYFHRAX1miHMyPGUg0HDQr%2Fsv42aLZ0PWy2YfvQL38TSEk7seWIDQkR3XKwj727uLPM1ZHNm0kR7HrAU%2F8YCYx%2BXNFU6AK%2FII3ND6GY1Q%3D%3D>, ¶ 6.7.

<sup>154</sup> See, e.g., European Court of Human Rights, *Gusinskiy v. Russia*, App. No. 70276/01 (May 19, 2004), <http://hudoc.echr.coe.int/eng?i=001-61767>, ¶¶ 76–78; European Court of Human Rights, *Cebotari v. Moldova*, App. No. 35615/06 (November 13, 2007), <http://hudoc.echr.coe.int/eng?i=001-83247>, ¶ 53; European Court of Human Rights, *Merabishvili v. Georgia*, App. No. 72508/13 (November 28, 2017), <http://hudoc.echr.coe.int/eng?i=001-178753>, ¶ 353; European Court of Human Rights, *Lutsenko v. Ukraine*, App. No. 6492/11 (August 1, 2012), <http://hudoc.echr.coe.int/eng?i=001-112013>, ¶ 109; European Court of Human Rights, *Tymoshenko v. Ukraine*, App. No. 49872/11 (July 30, 2013), <http://hudoc.echr.coe.int/eng?i=001-119382>, ¶ 299; European Court of Human Rights, *Mammadov v. Azerbaijan*, App. No. 15172/13 (May 22, 2014), <http://hudoc.echr.coe.int/eng?i=001-144124>, ¶ 143; European Court of Human Rights, *Mammadli v. Azerbaijan*, App. No. 47145/14 (April 19, 2018), <http://hudoc.echr.coe.int/eng?i=001-182178>, ¶¶ 104–105; European Court of Human Rights (Grand Chamber), *Navalnyy v. Russia*, App. No. 29580/12 (November 15, 2018), <http://hudoc.echr.coe.int/eng?i=001-187605>, ¶¶ 175–176.

ulterior purposes, the European Court of Human Rights would have regard to circumstantial evidence, including: the political context in which the prosecution is commenced; the degree to which the trial court is independent from executive authorities; the manner in which the criminal proceedings were conducted; and whether the court's ultimate decision is well-reasoned and based on law.<sup>155</sup>

Assessed against these criteria, we have serious concerns that the prosecution of Mr. Babariko was motivated by an improper or ulterior purpose, because:

- Mr. Babariko is a leading opponent of President Lukashenko, and his arrest and prosecution prevented him from campaigning as a candidate in the 2020 Belarusian elections;
- Mr. Babariko is one of several opponents of Lukashenko to have been targeted by prosecutors, which suggests that this case forms part of a systemic effort to intimidate and suppress activists who threaten the incumbent regime;
- there are well-documented concerns about the lack of judicial independence in Belarus, and public statements made by senior Belarusian authorities in this case could have influenced the trial court (and, at the very least, undermined Mr. Babariko's right to be presumed innocent until proven guilty);
- the criminal proceedings were not conducted in accordance with applicable fair trial standards, as detailed at length in the preceding sections; and
- the court's refusal to allow distribution of a complete copy of the judgment impedes effective scrutiny of its reasoning, including the ability of independent observers to verify the factual and legal basis for the findings.

We therefore conclude that the prosecution is likely to constitute an abuse of process.

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<sup>155</sup> European Court of Human Rights, *Guide on Article 18 of the European Convention on Human Rights: limitation on use of restrictions on rights* (August 31, 2020), [https://www.echr.coe.int/Documents/Guide\\_Art\\_18\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_18_ENG.pdf), ¶ 85.

## CONCLUSION AND GRADE



Overall, the monitoring information and public sources reveal repeated violations of applicable fair trial standards at all stages of this case, from Mr. Babariko's initial pre-trial detention through to the eventual verdict. Material issues that give rise to particularly serious concerns include:

- the targeting of Mr. Babariko's defense team for disciplinary measures or other sanctions;
- the lack of clarity about the factual and legal basis for the indictment, and the court's apparent indifference to Mr. Babariko's statement that he did not understand the charges against him at the outset of the trial;
- the various improper statements made by Belarusian authorities prior to the verdict, which undermined Mr. Babariko's right to be presumed innocent until proven guilty;
- the repeated impediments to Mr. Babariko's access to counsel, both before and during the trial;
- the detention of Mr. Babariko in a cage throughout the multi-week hearing;
- the curtailment of Mr. Babariko's right to call and examine witnesses in several respects; and
- the court's refusal to allow publication of a complete judgment containing its detailed reasoning on all factual and legal issues pertinent to the charges.

We conclude that these issues, taken together, are likely to have adversely impacted Mr. Babariko's ability to prepare and pursue a defense, or otherwise impeded his right to a fair trial. In turn, we have serious concerns that these issues could have been a contributory factor in Mr. Babariko's conviction. Accordingly, on the basis of the grading methodology set out in the Annex, we assign this trial a grade "D".

Further, in light of these apparent violations of applicable fair trial principles and the political context to the case, we conclude that the prosecution of Mr. Babariko is likely to constitute an abuse of process.

**GRADE:**





## GRADING METHODOLOGY

Experts should assign a grade of A, B, C, D, or F to the trial reflecting their view of whether and the extent to which the trial complied with relevant international human rights law, taking into account, *inter alia*:

- The severity of the violation(s) that occurred;
- Whether the violation(s) affected the outcome of the trial;
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,”<sup>2</sup> and retaliation for human rights advocacy (even if the defendant was ultimately acquitted);
- The extent of the harm related to the charges (including but not limited to whether the defendant was unjustly convicted and, if so, the sentence imposed; whether the defendant was kept in unjustified pretrial detention, even if the defendant was ultimately acquitted at trial; whether the defendant was mistreated in connection with the charges or trial; and/or the extent to which the defendant’s reputation was harmed by virtue of the bringing of charges); and
- The compatibility of the law and procedure pursuant to which the defendant was prosecuted with international human rights law.

### Grading Levels

- A: A trial that, based on the monitoring, appeared to comply with international standards.
- B: A trial that appeared to generally comply with relevant human rights standards excepting minor violations, and where the violation(s) had no effect on the outcome and did not result in significant harm.
- C: A trial that did not meet international standards, but where the violation(s) had no effect on the outcome and did not result in significant harm.
- D: A trial characterized by one or more violations of international standards that affected the outcome and/or resulted in significant harm.
- F: A trial that entailed a gross violation of international standards that affected the outcome and/or resulted in significant harm.