

Leninski District Court of Minsk  
33 Semashko St, Minsk  
The Republic of Belarus

**EXPERT'S DECLARATION ON INTERNATIONAL LAW**

**FILED BY**

**HUGHES HUBBARD & REED LLP**

**IN THE CASE**

**Belarus**

**vs.**

**Aliaksandr Bialiatski, Valiantsin Stefanovic,  
Uladzimir Labkovich & Dzmitry Salauyou**

Hughes Hubbard & Reed LLP (“Hughes Hubbard”) submits this Expert’s Declaration as an objective, legally supported and truthful expert statement regarding certain civil and political rights guaranteed by international law and their application in this case.

**PRINCIPAL POINTS OF THE EXPERT’S DECLARATION**

- I. The charges against the Defendants in this case constitute impermissible interference with the freedoms of expression, assembly, and association, which are rights guaranteed by the International Covenant on Civil and Political Rights (ICCPR) to which the Republic of Belarus (“Belarus”) is a signatory. Pursuant to the Vienna Convention on the Law of Treaties (VCLT), to which Belarus is also a signatory, Belarus must protect the rights guaranteed by the ICCPR and extend these guarantees to the Defendants.
- II. The detention of the Defendants is “arbitrary” within the meaning of the ICCPR because the Defendants have been detained for the purpose of preventing them, and others, from exercising their rights guaranteed by the ICCPR.
- III. The pre-trial detention of the Defendants did not conform to the international obligations of Belarus because the decision to hold Defendants in confinement before their trial was not made by an impartial judge as required by the ICCPR.

**STATEMENT OF INTEREST**

Hughes Hubbard, as an expert in international law, respectfully submits this statement in support of Aliaksandr “Ales” Bialiatski, Valiantsin Stefanovic, Uladzimir Labkovich and Dzmitry Salauyou (collectively referred to hereinafter as “Defendants”). Hughes Hubbard is an international law firm that

provides legal services across a variety of practice areas, including anti-corruption and international public law. Hughes Hubbard has not received any compensation for its work on this Expert Declaration.

Based on case materials and accounts of the public trial, Hughes Hubbard perceives that the prosecution of the Defendants in this case is the result of the exercise of their civil and political rights. This prosecution, therefore, violates the International Covenant on Civil and Political Rights (“ICCPR”), to which the Republic of Belarus is a signatory. As such, the Defendants should be acquitted, and they should be released from custody.

### STATEMENT OF THE CASE

Early in the morning of July 14, 2021 the apartments of Mr. Stefanovic, Mr. Bialiatski and Mr. Labkovich were searched, after which they were detained, initially for 72 hours. They were subsequently charged with tax evasion (Article 243 of the Criminal Code of Belarus). In September 2022, these tax evasion charges were replaced with new criminal charges of “smuggling” and “financing group actions that disrupted public order” (Part 4 of Article 228, and Part 2 of Article 342 of the Criminal Code of Belarus, respectively). Since then, they have remained in pre-trial detention, a decision that was made by the General Prosecutor’s Office. The other Defendant, Mr. Salauou, is not in custody and is being tried *in absentia* in this case.

### SUMMARY OF ARGUMENT

Belarus is a signatory to the ICCPR. Until recently, Belarus was also a signatory to the First Optional Protocol to the ICCPR, which established a mechanism for individuals to file complaints with the United Nations Human Rights Committee (“HRC”) against state parties for alleged violations of the rights guaranteed by the ICCPR. In October 2022, however, Belarus passed legislation denouncing the First Optional Protocol, and that denunciation took effect on February 8, 2023. Despite this denunciation, Belarus is still obligated to protect – and refrain from interfering with – all civil and political rights guaranteed under the ICCPR. This continuing obligation stems from three separate sources of law, all of which are binding on this Court.

*First*, Article 2 of the ICCPR itself imposes a general obligation on State Parties “to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the [ICCPR].”<sup>1</sup> Article 2 also imposes a more specific obligation on State Parties “to develop the possibilities of judicial remedy” for those whose rights guaranteed by the ICCPR have been violated.<sup>2</sup> Despite the fact that Belarus has denounced the First Optional Protocol, it remains a State Party to the ICCPR, and is therefore, still obligated to ensure that the rights recognized in the ICCPR are given full effect. The judiciary can – and should – be an effective avenue for those whose rights have been violated to seek redress.

*Second*, Belarus is also a signatory to the Vienna Convention on the Law of Treaties (“VCLT”), Article 26 of which states that parties are bound by the international treaties that they sign and that they must perform their obligations under those treaties in good faith.<sup>3</sup> As Belarus is a signatory to the ICCPR, the VCLT compels Belarus to perform its obligations under the ICCPR in good faith.

*Finally*, Article 8 of the Constitution of the Republic of Belarus states, “The Republic of Belarus recognizes the priority of the *universally recognized principles of international law* and ensures that the legislation

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<sup>1</sup> U.N., International Covenant on Civil and Political Rights, art. 2, ¶ 2, Dec. 16, 1966, 999 U.N.T.S. 171 [*hereinafter* ICCPR].

<sup>2</sup> ICCPR, art. 2, ¶ 3(b).

<sup>3</sup> Vienna Convention on the Law of Treaties, art. 26, 23 May 1969, 1155 U.N.T.S. 331 [*hereinafter* VCLT].

complies with them.”<sup>4</sup> Further, Article 21 of the Constitution states that the government of Belarus “guarantees the rights and freedoms of the citizens of Belarus, enshrined in the Constitution, laws *and stipulated by the international obligations of the state.*”<sup>5</sup> As set forth above, these “universally recognized principles of international law” and “international obligations” include the obligation to guarantee for its citizens the rights and freedoms enumerated in the ICCPR. The Belarus Constitution also directly guarantees its citizens many of the same rights enumerated in the ICCPR, including freedom of expression<sup>6</sup> and freedom of association.<sup>7</sup>

In sum, Belarus guaranteed these rights and freedoms in its international treaties and confirmed them in the Constitution. As set forth further below, the charges against the Defendants in this case constitute an impermissible interference with the rights and freedoms that Belarus is obligated to protect under the ICCPR. The prosecution also violates rights enshrined in the Declaration on Human Rights Defenders — a key UN framework document that, while not legally binding, was adopted by the UN General Assembly by consensus. This Court should remedy these violations by acquitting the Defendants and releasing them from custody.

## ARGUMENT

### **I. The Prosecution of the Defendants Constitutes an Unjustified Interference with, and Restriction of, the Exercise of Their Expressive Rights Protected by International Law.**

The prosecution of the Defendants in this case constitutes an interference with, and restriction of, the exercise of their expressive rights under the ICCPR and Declaration on Human Rights Defenders. Because there is no legitimate justification for this interference, it constitutes a violation of international law.

#### **A. The Government’s Prosecution of the Defendants Restricts and Chills the Exercise of Their Expressive Rights under the ICCPR and Declaration on Human Rights Defenders.**

Belarus’ prosecution of the Defendants restricts the exercise of the right to freedom of expression (Article 19), the right of peaceful assembly (Article 21), and the right to freedom of association with others (Article 22)<sup>8</sup> under the ICCPR and chills the broader exercise of these rights in Belarus, which are also incorporated in, and reinforced by, provisions in the Belarusian Constitution.

#### **1. The Prosecution of the Defendants Interferes with Freedom of Expression.**

Article 19 of the ICCPR guarantees both that “[e]veryone shall have the right to hold opinions without interference” and the right to express those opinions.<sup>9</sup> Arrest, detention, and trial of an individual merely

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<sup>4</sup> Constitution of the Republic of Belarus, art. 8 (emphasis added).

<sup>5</sup> *Id.*, art. 21 (emphasis added).

<sup>6</sup> *Id.*, art. 33.

<sup>7</sup> *Id.*, art. 36.

<sup>8</sup> The Declaration on Human Rights Defenders further refines and expands on the rights of association enshrined under the ICCPR, expressly recognizing the right, both individually and in association with others, “to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means.” *See* Declaration on Human Rights Defenders, arts. 12, 13, A/RES/53/144, *adopted by the UN General Assembly* 9 December 1998.

<sup>9</sup> ICCPR, art. 19, ¶¶ 1, 2. Similarly, Article 33 of the Belarussian Constitution guarantees this freedom of expression as well. Constitution of the Republic of Belarus, art. 33 (“Everyone is guaranteed freedom of opinion, belief and their free expression.”).

because of the opinions they hold is an interference with this right that cannot be justified and is therefore always a violation of Article 19.<sup>10</sup> The HRC<sup>11</sup> has made clear that “citizens must be allowed to inform themselves about alternatives to the political system/parties in power, and that they may criticize or openly and publicly evaluate their [g]overnments without fear of interference or punishment[.]”<sup>12</sup>

Based on the case materials, the charges against the Defendants appear to have been brought for the purpose of preventing them from expressing their views regarding democracy and respect for human rights in violation of Article 19’s guarantee of freedom of expression. The Defendants are prominent human right activists who have, through their individual work and affiliation with other activists, expressed their political opinions and opposition to the current government. As explained further below, while the charges are not expressly based on these opinions, the apparent intention of the prosecution is to silence the Defendants through penal confinement. This effort to punish the Defendants for holding certain political opinions violates Article 19.

## **2. The Prosecution of the Defendants Restricts the Freedom of Peaceful Assembly.**

Article 21 of the ICCPR protects “[t]he right of peaceful assembly” by prohibiting restrictions on the exercise of this right “other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order[.]”<sup>13</sup> Peaceful assembly is the “non-violent gathering by persons for specific purposes” including expressive political purposes.<sup>14</sup>

The prosecution seeks to penalize protected activities undertaken by the Defendants in relation to peaceful political protests and “may create a chilling effect on the enjoyment of the right to freedom of assembly”<sup>15</sup> in violation of Article 21’s right to peaceful assembly. The Defendants are charged with financing protests and smuggling money into Belarus. The government alleges that the Defendants used foreign funds to finance unlawful protest activities. These charges relate, in part, to activities during the peaceful protests in Belarus against alleged electoral fraud in the 2020 Presidential election when the Defendants documented and reported on alleged human rights violations by the Belarusian government and the government’s

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<sup>10</sup> See *General Comment No. 34 Freedoms of Opinion and Expression*, U.N. Doc. CCPR/C/GC/34 (HRC July 29, 2011) ¶ 9.

<sup>11</sup> Belarus has denounced the First Optional Protocol, which permitted the HRC to hear complaints from individuals who allege that their rights under the ICCPR have been violated. While this denunciation means that individual complaints can no longer be brought against Belarus, the HRC’s interpretations of the ICCPR provisions in cases against other State Parties are still useful for this Court to better understand the obligations set forth in the ICCPR, to which Belarus is still a signatory.

<sup>12</sup> *Aduayom et al. v. Togo*, Comm. Nos. 422/1990, 423/1990 and 424/1990, U.N. Doc. CCPR/C/51/D/422/1990, 423/1990 and 424/1990 (HRC 1996) ¶ 7.4.

<sup>13</sup> ICCPR, art. 21. Similarly, Article 36 of the Belarussian Constitution guarantees this freedom of peaceful assembly as well. Constitution of the Republic of Belarus, art. 36 (“Everyone has the right to freedom of association. Citizens for the implementation and satisfaction of political, social, economic, cultural and other interests have the right to create political parties and other public associations [and] participate in their activities.”).

<sup>14</sup> See *General Comment No. 37 (2020) on the Right of Peaceful Assembly (article 21)*, U.N. Doc. CCPR/C/GC/37 (Sept. 17, 2020) ¶ 4.

<sup>15</sup> See *Concluding Observations on the 3rd Periodic Report of the Republic of Moldova*, UN Human Rights Committee, U.N. Doc. CCPR/C/MDA/CO/3 (Nov. 18, 2016) ¶ 33.

response to these protests. The government also alleges that the Defendants helped pay the legal fees of individuals detained during the peaceful protests.<sup>16</sup>

The Defendants' peaceful activities in support of these peaceful protests are protected by the ICCPR given that the "role of [ ] human rights defenders . . . and others involved in monitoring or reporting on assemblies is of particular importance for the full enjoyment of the right of peaceful assembly."<sup>17</sup> The HRC has concluded that such persons may not be prohibited from or suffer reprisal for engaging in monitoring or reporting activity even if an assembly is declared unlawful.<sup>18</sup> Similarly, the alleged conduct of financing legal fees of peaceful protesters detained by the government is protected by Article 21 as the ICCPR's protections extend to activities associated with peaceful assemblies and that are integral to the meaningful exercise of Article 21 rights.<sup>19</sup> Further, the Declaration on Human Rights Defenders states that human rights defenders have the right "[t]o solicit, receive and utilize resources for the purpose of protecting human rights (including the receipt of funds from abroad.)"<sup>20</sup> The broader impact of levying charges against the Defendants for engaging in such protected activity may be to discourage other Belarusian citizens from engaging in similar protected activity, thereby also likely chilling the exercise of this critical right in the country. Accordingly, the prosecution of the Defendants constitutes an unlawful interference with the freedom of assembly by penalizing, and therefore chilling, the exercise of that right guaranteed by the ICCPR.

### 3. The Prosecution of the Defendants Restricts the Freedom of Association.

Further, the prosecution of the Defendants restricts their freedom of association. Article 22 of the ICCPR stipulates that "[e]veryone shall have the right to freedom of association with others" and that "[n]o restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order[.]"<sup>21</sup> Article 22's protections extend to the activities of an association in addition to the formation of the association itself.<sup>22</sup> Protected activities include fundraising activities and other actions related to the use and solicitation of an association's financial resources for human rights activity.<sup>23</sup> The Declaration on Human Rights Defenders affirms both the right to associate with others against violations of human rights<sup>24</sup>

<sup>16</sup> *Belarus Opens Trial of Nobel Peace Prize Laureate Bialinski*, AP NEWS (Jan. 5, 2023), <https://apnews.com/article/protests-and-demonstrations-belarus-alexander-lukashenko-government-055039bfb3570b83ddce05a80b202413>.

<sup>17</sup> *See General Comment No. 37*, ¶ 30.

<sup>18</sup> *See id.*

<sup>19</sup> *See id.* ¶ 33 ("Article 21 and its related rights do not only protect participants while and where an assembly is ongoing. Associated activities conducted by an individual or by a group, outside the immediate context of the gathering but which are integral to making the exercise meaningful, are also covered. The obligations of States parties thus extend to actions such as participants' or organizers' mobilization of resources; planning; dissemination of information about an upcoming event; preparation for and travelling to the event; communication between participants leading up to and during the assembly; broadcasting of or from the assembly; and leaving the assembly afterwards.").

<sup>20</sup> *Declaration on Human Rights Defenders, Special Rapporteur on Human Rights Defenders*, U.N., <https://www.ohchr.org/en/special-procedures/sr-human-rights-defenders/declaration-human-rights-defenders>. As stated above, while this document is not legally binding, it is based on international principles enshrined in other legally binding instruments and was adopted by consensus by the United Nations General Assembly. *Id.*

<sup>21</sup> ICCPR, art. 22, ¶¶ 1, 2.

<sup>22</sup> *See Kungurov v. Uzbekistan*, Comm. No. 1478/2006, U.N. Doc. CCPR/C/102/D/1478/2006 (HRC 2011) ¶ 8.2.

<sup>23</sup> *See Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association*, Maina Kiai, UN Human Rights Council, U.N. Doc. A/HRC/23/39 (Apr. 24, 2013) ¶ 16.

<sup>24</sup> *Declaration on Human Rights Defenders*, art. 12, U.N. Doc. A/RES/53/144, *adopted by the UN General Assembly* Dec. 9, 1998.

and to “solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms[.]”<sup>25</sup> Thus, a government’s reason for restricting the activities of an association and its funding must also be compatible with Article 22(2).<sup>26</sup>

The prosecution of the Defendants violates Article 22 to the extent it rests on the inability to register the group known as “Viasna” as a human rights organization in Belarus and on the organization’s fundraising efforts. The HRC previously concluded that Belarus violated Article 22 by failing to permit the registration of Viasna, obstructing attempts to register the organization, and then by prosecuting Mr. Bialiatski for tax violations related to his use of funds on behalf of Viasna.<sup>27</sup> Belarus was a signatory to the First Optional Protocol when the HRC reached this decision regarding Viasna’s registration, meaning that under Article 26 of the VCLT Belarus was obligated to comply with the decision in good faith.<sup>28</sup> Pursuant to Article 70, paragraph 1(b) of the VCLT, this obligation remains in effect today despite Belarus’ recent denunciation of the Optional Protocol.<sup>29</sup>

The charges against the Defendants also interfere with the freedom of association because they impinge on the ability to receive and use resources in pursuit of their activism in defending human rights. The Government’s case references the impermissible foreign sourcing of the alleged funding used by the organization and the use of such funds to pay legal fees for protestors. However, international law protects the right to solicit funding, including from outside Belarus, and the use of that funding to support peaceful activities that advance an association’s human rights work.<sup>30</sup> Paying legal fees for peaceful protestors who themselves suffered deprivations of their civil and political rights is a protected exercise of the freedom of association. As discussed further below, regardless whether the financial laws the Defendants are charged with violating comply with Belarus’ treaty obligations, they are being applied in an illegitimate manner in this case to the extent that they criminalize conduct – solicitation and use of foreign financing for human rights activity – protected by Article 22 of the ICCPR.<sup>31</sup>

### **B. The Interference and Restriction of Defendants’ Protected Rights is Not Justified by a Specific Threat and is therefore in violation of the ICCPR.**

The charges against the Defendants, which restrict these protected rights are likely neither necessary nor proportionate to the extent the Government may argue their conduct is permitted by the ICCPR. Articles 19, 21, and 22 list situations where legal restrictions may be imposed on the rights that the articles protect. This includes permitting restrictions when necessary to protect national security and public order. Such

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<sup>25</sup> *Id.* art. 13.

<sup>26</sup> See Paul M. Taylor, *A COMMENTARY ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: THE UN HUMAN RIGHTS COMMITTEE'S MONITORING OF ICCPR RIGHTS 623* (Cambridge University Press 2020) (ebook).

<sup>27</sup> See *Natalya Pinchuk v. Belarus*, Comm. No. 2165/2012, U.N. Doc. CCPR/C/112/D/2165/2012 (HRC 2014) ¶¶ 8.5–8.6.

<sup>28</sup> See VCLT, art. 26; see also *General Comment No. 33*, 25 June 2009, CCPR/C/GC/33 [15] (citing VCLT, art. 26).

<sup>29</sup> VCLT, art. 70, ¶ 1(b) (“[T]he termination of a treaty under its provisions . . . does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.”).

<sup>30</sup> See Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai, Human Rights Council, U.N. Doc. A/HRC/23/39 (Apr. 24, 2013) ¶ 16; *Declaration on Human Rights Defenders*, *supra* note 20.

<sup>31</sup> See Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, ¶¶ 15–20.

restrictions, however, are subjected to a strict test and must be prescribed by law, be required for a legitimate and permissible purpose, and be proportionate to accomplishing that purpose.<sup>32</sup>

As stated above, the HRC previously concluded that Belarus' refusal to register Viasna was not justified under Article 22(2) – the Article's limiting provision – and therefore found that Belarus violated the ICCPR by refusing to register the organization.<sup>33</sup> To the extent that the charges in this case also rely in part on the unregistered status of Viasna, they likewise fail to be necessary and proportionate restrictions on the freedom of association.

More generally and as noted above, the charges in this case would, in effect, prohibit the exercise of the protected ICCPR rights themselves. The charges against the Defendants relate to their human rights work, seeking to penalize them for engaging in and supporting internationally protected expressive conduct, in addition to seeming to penalize the defendants for their individual opinions. As the HRC concluded, “when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself.”<sup>34</sup> The charges in this case appear to do just that, penalizing and, more broadly, chilling the exercise of ICCPR rights.

The prosecution is also unlikely necessary under the ICCPR's standards. A restriction is necessary if it is required to “avert a real and not only hypothetical danger” to national security or public safety and that less intrusive means would be insufficient to achieve the goal.<sup>35</sup> Given the largely peaceful nature of the protests that the charges appear to be based on, it is unlikely that the prosecution is necessary under the ICCPR to protect public safety or national security from any specific threat. It is also unlikely that the charges could be justified as mere legal financial restrictions as applied in this case. The Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association has previously noted that efforts to justify restrictions on foreign funding to human rights groups on national security grounds is “spurious and distorted, [and] also in contradiction with international human rights law.”<sup>36</sup> The Special Rapporteur also emphasized that financial controls intended to promote transparency and accountability must be “fair, objective and non-discriminatory, and not be used as a pretext to silence critics.”<sup>37</sup>

As discussed above, the prosecution of the Defendants appears intended to silence prominent critics of the ruling government. Additionally, the prosecution does not appear proportionate to such transparency and accountability goals, assuming they are legitimate. Detaining and prosecuting the Defendants with the threat of lengthy prison sentences is unlikely proportionate to any alleged – and potentially vague – threat from the actions of the Defendants and Viasna. Thus, any effort by the Belarusian Government to justify the restriction on the ICCPR rights presented by this prosecution is unlikely to succeed under international law.

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<sup>32</sup> See *Pinchuk v. Belarus*, CCPR/C/112/D/2165/2012 ¶ 8.4; *General Comment No. 34* ¶¶ 21–36; *General Comment No. 37* ¶¶ 36–69.

<sup>33</sup> See *Pinchuk v. Belarus*, CCPR/C/112/D/2165/2012 ¶ 8.5.

<sup>34</sup> *General Comment 34* ¶ 21.

<sup>35</sup> See Paul M. Taylor, *A COMMENTARY ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: THE UN HUMAN RIGHTS COMMITTEE'S MONITORING OF ICCPR RIGHTS 623* (Cambridge University Press 2020) (ebook).

<sup>36</sup> Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai, Human Rights Council, U.N. Doc. A/HRC/23/39 (Apr. 24, 2013) ¶ 30.

<sup>37</sup> *Id.* ¶¶ 35–38.

## II. The Detention of the Defendants is “Arbitrary” Within the Meaning of the ICCPR, and Thus, Unlawful.

Similarly, State Parties must have a valid reason to deprive the liberty of its citizens and cannot arbitrarily arrest and detain citizens for exercising rights protected by state or international laws. In this case, the government of Belarus arrested Mr. Stefanovic, Mr. Bialiatki, and Mr. Labkovic based on their human rights activities and political activity, which constitutes unlawful and arbitrary arrest and detention.<sup>38</sup>

Article 9 of the ICCPR provides that “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”<sup>39</sup> An arrest or detention is arbitrary if it “lacks any legal basis” and/or constitutes “punishment for the legitimate exercise of the rights guaranteed by the [ICCPR].”<sup>40</sup> Even if the arrest or detention is authorized by a state’s domestic law, it may nevertheless be arbitrary since “[t]he notion of ‘arbitrariness’ is not to be equated with ‘against the law,’ but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.”<sup>41</sup>

In fact, the HRC has already expressed its opinion that a detention like those at issue in this case is “arbitrary” under Article 9. In *General Comment No. 35*, the HRC stated, “arrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the [ICCPR] is arbitrary, including freedom of opinion and expression (art. 19), freedom of assembly (art. 21), [and] freedom of association (art. 22).”<sup>42</sup>

The HRC has consistently applied this principle in finding arrest and detention to be arbitrary where it is used against citizens expressing political opinions or other convictions protected by the ICCPR. Instances of arbitrary detention include states arresting and detaining individuals for their political opinion (protected by ICCPR Article 19)<sup>43</sup> and peaceful assembly and association (protected by ICCPR Articles 21 and 22).<sup>44</sup>

<sup>38</sup> As explained above, one of the Defendants, Mr. Salauyou, has fled Belarus and is not in custody. He is being tried *in absentia*.

<sup>39</sup> ICCPR art. 9, ¶ 1.

<sup>40</sup> *General Comment No. 35*, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014) ¶¶ 11, 17.

<sup>41</sup> *Id.* ¶ 12; see also *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2365/2014*, U.N. Doc. CCPR/C/132/D/2365/2014, (HRC Jan. 14, 2022), <https://ccprcentre.org/files/decisions/G2200550.pdf> (last visited Feb. 8, 2023).

<sup>42</sup> *General Comment No. 35*, ¶ 17.

<sup>43</sup> See, e.g., *Marques de Morais v. Angola*, Comm. No. 1128/2002, U.N. Doc. CCPR/C/83/D/1128/2002 (HRC 2005) ¶¶ 2.1, 2.3-2.4, 2.6, 6.1, 6.8 (concluding that a journalist’s arrest and detention were, at least in part, of a punitive character and thus arbitrary where that journalist was arrested, detained, and charged with defamation and slander after they had written several articles critical of the Angolan President); *Zelayo Blanco v. Nicaragua*, Comm. No. 328/1988, U.N. Doc. CCPR/C/51/D/328/1988 (HRC 1994) ¶ 10.3 (finding that a citizen’s arrest and detention based on his political opinions contrary to those of the Sandinista Government violated Article 9(1)).

<sup>44</sup> See, e.g., *Zhagiparov v. Kazakhstan*, Comm. No. 2441/2014, U.N. Doc. CCPR/C/124/D/2441/2014 (HRC 2018) ¶ 13.6 (finding that a journalist was arbitrarily detained in violation of Article 9(1) when they were penalized for covering an unsanctioned public gathering critical of the Government); *Bakur v. Belarus*, Comm. No. 1902/2009, U.N. Doc. CCPR/C/114/D/1902/2009 (HRC 2015) ¶¶ 2.2, 7.2 (finding that a citizen’s arrest and detention were arbitrary where they participated in a public meeting of a political party).



Similarly, the U.N. Working Group on Arbitrary Detention, which is entrusted with the task of investigating all cases involving arbitrary deprivation of liberty,<sup>45</sup> defines five categories that constitute arbitrary deprivation of liberty. Relevant to this case, the U.N. Working Group on Arbitrary Detention provides that deprivation of liberty is arbitrary in the following cases:

- “When the deprivation of liberty results from the exercise of the rights [ ] guaranteed. . . , insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights”<sup>46</sup>;
- “When the deprivation of liberty constitutes a violation of international law for reasons of . . . political or other opinion . . . and which is aimed at or may result in ignoring the equality of human rights.”<sup>47</sup>

Here, the underlying motive behind the arrest and detention of Mr. Stefanovic, Mr. Bialiatski, and Mr. Labkovich is no different: it serves to punish the legitimate exercise of their rights protected by the ICCPR, including freedom of opinion and expression, freedom of assembly, and freedom of association. As detailed above, the current charges against the Defendants appear to be intended to suppress the exercise of the freedoms of expression, peaceful assembly, and association.

The HRC has also interpreted the prohibition against arbitrary detention to mean that detention must be both reasonable and necessary. In *Alphen v. Netherlands*, the HRC explained that this means that custody on criminal charges must be reasonable and necessary “in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.”<sup>48</sup> Similarly, in *A v. Australia*, the HRC noted that detention should not continue beyond a certain period if the state can no longer adequately justify its need.<sup>49</sup>

In the present case, Belarus has provided no evidence that Mr. Stefanovic, Mr. Bialiatski, and Mr. Labkovich posed any risk of flight, interference with evidence, or criminal conduct pending trial, or that a milder measure of restraint was not possible. Accordingly, the arrest and detention of Mr. Stefanovic, Mr. Bialiatski, and Mr. Labkovich is “arbitrary” under Article 9 of the ICCPR.

### III. The Pre-Trial Detention of the Defendants Violates the ICCPR

The pre-trial detention of the Defendants also violates Article 9 of the ICCPR because the determination of whether a defendant is detained pre-trial must be made by a judge as opposed to a prosecutor. In this case, the Prosecutor General authorized the pre-trial detention of Mr. Stefanovic, Mr. Bialiatski, and Mr. Labkovich pursuant to Article 126.4 of the Criminal Procedure Code of Belarus. This law itself, as well as its application in this case, both violate Article 9, paragraph 3 of the ICCPR, which stipulates that “[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release

<sup>45</sup> See *Question of Arbitrary Detention.*, U.N. Doc. E/CN.4/RES/1998/41 (U.N. Comm’n on Hum. Rts. Apr. 17, 1998).

<sup>46</sup> *Report of the 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*, U.N. Doc. A/HRC/30/37 (HRC July 6, 2015) ¶ 10(b).

<sup>47</sup> *Id.* ¶ 10(e).

<sup>48</sup> *van Alphen v. the Netherlands*, Comm. No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (HRC 1990) ¶ 5.8.

<sup>49</sup> *A. v. Australia*, Comm. No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (HRC 1997) ¶ 9.4.

may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.”<sup>50</sup>

The HRC has already found that this law authorizing a Belorussian prosecutor to make the pre-trial detention determination violates Article 9. The HRC has also stated in other similar cases that prosecutors should not be authorized by law to exercise judicial power, because they likely do not have the institutional objectivity and impartiality necessary to be considered an “officer authorized by law to exercise judicial power” within the meaning of Article 9.<sup>51</sup> Moreover, the U.N. Working Group on Arbitrary Detention has also found that a public prosecutor cannot be considered a judicial authority for the purposes of Article 9.<sup>52</sup>

Here, the Defendants were detained for an initial period of 72 hours shortly after their apartments were searched on July 14, 2021. The General Prosecutor’s Office has since routinely extended the Defendants’ pre-trial detention pursuant to its authority under Article 126.4 of the Criminal Procedure Code of Belarus. Further, the court hearings regarding the appeals to the extension of the Defendants’ pre-trial detention were held in closed-door sessions. There is no way, therefore, to determine the necessity, reasonableness and proportionality of these custodial measures, nor the institutional objectivity and impartiality of the decision makers. Thus, the Defendants’ pre-trial detention violates Articles 9 of the ICCPR.

### CONCLUSION

The criminal prosecution of Ales Bialiatski, Valiantsin Stefanovic, Uladzimir Labkovich and Dzmitry Salauyou is emblematic of Belarus’ persistent failure to abide by its international obligations in the field of human rights and seeks to silence dissent and penalize the Defendants for their work to protect fundamental rights of citizens. The charges against them have no legitimate basis and constitute impermissible restrictions on the freedoms of expression, assembly, and association guaranteed by Article 19, Article 21, and Article 22 of the ICCPR. The government has failed to demonstrate that these restrictions are necessary or proportionate. In addition, the pre-trial detention of Mr. Bialiatski, Mr. Stefanovic and Mr. Labkovich violated the ICCPR because it was arbitrary. As a State Party to the ICCPR, Belarus is obligated to comply with the provisions of the Convention and ensure that the rights recognized in the ICCPR are given full effect. Accordingly, consistent with Belarus’ obligations under international law, the Court should acquit the Defendants and order them to be released from custody.

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<sup>50</sup> ICCPR, art. 9, ¶ 3. To the extent that the Criminal Procedure Code conflicts with international law, it must be amended. Article 27 of the VCLT, provides that a State Party “may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” Therefore, where there are inconsistencies between domestic law and the ICCPR, Article 2 of the latter requires that the domestic law or practice be changed to meet the standards imposed by the ICCPR’s substantive guarantees.

<sup>51</sup> See *Pinchuk v. Belarus*, CCPR/C/112/D/2165/2012, ¶¶ 3.10, 8.2.

<sup>52</sup> Opinions Adopted by the Working Group on Arbitrary Detention at its Ninety-First Session, U.N. Doc. A/HRC/WGAD/2021/23 (HRC 2021) ¶ 73.

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