



# **Trials in absentia in Belarus**

# **Analysis of the legislation and the practice of special proceedings in criminal cases in the Republic of Belarus**

Belarusian Association of Journalists, 2024

# Contents

Introduction .....	1
What do "special proceedings" entail? .....	3
Who can become a defendant in special proceedings? .....	3
When may special proceedings be initiated? .....	5
The special proceedings procedure .....	6
Defense in special proceedings .....	7
Ways to exercise defendants' rights in special proceedings .....	9
Consequences of the verdict .....	11
Property issues arising from the verdict .....	12
Special proceedings' compatibility with fair trial standards .....	15
<b>Recommendations</b> .....	<b>20</b>

## Introduction

In 2022, amidst the ongoing political repression in Belarus, the country introduced the institution of **"special proceedings"**, which permits the authorities to prosecute individuals outside the country. In other words, the state has authorized the possibility of conducting trials in absentia (in the defendant's absence).

It is important to note that trials in absentia are not a novel concept in international practice and there is no presumption of their illegality. Nevertheless, even at the stage of adoption of the new institution, the statements of the authorities made it clear that it was expected to be used in a repressive manner. In particular, the chairman of the Investigative Committee, Dzmitry Hora, who proclaimed himself the mastermind behind the special proceedings, [stated](#) that one of the purposes of its introduction was to partially offset the "damage" caused to the country by "calls for sanctions, disruption of sporting events, isolation of ... the country."

These concerns were subsequently validated in practice. In September 2022, the Investigative Committee tested the new tool in the "Belarus' Black Book case." As a result, the defendants were sentenced in absentia to 12 years in prison. Subsequently, the procedure above was employed in the cases against the heads of the Belarusian Sports Solidarity Foundation, Aliaksandra Herasimenia and Aliaksandr Apeikin, human rights activist Dzmitry Salaiou, as well as politicians Sviatlana Tsikhanouskaya, Pavel Latushka, Volha Kavalkova and others.

Since the beginning of 2024, this instrument of political persecution has also affected journalists. Pavel Marynich, the head of Malanka Media, [was sentenced](#) in absentia to four years' imprisonment. Proceedings [were initiated](#) against the RFL/RL Belarus columnist Yury Drakakhrust and journalist Hanna Liubakova (defendants in the "Sviatlana Tsikhanouskaya's Analysts case"), as well as [freelance journalists](#) Iryna Charniauka and Aliaksandr Kirkevich (under Article 361-4 of the Criminal Code "Promoting extremist activities").

It is crucial to acknowledge that the politically motivated nature of the trials in absentia persists to this day. Nevertheless, there is a discernible inclination

to broaden the scope of those subjected to prosecution, which now encompasses individuals beyond the ranks of prominent opposition figures<sup>1</sup>.

In light of the increasing number of cases initiated within special proceedings, this report seeks to address key questions about this procedure, analyze it through the lens of fair trial standards, and provide practical guidance to those concerned.

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<sup>1</sup> Belarusian Helsinki Committee, «Human Rights in Belarus: Key Trends in Public Policy (January–April '24) <https://trends.belhelcom.org/storage/reviews/May2024/Ln6pcg0TcStHLNDeUimT.pdf>

## What do “special proceedings” entail?

The Criminal Procedure Code defines special proceedings as “proceedings in a criminal case against a defendant who stays outside the Republic of Belarus and avoids appearing before the body conducting criminal proceedings”<sup>2</sup>.

This procedure allows for a trial to be held and a verdict to be rendered in the absence of the defendant, whereas the general procedure does not allow this. This is the primary distinguishing feature of special proceedings; otherwise, they are conducted in the same manner as general proceedings<sup>3</sup>.

On July 20, 2022, the special proceedings regulations<sup>4</sup> were introduced into the Criminal Procedure Code, and the amendments entered into force on July 27, 2022. As of June 1, 2024, special proceedings have been initiated against 105 individuals. Many of them have already received their sentences (all of them have been convicted). The majority of those prosecuted are opposition politicians, civic activists, or individuals who participated in the protest movement that began in Belarus in 2020.

## Who can become a defendant in special proceedings?

The Criminal Procedure Code outlines several conditions for initiating special proceedings<sup>5</sup>. These include:

1. Special proceedings may only be conducted against individuals charged with one of the crimes listed in Part 2 of Article 468–25 of the Criminal Procedure Code<sup>6</sup>. These include crimes against the peace and

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<sup>2</sup> Article 6 of the Criminal Procedure Code.

<sup>3</sup> This is exemplified by the case of the Viasna Human Rights Center. Ales Bialiatski, Valiantsin Stefanovic, and Uladzimir Labkovich were in custody during the trial and the case against them was considered by the court in the usual procedure. In the same case, the court considered the charges against Dzmitry Salaiou, who was outside Belarus, and conducted special proceedings against him. This demonstrates that the procedure for considering the case in special proceedings is not distinct from the general procedure, which allows for the combination of both in a single proceeding.

<sup>4</sup> Chapter 49-3 (Articles 468-25–468-28) and the corresponding amendments to certain other Articles.

<sup>5</sup> Part 2 of Article 468-25 of the Criminal Procedure Code.

<sup>6</sup> Articles 122-137, 289, Part 2 of Article 290, Articles 290-1-293, Part 4 of Article 294, Part 4 of Article 295, Part 4 of Article 309, Part 3 of Article 311, Part 3 of Article 322, Part 3 of Article 323, Part 3 of Article 324, Part 2 of Article 333, Articles 356-361 of the Criminal Code of the Republic of Belarus.

security of mankind (war propaganda, genocide, etc.)<sup>7</sup>, war crimes, terrorism, mass riots, and some crimes against the state (high treason, conspiracy to seize state power, calls for sanctions, etc.), and some other crimes. In the event that the defendant is charged with any additional offenses beyond those enumerated, special proceedings may still be initiated on the basis of such an accusation<sup>8</sup>.

2. In order to be eligible for consideration, the defendant must be a citizen of Belarus and must have reached the age of majority.

3. The defendant is currently outside the jurisdiction of Belarus, evading the authority of the relevant law enforcement body. The foreign state where they are located has either refused to extradite them to Belarus for criminal prosecution or has failed to respond to the extradition request filed by Belarus for a period of six months.

In general, special proceedings are only possible if all of the specified conditions are met simultaneously. The existence of these conditions must be established by the prosecuting authority.

Nevertheless, Article 468–25 of the Criminal Code stipulates that in instances not encompassed by Article 468–25, Part 2 of the Criminal Procedure Code, special proceedings may be initiated by order of the Prosecutor General or by order of the Chairman of the Investigative Committee or the Chairman of the State Security Committee, with the consent of the Prosecutor General.

It follows that any individual may potentially become a defendant in special proceedings, not only an adult citizen of Belarus, and not only under the specified articles of the Criminal Procedure Code. In fact, they may even be prosecuted without an extradition request. In practice, cases on charges not included in the list of Part 2 of Article 468–25 of the Criminal

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<sup>7</sup> It should be noted that various ways of participation in «extremist activities» or «extremist formation» (Articles 361-1–361-5) are not included in this enumeration.

<sup>8</sup> Summary accusations are a common occurrence. In the first practical application of special proceedings, the Belarus' Black Book case,<sup>8</sup> the defendants were charged with two offenses: under Part 3 of Article 130 (listed) and Article 203-1 (not listed) (<https://court.gov.by/ru/93/informaciya/o/date/meste/vremeni/sudebnogo/razbirateljstva/vizove/obvinyaemogo/v/sud/3e0218e8c9be4c40.html>). In many instances, the number of non-listed offenses is often greater than the number of listed offenses. For instance, of the 12 offenses attributed to Valer Tsapkala, only three are included in the list (<https://court.gov.by/ru/103/informaciya/o/date/meste/vremeni/sudebnogo/razbirateljstva/vizove/obvinyaemogo/v/sud/f7076812e49b4c02.html>).

Procedure Code have been repeatedly considered in special proceedings<sup>9</sup>. This indicates that the number of individuals at risk of special proceedings is greater than initially apparent.

## When may special proceedings be initiated?

The commencement of special proceedings is distinct from the initiation of a criminal case. These are two separate procedural steps that cannot coincide in time.

A criminal case is initiated regardless of whether the individual is present in the country or not. The case is then subject to a mandatory preliminary investigation, which is also possible without the physical presence of the suspect/defendant.

In contrast to general proceedings, special proceedings permit the case to be tried in the absence of the defendant. Consequently, the necessity for initiating special proceedings arises exclusively at the conclusion of the investigation. Moreover, the commencement of special proceedings is preceded by the filing of an indictment (in absentia), the identification of the country where the defendant is located, and the sending of an extradition request to that country. The waiting period for a response to such a request is six months.

Therefore, a long period may elapse between the initiation of the case and the commencement of the special proceedings<sup>10</sup>. During this entire period, individuals may be unaware that they are being investigated.

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<sup>9</sup> Dzmitry Salaiou was charged with two articles - Part 4 of Article 228 and Part 2 of Article 342 of the Criminal Code. Neither of these articles is listed in Part 2 of Article 468-25 of the Criminal Procedure Code (<https://www.court.gov.by/ru/93/informaciya/o/date/meste/vremeni/sudebnogo/razbirateljstva/vizove/obvinyaemogo/v/sud/6e1e01b422bf46fa.html>). Uladzimir Astapenka was indicted on a single charge: attempted embezzlement by official misconduct (Part 1 of Article 14, Part 3 of Article 210 of the Criminal Code). This charge is not included in the list (<https://court.gov.by/ru/93/informaciya/o/date/meste/vremeni/sudebnogo/razbirateljstva/vizove/obvinyaemogo/v/sud/5b3cc0331b884c5f.html>). Concurrently, two of the three aforementioned articles of the Criminal Code are not classified as «extremist» and pertain to offenses against property and procedure for business activity.

It should be noted that both Dzmitry Salaiou and Uladzimir Astapenka are representatives of civil society, i.e. the intended targets of the special criminal proceedings. Nevertheless, the list of individuals subject to special proceedings, published by the Investigative Committee, includes citizens charged with «economic» offenses who are not publicly reported as being involved in the protest movement (<https://t.me/specprosk/40>). This indicates that special proceedings can be conducted even in cases that are not politically motivated.

<sup>10</sup> One example is the «Coordination Council case.» On August 19, 2020, Prosecutor General Aliaksandr Koniuk initiated a criminal case (<https://www.belta.by/society/view/konjuk-po-faktu-sozdanija-koordinatsionnogo-soveta-vozbuzhdeno-ugolovnoe-delo-403511-2020/>). The special proceedings against Sviatlana Tsikhanouskaya, Pavel Latushka, Volha Kavalkova, Siarhei Dyleuski and Maryia Maroz, who left the country commenced as late as on October 20, 2022 (<https://t.me/specprosk/17>). At the same time, Maryia Kalesnikava and Maksim Znak, who remained in the country and were arrested in September 2020, were sentenced in September 2021.



From a procedural standpoint, the initiation of special proceedings entails the issuance of a decision by the investigator<sup>11</sup> and its submission to the public prosecutor, who has 10 days to provide consent or refuse to conduct special proceedings. In the event of consent, the special case is considered to be opened and the relevant information [is published](#) on the official website of the Investigative Committee and additionally [shared](#) in a special Telegram channel within one business day.

## **The special proceedings procedure**

The defendant is informed of the initiation of the special proceedings through a notice issued by the Investigative Committee. The pre-trial investigation authority is not required to communicate with the defendant in any other manner. The defendant is assigned<sup>12</sup> a defense lawyer with whom the pre-trial investigation authority will conduct all further communications.

As previously stated, it is recommended that the prosecutor's office initiate special proceedings at the final stage of the investigation. A review of information from the [official website of the Investigative Committee](#) indicates that the average time between the commencement of the special proceedings and the conclusion of the preliminary investigation is one to two weeks or one to two months. This period is obviously devoid of significant investigative actions. It seems probable that at the stage of the investigation, the participation of the defense lawyer in the special proceedings is limited to familiarization with the materials of the criminal case.

Subsequently, the case is submitted to the prosecutor, who forwards it to the court. Upon receipt of the case, the court [is obliged to publish](#) on its official website information regarding the date, time, and location of the court hearing at which the case will be considered.

The trial itself follows the general procedure, with the exception that the defendant does not participate. The participation of the defense lawyer is mandatory.

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<sup>11</sup> In accordance with the Criminal Procedure Code, a decision may also be issued by the public prosecutor if the criminal case is examined by them.

<sup>12</sup> A contract defense lawyer may also be involved, as discussed below.

Once the verdict has been reached, the court issues a public announcement, which includes the results of the case, the sentence imposed, and any other relevant information. In practice, courts publish only the operative part of the verdict, without any additional details. The verdict is not sent to the defendant.

In the event that the sentence is appealed by the defendant or the defense lawyer or challenged by the prosecutor, the appeal is conducted in accordance with the general procedure. The results of the appeal are also published on the court's website. Similarly, the case may be considered in a cassation or supervisory review if an appeal or protest is filed.

Accordingly, throughout the special proceedings, the defendant is only informed of the commencement of the proceedings, the date of the trial, the verdict, and the appeal decision. Neither the prosecution nor the court provides the defendant with any additional information.

## **Defense in special proceedings**

### ● **Defending oneself in court**

Individuals subject to a special procedure have a constrained opportunity to present a defense in court. This is due to both the norms of the Criminal Procedure Code and the emerging practice of their application.

The Criminal Procedure Code does not contain explicit provisions that wholly negate any defendant's rights within special proceedings. For instance, Article 43 ("Rights and Duties of the Defendant") does not include any exceptions for this procedure. Consequently, the defendant is entitled to submit petitions, statements, testimonies, complaints, etc. to the investigation and court.

However, there is no effective means of exercising these rights. Article 468–26 of the Criminal Procedure Code states that the procedure for a special trial and all documents normally served on the defendant (including the indictment itself) shall be sent to the defense lawyer in a special trial. With regard to the case file, the Criminal Procedure Code expressly states

that in special proceedings it shall be made available for inspection by the defense lawyer, but not by the defendant<sup>13</sup>. It is clear that the defendant is unaware of the nature and content of the indictment and the case file. Consequently, the defendant is unable to present any arguments on the case.

Moreover, it is reasonable to posit that the prosecution and the court will decline to consider or ignore appeals from the defendant in special proceedings on the grounds that they are unable to identify the person who sent the appeals.

### ● **Defense by a lawyer**

The Criminal Procedure Code stipulates that a defense lawyer must be present throughout special proceedings from the moment they commence. In the event that the defendant does not retain legal counsel, a lawyer will be appointed by the territorial bar association in accordance with Article 46 of the Criminal Procedure Code. As previously stated, the defense lawyer is the recipient of all procedural documents in the case and is entitled to exercise all the rights granted to the defense lawyer by the Criminal Procedure Code in the General Rules.

In theory, the defendant may exercise their rights through such counsel. The defendant may request copies of the procedural documents from the defense lawyer and familiarize themselves with the case file, which does not fully ensure their rights, but allows them to present a justified position.

However, the examples currently available demonstrate that the defense lawyers appointed to participate in the case have chosen to refrain from contacting their clients. In some instances, they have even chosen to disengage from their clients and refrain from expressing any position on the case. Furthermore, contact between the defense lawyer and the client is often excluded due to the lack of clarity regarding which lawyer is involved in the case. This information is not publicly available.

The aforementioned conduct of lawyers can be attributed to a number of factors. While the Criminal Procedure Code does not explicitly prohibit

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<sup>13</sup> Part 1 of Article 257 of the Criminal Procedure Code.

communication between lawyers and defendants in special proceedings, a number of instances of arbitrary interpretation of the Criminal Code have led lawyers to express concerns that such communication (which involves the transfer of information about the case) may be considered as disclosure of information about the investigation or closed court sessions, and possibly as facilitation of extremist activities.

It is currently unclear whether there are any cases in which a lawyer provides legal representation on a contractual basis to a defendant. However, it seems reasonable to posit that the majority of lawyers would be unlikely to enter into such an arrangement, given the aforementioned considerations.

Thus, in the absence of a normative prohibition, but based on current practice, the defendant is unable to exercise their right to attorney.

## **Ways to exercise defendants' rights in special proceedings**

Individuals who are defendants in special proceedings cases lack information about the charges against them and the case file. Consequently, they are unable to enter into a contract with a lawyer of their choosing and have no contact with the appointed defense lawyer. Furthermore, the state authorities will ignore their appeals. As a result, any attempt by the defendant to influence the ongoing proceedings is unlikely to succeed.

However, the defendant may undertake a number of actions during the special proceedings in accordance with the criminal procedure. These actions are primarily designed to create additional arguments in favor of the illegality of the ongoing proceedings, rather than to directly influence the outcome of the proceedings themselves.

1. From the outset of the special proceedings, it is prudent to demand that the prosecution and subsequently the court furnish the indictment. Despite the stipulation in the Criminal Procedure Code that all procedural documents in special proceedings must be transmitted to the defense lawyer, this does not preclude the transmission of documents to

the defendant. Furthermore, it does not negate the individual's right to be apprised of the charges against them<sup>14</sup>.

2. It is recommended that an attempt be made to contact the counsel assigned to the special case. Ideally, such contact should involve full communication with a discussion of the materials and position on the case. However, given the risks to the defense lawyer, if they make contact, it is possible to limit it to communicating the position for presentation in court and obtaining written confirmation from them that the body conducting the criminal proceedings has prohibited the defense lawyer from releasing any case file to the defendant.

In the event that the name of the appointed defense lawyer is unknown, it may be necessary to contact the investigating authority, the court, and the local bar association to request this information.

3. In addition, the defendant may attempt to exercise other rights during the trial. For instance, the defendant may wish to present evidence or initiate their examination via videolink<sup>15</sup>. However, given the defendant's lack of information about the nature of the charges, it is challenging and potentially detrimental to present any evidence (including testimony).

The absence of responses to all the above appeals, as well as the refusal to consider or satisfy them, would permit the conclusion that the defendant was not adequately informed of the charges against them, was denied the opportunity to communicate with their legal counsel, and was deprived of the opportunity to present evidence in their defense. Collectively, these circumstances indicate a violation of the defendant's right to a fair trial.

4. It is a fundamental right of the defendant to appeal against procedural decisions taken against them. This includes, first and foremost, the order for special proceedings, which initiates the proceedings, as well as the verdict of the court (along with subsequent court decisions). An appeal against the special proceedings procedure is filed with the Prosecutor's Office, while an appeal against the verdict is filed with the Court of Appeal in the same manner as in the general proceedings (with the exception that the 10-day

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<sup>14</sup> Paragraph 1 of part 2 of Article 43 of the Criminal Procedure Code.

<sup>15</sup> The Criminal Procedure Code does not explicitly provide for the examination of the defendant via videolink. Furthermore, the procedure in which it must be conducted (i.e., the secretary of the court session must be in the room with the person being interrogated) renders such an examination impractical in special proceedings.

appeal period commences on the day the court publishes a notice on the results of the proceedings).

In such an appeal, it would be prudent to refrain from challenging the merits of the alleged charge or sentence. Instead, it would be more effective to argue that the special proceedings themselves violate the right to a defense and to a fair trial. While the defendants are unlikely to have any other arguments at the outset of the special trial, they will be able to raise specific violations of their rights on appeal if they have raised the aforementioned appeals during the trial.

## **Consequences of the verdict**

The sentence pronounced in the special proceedings and which has entered into force serves as the basis for the arrest of the convicted person and sending them to serve the sentence. Therefore, it is equivalent to a sentence handed down in the general procedure. The legislation does not provide for the possibility of reviewing the case with the participation of the convicted person at their request in the event of their appearance (detention)<sup>16</sup>.

Moreover, the sentence serves as the foundation for locating the convicted individual and submitting new extradition requests to foreign countries. It is of paramount importance for the convicted individual to be aware of this when visiting different foreign countries.

Additionally, the convicted person may be expatriated.

The legislation of the Republic of Belarus, as set forth in the Law on Citizenship, provides that the citizenship of the state, including that obtained at birth, may be revoked in instances where a final judgment is rendered confirming the individual's involvement in extremist activities or actions that have caused significant harm to the interests of the Republic of Belarus, provided that the individual in question is situated outside the borders of the Republic of Belarus<sup>17</sup>. In this case, the terms "extremist activities" and "causing significant harm" are defined in accordance with the

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<sup>16</sup> If the defendant appears, is arrested, or extradited prior to the court entering the deliberation room, the special proceedings are effectively terminated, the case is returned to the public prosecutor, and it is then considered by the court with the participation of the defendant (Part 2 of Article 468-28 of the Criminal Procedure Code).

<sup>17</sup> Part 3 of Article 19 of the Law on Citizenship of the Republic of Belarus.

list of crimes outlined in the explanatory note to Article 19 of the Law. This list encompasses all the acts enumerated in Article 468–25 of the Criminal Procedure Code, which are subject to special proceedings. Additionally, it includes a number of other acts, including all variants of “extremist activities” as defined in the Criminal Code (Articles 361–1–361–5).

Consequently, the overwhelming majority of individuals convicted in special proceeding cases fall into the category of those who may lose their citizenship in accordance with Part 3 of Article 19 of the Law on Citizenship of the Republic of Belarus. In light of the fact that this norm was introduced into the law on January 5, 2023, shortly after the introduction of special proceedings in the Criminal Procedure Code, it is possible to consider this norm as another form of repression against those convicted in special proceedings.

To date, within almost a year since the introduction of this norm<sup>18</sup>, there have been no known cases of its application. However, due to the fact that there is no normative obstacle for it now, its future application will depend entirely on the will of the current government and is likely to occur.

## **Property issues arising from the verdict**

In addition to the penalty imposed by the court in special proceedings, the sentence may include property penalties against the convicted person:

1. **Harm caused by the crime.** The presence of such harm is contingent upon the category of the imputed crime and the specific circumstances of the case. A significant number of articles within the Criminal Code are not directly related to the infliction of harm. It is important to note that among the articles that could potentially lead to special proceedings, there are those for which the courts have already established a precedent for recovering damages. In particular, this is Article 293 of the Criminal Code (mass riots). With regard to other articles of the Criminal Code, the possibility of recovering damages exists in cases where an affected person has filed a

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<sup>18</sup> The effective date of the provision is July 11, 2023



civil suit. This is the case, for example, in cases of insult or violence against an official, as well as economic crimes<sup>19</sup>.

2. **Fines.** Some articles of the Criminal Code provide for a fine as the primary or additional punishment. In such cases, the fine is added to other penalties imposed by the court. The fine for offenses subject to special proceedings under Article 468–25 (2) of the Criminal Procedure Code ranges from 500 to 50,000 base values.

3. **Court costs.** In certain cases, costs incurred during the investigation or trial (e.g., expert witness fees) may be recoverable. In addition, the defendant may be assessed a governmental charge for filing a civil action. These amounts are typically not significant compared to other types of forfeitures. However, they are grounds for initiating enforcement proceedings.

4. **Special confiscation.** As of July 19, 2019, confiscation as a form of punishment has been removed from the Criminal Code. It should be noted that special confiscation remains a viable option in criminal proceedings. This may include the confiscation of property and proceeds of crime, weapons or instruments of crime, and prohibited items. Special confiscation is also possible in cases involving “extremist” crimes. For example, a mobile phone used by the defendant to post messages on the Internet that the court considers to be incitement to hatred.

The presence of any of the penalties in the sentence is the basis for initiating enforcement proceedings<sup>20</sup>. Once the sentence has entered into force, the bailiff initiates enforcement proceedings. These proceedings allow the bailiff to seize bank accounts, movable and immovable property, shares in legal entities, conduct and inventory, and seize property at the place of residence of the convicted person, etc<sup>21</sup>.

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<sup>19</sup> In instances where the harm was imputed, the verdicts may not include a determination regarding the recovery of a monetary sum. In such cases, the verdict shall state that the civil plaintiff is recognized as having the right to compensation for harm. The recovery of specific amounts of damages shall be addressed in a separate trial within civil proceedings.

<sup>20</sup> It is standard practice for courts to refrain from reporting on the recovery of monetary amounts when publishing information on the outcome of a case. Consequently, it is often only possible to ascertain whether a recovery has been made under the judgment when enforcement proceedings are initiated.

<sup>21</sup> In the event of a special confiscation ordered by a court of law, specific items are subject to seizure, rather than their monetary equivalent (with rare exceptions). Consequently, the executor’s actions are focused on locating and seizing these items (which are often already seized and held with the criminal case). Bank accounts, cash, or other forms of property are not subject to seizure in this instance.



All property subject to registration (real estate, automobiles), as well as the property of spouses (acquired during marriage), and any property found at the place of residence (regardless of whether it is the place of registration or actual residence—that is, any dwelling where the executor believes the convicted person could live), are subject to the risk of arrest. It is not uncommon for executors to seize property that does not belong to the convicted person but to their relatives. It is important to note that these individuals will not be able to exclude this property from the inventory unless they file a lawsuit to release it from seizure.

Firstly, the execution of the sentence is carried out at the expense of the seized funds, and if these are insufficient, at the expense of selling the seized property at auction. As long as the debt remains outstanding, the property will remain under seizure and be offered for sale at auction.

Consequently, a sentence rendered in special proceedings may result in the convicted party experiencing significant losses of property, even if the property is not completely seized.

The Law on Seizure of Property, enacted on January 3, 2023, has prompted concerns regarding the compulsory seizure of property belonging to foreign states, "persons from foreign states," and "affiliated persons" for the commission of "unfriendly actions."

At this time, it is challenging to ascertain the potential scope of application of this law with certainty. The law does not define what constitutes "unfriendly acts." Furthermore, the definitions of "persons from foreign states" and "affiliated persons" do not provide a clear answer as to whether Belarusian citizens can be attributed to any of these categories. The content of the law indicates that it should be applied in response to the potential seizure of property belonging to the Republic of Belarus in foreign countries. It is possible that the Belarusian state authorities may in the future apply this law to citizens convicted in special proceedings (e.g., calls for sanctions, an offense that may be the subject of special proceedings, may be considered as "unfriendly acts").

## Special proceedings' compatibility with fair trial standards

As a state that has ratified the International Covenant on Civil and Political Rights, Belarus has undertaken to provide every person accused of a criminal offense with a number of minimum guarantees enshrined in Article 14 of the Covenant. These guarantees should be considered the starting point in answering the question of whether the "special proceedings" procedure complies with international human rights standards.

### ● The right to be tried in one's presence

The first guarantee that deserves attention is the defendant's right to be tried in their presence<sup>22</sup>. The existence of this guarantee is not unexpected; presence in the courtroom is a prerequisite for the exercise of several other rights regulated by Article 14. These include the right to defend themselves in person, the right to examine witnesses, the right to access documents and other evidence, and so forth. Nevertheless, the existence of this guarantee does not signify a prohibition of in absentia trials per se. In particular, the stance of the UN Human Rights Committee suggests that the defendant may waive their right to be present at the trial<sup>23</sup>.

Nevertheless, it appears evident that a waiver must be preceded by the defendant's awareness that criminal proceedings are pending against them. For this reason, the state must take all necessary measures to inform the individual of the ongoing proceedings and summon them to court promptly<sup>24</sup>. It should be noted that the mere fact that an individual is in a foreign country should not be regarded as an intention to avoid justice, nor should it relieve the authorities of the obligation to inform.

In accordance with the procedure for informing about special proceedings as outlined in Belarusian legislation, it can be ascertained that the general

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<sup>22</sup> Article 14(3)(d) of the International Covenant on Civil and Political Rights <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

<sup>23</sup> General Comment No. 32, para. 36, CCPR/C/GC/32, August 23, 2007, <http://hrlibrary.umn.edu/gencomm/hrcom32.html>.

<sup>24</sup> Human Rights Committee, Communications No. 16/1977, Mbenge v. Zaire, para. 14.1; No. 699/1996, Maleki v. Italy, para. 9.3.

method is to post a notice on the official website of the Investigative Committee. It is noteworthy that the website above is inaccessible to users from abroad. Nevertheless, according to the law, the defendant is deemed to have been informed as early as the day after such publication.

Hence, the state relies on a legal presumption that an individual is aware of ongoing proceedings without any factual evidence of that awareness. In contrast, the law does not require additional measures to establish actual contact with the defendant. It is, of course, doubtful that such a procedure can be regarded as fulfilling the state's obligation to "take all necessary steps" to inform in advance<sup>25</sup>.

Furthermore, the fact that special proceedings in Belarus necessitate the mandatory appointment of a defense lawyer cannot be considered adequate information. In the case of *Maleki v. Italy*, the Human Rights Committee observed<sup>26</sup> that the State's assumption that the defendant would be informed by his appointed defense lawyer was not sufficient to conclude that he was in fact informed. In particular, the Italian court hearing the case should have first ascertained that Mr. Maleki was aware of the criminal proceedings against him. Only then should the court have initiated proceedings in absentia. The current practice of Belarusian defense lawyers in special proceedings cases indicates their reluctance to contact their clients. Consequently, the likelihood of learning about the trial from the appointed defense lawyer is even less likely.

Nevertheless, despite the questionable nature of these measures, it is possible that a Belarusian court may have sufficient grounds to ascertain a waiver of the right of personal presence in court in certain circumstances. To illustrate, the European Court of Human Rights<sup>27</sup> has determined that such a scenario may emerge when the defendant publicly or in writing declares their intention to refrain from participating in criminal proceedings of which they have become aware.

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<sup>25</sup> It is important to note that the procedure for summoning the defendant to court is similarly regulated. This is accomplished through the issuance of a notice by the court on the official website, which specifies the date, time, and location of the court hearing.

<sup>26</sup> Human Rights Committee, Communication No. 699/1996, *Maleki v. Italy*, para. 9.4.

<sup>27</sup> *Sejdovic v. Italy*, Grand Chamber, Judgment of 1 March 2006, Appl. No. 56581/00, para. 99.

## ● **The right to be informed of the nature and cause of the charge**

It should be pointed out that the aforementioned notification on the website of the Investigative Committee can be interpreted through the lens of another guarantee enshrined in Article 14 of the Covenant. Namely, the right to be informed in detail of the nature and cause of the criminal charge<sup>28</sup>. The awareness of this information is a necessary prerequisite for the further exercise of the right to defense during the trial. It should be emphasized that this guarantee implies awareness not only of the offense charged but also of the "alleged general facts on which the charge is based."<sup>29</sup>

However, an examination of the model notices published by the Investigative Committee reveals that they only list the articles of the Criminal Code ("nature of the charge"), without any mention of the factual circumstances ("cause of the charge"). Moreover, the considerable vagueness of many of the alleged crimes, such as "inciting hatred" or "extremist activity," makes it challenging to ascertain the precise actions that led to the initiation of criminal proceedings.

## ● **Right of defense**

As previously stated, special proceedings necessitate the mandatory appointment of a defense lawyer to represent the defendant in court. This is consistent with the right of defense, at least on the face of it<sup>30</sup>. Nevertheless, the formal appointment of counsel to represent a client in a legal matter does not guarantee that the appointed counsel will reliably represent the client's interests<sup>31</sup>. A review of case studies reveals that defense lawyers frequently refrain from direct contact with their clients, thereby denying them access to case files and the opportunity to provide instructions regarding their defense.

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<sup>28</sup> Article 14(3)(a) of the International Covenant on Civil and Political Rights

<sup>29</sup> General Comment No. 32, para. 31, CCPR/C/GC/32, August 23, 2007, <http://hrlibrary.umn.edu/gencomm/hrcom32.html>.

<sup>30</sup> Article 14(3)(d) of the International Covenant on Civil and Political Rights reads: «to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it».

<sup>31</sup> General Comment No. 32, para. 38, CCPR/C/GC/32, August 23, 2007, <http://hrlibrary.umn.edu/gencomm/hrcom32.html>.

It is a fundamental tenet of the legal profession that independence is presumed. This implies that the state is not liable for a lawyer's failure to perform their professional duties in good faith. Nevertheless, according to the position of the Human Rights Committee, where the authorities deliberately prevent appointed lawyers from effectively carrying out their functions, the responsibility of the state is "triggered."<sup>32</sup> In this context, it is worth recalling the existing practice in Belarus of political persecution of lawyers for their professional activities. This practice has the effect of causing lawyers to be fearful of contacting clients within special proceedings. This is due to the risk of disbarment as well as their own criminal liability.

### ● **The right to a retrial**

A review of the extensive caselaw of the European Court of Human Rights on the issue of trials in absentia reveals that in the majority of cases, the Court finds a violation of the right to a fair trial due to the lack of a re-examination of the case (on both factual and legal issues)<sup>33</sup>. Unfortunately, this guarantee has not yet been reflected in the caselaw of the Investigative Committee, which is not surprising given the disproportionately low number of cases on this issue. Nevertheless, the aforementioned guarantee is worthy of particular scrutiny (and with a high probability it may soon become one of the standards outlined in Article 14 of the Covenant).

In accordance with the position of the EctHR, once a person who has not previously waived their right to be present in court in person learns of the verdict, they should be able to exercise their right to retrial<sup>34</sup>. In essence, this guarantee serves as a means by which the state can rectify the initial illegality of holding a trial in absentia without establishing the defendant's waiver of their right to be present<sup>35</sup>. Where a person is deprived of such an opportunity, the Court finds a "flagrant denial of justice," indicating a violation of the right to a fair trial<sup>36</sup>.

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<sup>32</sup> Ibid.

<sup>33</sup> ECtHR, *Colozza v. Italy*, judgment of 12 February 1985, Appl. No. 9024/80, para.29; *Krombach v. France*, judgment of 13 February 2001, Appl. No. 29731/96, para. 86, *Somogyi v. Italy*, judgment of 18 May 2004, Appl. No. 67972/01, para 72.

<sup>34</sup> Ibid.

<sup>35</sup> It is important to note that, in accordance with the position of the European Court of Human Rights, this right is preserved only if the individual has not previously waived their right to be present in court.

<sup>36</sup> *Sejdovic v. Italy*, Grand Chamber, Judgment of 1 March 2006, Appl. No. 56581/00, para. 84.

It is crucial to reiterate that Chapter 49–3 of the Criminal Procedure Code, which addresses special proceedings, lacks the necessary guarantees for reviewing a verdict in the event that the individual convicted in absentia arrives in Belarus. This creates a risk of violating the standard in practice.

In light of the above, it can be concluded that the legislative provisions of special proceedings are inconsistent with the fundamental guarantees of a fair trial when considered in the context of current practice. Consequently, sentences handed down in absentia courts in violation of the standards outlined in Article 14 of the Covenant are also invalid. This demonstrates, among other things, that the actions of the authorities in seizing the property of those convicted in absentia were illegal.

❗ It is clear that special proceedings are nothing but a repressive tool used by the Belarusian authorities to continue the politically motivated persecution of persons who have been forced to leave the country for security reasons. The utilization of this instrument by Belarus poses further risks to freedom of expression and equality, and once again demonstrates the authorities' lack of regard for their international human rights obligations.

## **Recommendations:**

### ● **Persons subject to special proceedings / potentially facing them in the future:**

1. Take the necessary steps to formalize the transfer of the ownership of your real estate in Belarus to a third party. To those remaining in Belarus, we recommend establishing a global power of attorney with a notary. This will allow a third party to manage your property and represent your interests.
2. If your appointed defense lawyer is unable or unwilling to communicate with you, you have the option of requesting a replacement from the Bar Association and/or requesting that the court disqualify the current lawyer and appoint a new one to represent your interests.
3. To protect your rights and document violations of your rights, you may:
  - demand familiarization with the charges and case file,
  - appeal against the ruling to carry out special proceedings, the court verdict, and other procedural decisions and actions.

### ● **To foreign countries:**

In case of a formal request for extradition of a person based on a court decision within special proceedings:

- find that it is incompatible with the standards of a fair trial as regulated by Article 14 of the International Covenant on Civil and Political Rights,
- refuse to extradite the individual in question,
- urge the Belarusian authorities to immediately cease the politically motivated practice of conducting trials in absentia.

### ● **To international organizations:**

Demand that the Belarusian authorities comply with their international human rights obligations, and in this regard:

- demand an immediate end to the politically motivated practice of special trials; and
- demand harmonization of criminal procedural legislation with international fair trial standards.

● **To civil society organizations:**

1. Educate foreign governments about the illegality of special proceeding trials as a procedure that violates fair trial standards and the practice of using them as an instrument of political persecution.
2. Should your organization become aware of the detention of an individual abroad who has been convicted within special proceedings with a view to their subsequent extradition to Belarus, it is imperative to respond to the situation in an active manner and to assist the individual in protecting their rights.