

# **ACCESS TO JUSTICE FOR CHILDREN: BELARUS**

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## **I. What is the legal status of the Convention on the Rights of the Child (CRC)?**

### **A. What is the status of the CRC and other relevant ratified international instruments in the national legal system?**

Belarus recognises the supremacy of universally acknowledged principles of international law and ensures that its laws comply with such principles.<sup>1</sup> According to the International Agreements Act, the rules of law contained in the international agreements that Belarus has acceded to form part of national legislation and are directly enforceable, except where such enforcement requires the adoption of a domestic legal act.<sup>2</sup> Belarus ratified the CRC on 1 October 1990 and it entered into force on 31 October 1990.

### **B. Does the CRC take precedence over national law?**

The Law on Child's Rights<sup>3</sup> as amended, states that if an international treaty contains other rules, which provide a wider or a more complete protection of the rights of children than the ones contained in this law, then such international treaty takes precedence over this law and the rules contained in the international law are applied.

### **C. Has the CRC been incorporated into national law?**

The provisions of the CRC have been implemented in a subject-by-subject manner in the Law on Child's Rights, as amended, as well as in other laws and regulations pertaining to children's rights. The general principles of the CRC are established in the Law on Child's Rights and in the Code of Marriage and Family of the Republic of Belarus.<sup>4</sup>

### **D. Can the CRC be directly enforced in the courts?**

Article 112 of the Constitution requires that courts administer justice on

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<sup>1</sup> Constitution of the Republic of Belarus, of 1994 (with changes and additions adopted at the republican referenda of 24 November 1996 and of 17 October 2004). Article 8, available at: <http://president.gov.by/en/press10669.html>.

<sup>2</sup> International Agreements Act Law No. 1188-XII of 23 October 1991, Article 33, available at: <http://www.legislationline.org/download/action/download/id/844/file/ba570518708774548c46a9883927.htm/preview>.

<sup>3</sup> Law of the Republic of Belarus on Child's Rights No. 2570-XII of 19 November 1993, Article 38, available at: <http://www.crin.org/Law/instrument.asp?InstID=1282>.

<sup>4</sup> Code of Marriage and Family of the Republic of Belarus № 278-3 of 9 July 1999, available at <http://www.tamby.info/kodeks/kobs.htm>.

the basis of the Constitution and other normative acts adopted in accordance therewith.<sup>5</sup> According to the Law on “Legal acts of the Republic of Belarus”, international treaties are subject to direct application except in cases which require the adoption of an internal legal act.<sup>6</sup> Therefore, the CRC can be directly applied only when there is no need to create additional internal laws. Accordingly, there exists a possibility of direct application of CRC norms which also follows from article 38 of the Law on the Child’s Rights, in particular, when the position expressed by the international treaty broadens, amends, or alters the approach of national laws.

E. Are there examples of domestic courts using or applying the CRC or other relevant international instruments?

The protection of children’s rights and legitimate interests are addressed in Supreme Court plenum decisions No. 9 of 20 December 2000 on judicial practice regarding adoption,<sup>7</sup> and No. 11 of 30 September 2004 on judicial practice regarding child-rearing disputes, which refer to the court’s obligation to comply with CRC provisions while settling such disputes.<sup>8</sup> Constitutional Court decision from 17 May 2012 on curfews for children under 16 years old also refers to CRC provisions.<sup>9</sup>

## II. What is the legal status of the child?

A. Can children and/or their representatives bring cases in domestic courts to challenge violations of children's rights?

Yes, legal challenges of violations of children’s rights are possible in domestic courts in relation to children aged 14 years or older, subject to the conditions outlined in part II.B below. Furthermore, the Code of Marriage and Family provides that every child has the right to defend their person, honor and dignity against all forms of exploitation and violence: economic, sexual, political, spiritual, moral, physical or psychological.<sup>10</sup>

B. If so, are children of any age permitted to bring these cases by themselves in their own names/on their own behalf, or must the case be brought by or with the assistance of a representative?

In case of a violation of their rights as established by the CRC and other national laws, every child has the right to seek protection of their rights through recourse to the juvenile affairs commissions, guardianship and custodial bodies and public prosecution office.<sup>11</sup> However, only children

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<sup>5</sup> Constitution, Article 112.

<sup>6</sup> Law “On legal acts of the Republic of Belarus” N 361-z of 10 January 2000, art. 20. Available at: <http://www.pravo.by/main.aspx?guid=3871&p0=h10000361&p2=%7bNRPA%7d>

<sup>7</sup> Available at [http://www.tamby.narod.ru/belarus/belarus-zakon\\_PVS\\_9-2000.htm](http://www.tamby.narod.ru/belarus/belarus-zakon_PVS_9-2000.htm).

<sup>8</sup> Available at <http://pravo.levonevsky.org/bazaby/org449/basic/text0022.htm>.

<sup>9</sup> Available at: <http://naviny.org/2012/05/17/by11497.htm>

<sup>10</sup> Code of Marriage and Family, Article 189 (*Right of defense*).

<sup>11</sup> Law on Child’s Rights, Article 13 and Code of Marriage and Family, Article 189 (*Right of defense*).

aged 14 and above have the right of recourse to the court.<sup>12</sup> The rights of the children under the age of 14 are defended in court by their legal guardians. Parents, adoptive parents, guardians and custodians are entitled to file a lawsuit to the court against an individual person or an organisation, which infringed the rights and legitimate interests of their children.<sup>13</sup> A child aged 14 and above is entitled to legal assistance for realisation and protection of their rights, including the assistance of lawyers and other legal representatives in court, other state bodies, organisations and in relations with officials and individuals, without consent of parent or legal guardians.<sup>14</sup>

Court proceedings for the protection of the rights of children between 14 and 18 must be brought by their parents or legal guardians, but the court is under an obligation to involve the children in such proceedings, except where that would be against the interests of the child. However, children aged between 14 and 18 have the right to recourse to the court for the protection of their rights independently in certain disputes arising from civil, family, labour, administrative and other relationships and transactions in relation to job earnings or income from entrepreneurial activities.<sup>15</sup>

C. In the case of infants and young children, how would cases typically be brought?

As mentioned in part II.B, violations of the rights of children under 14 years old can only be challenged in court by their parents, adoptive parents, or legal guardians on behalf of the child.

As mentioned above, children under that age, however, have the right to apply themselves for protection of their rights to juvenile affairs commissions, guardianship and custodial bodies and public prosecution office, for example, in cases where the parents or legal guardians of children fail to perform or improperly perform their parental obligations, abuse their rights, negatively impact children's behavior, or ill-treat the children.<sup>16</sup>

In addition, state organs and legal entities have a right to initiate court proceedings on their own initiative for the protection of rights of children in matters related to termination of an adoptions, termination of parental rights, alimony, child support and recovery of costs incurred by the State for the maintenance of children in public care, as well as the protection of other interests of minors or those who lack legal capacity.<sup>17</sup> Such type of action may be raised without the consent of the minor.<sup>18</sup>

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<sup>12</sup> Law on Child's Rights, Article 13.

<sup>13</sup> Code of Marriage and Family, art. 66

<sup>14</sup> Law on Child's Rights, art. 13

<sup>15</sup> Code of Civil Procedure of the Republic of Belarus of 11 January 1999, № 238-3, as amended, Article 59 (*Civil Legal Capacity*), available at: <http://levonevski.net/pravo/norm2013/num57/d57077.html>.

<sup>16</sup> Code of Marriage and Family, Article 66<sup>1</sup> (*Protection of rights and legal interests of children*).

<sup>17</sup> Code of Civil Procedure, Article 85 (*Civil Legal Capacity*).

<sup>18</sup> Code of Civil Procedure, Article 88 (*Applications by state organs etc*).

D. Would children or their representatives be eligible to receive free or subsidised legal assistance in bringing these kinds of cases?

Under Belarus law, the bar associations provide free legal aid to children and to their parents or legal guardians for the protection of the interests of the children.<sup>19</sup> Legal aid is also available in relation to social protection and rehabilitation of the victims of human trafficking and can be awarded to children directly, if they have attained 14 years of age, or to their parent or guardian, if they have not.<sup>20</sup>

In addition, in cases where legal assistance is required for drafting a statement of claim to deprive a child's parents of parental rights, legal advice centers or law firms in the area where the child resides are instructed by the Department of Justice to provide free legal aid to an educational institution which the child attends or to the child's legal guardian or to another organisation authorised by law to protect the rights and legitimate interests of the child.<sup>21</sup>

E. Are there any other conditions or limits on children or chosen legal representatives bringing cases (e.g., would a child's parents or guardian have to agree to a case being brought)?

As addressed in part II.B, only children aged 14 or older can act through a representative without parental consent.

### III. **How can children's rights violations be challenged before national courts?**

A. If there is a potential violation of the Constitution or other principles established in domestic law, or with the CRC or other relevant ratified international/regional instruments, how can a legal challenge be brought?

Under the Constitution, everyone is guaranteed protection of their rights and freedoms by a competent, independent, and impartial court within the time limits specified by law.<sup>22</sup> In addition, every person also has the right in accordance with the international legal acts ratified by the Republic of Belarus to appeal to international organisations to defend his or her rights and freedoms, provided that all available domestic legal remedies have been exhausted.<sup>23</sup>

Under the Law "On petitions of citizens and legal entities,"<sup>24</sup> every

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<sup>19</sup> Law on Child's Rights, Article 13 (*Protection of their rights and legal interests by children*).

<sup>20</sup> Law on Advocacy and Legal Practice of the Republic of Belarus of 30 December 2011, № 334-3, as amended, Article 28 (*Provision of legal aid funded by the bar associations and national and (or) local budgets*), available at <http://pravo.by/main.aspx?guid=3871&p2=2/1884>.

<sup>21</sup> Regulation of the Ministry of Justice of the Republic of Belarus "On some issues of legal aid" of 12 December 2006, № 80, available at: <http://www.pravoby.info/docum09/part11/akt11872.htm>.

<sup>22</sup> Constitution, Article 60.

<sup>23</sup> Constitution, Article 61.

<sup>24</sup> Law of Republic of Belarus on complaints of citizens and legal entities of 18 July 2011, № 300-3,

person has a right to make a petition to the state bodies and organisations for protection of their rights. Relevant organisations are under an obligation to respond to written petitions within 15 days of registration or, if further investigation of the facts is necessary, no later than one month from the registration of such petition.<sup>25</sup>

If the relevant organisations do not respond within the prescribed time period, or the applicant does not agree with the decision rendered, there is a right to appeal to a superior organisation in cases where such procedure is established by law, as well as a right to petition the court to review administrative decisions.<sup>26</sup>

Court petitions are permissible where the applicant considers that an illegal action (or inaction) of the state organs or other legal entities breached their rights or limited the ability of the applicants to exercise their rights to the full extent permitted by law.<sup>27</sup> The court reviews the petition, verifies the legality and validity of such action (or inaction)<sup>28</sup> and renders its decision within one month from the date the petition was filed.<sup>29</sup>

Upon review, if the court agrees with the applicant, it orders the relevant entity to remedy the breach of rights. The relevant entity is then under an obligation to enforce the decision of the court within one month from the date of the decision and notify the court and the applicant that the decision has been enforced.<sup>30</sup>

Everyone can present the initiative for checking the constitutionality of a normative act by presenting a petition to the state bodies empowered to address with proposals to the Constitutional Court.<sup>31</sup>

As for the criminal justice, a victim, or in case of inability due to young age, any of the close relatives, family members or legal guardians are entitled to participate in the criminal prosecution of the accused, and in cases of private or private public prosecution to initiate and pursue a charge against the offender.<sup>32</sup>

## B. What powers would courts have to review these violations, and what remedies could they offer?

Civil courts can utilise the following possible remedies: recognition of

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Article 3 (*Right to make a petition*), available at <http://www.pravo.by/main.aspx?guid=3871&p2=2/1852>.

<sup>25</sup> Law on complaints of citizens and legal entities, Article 17 (*Timing for considering applications*).

<sup>26</sup> Law on complaints of citizens and legal entities, Article 20 (*Appeal of the decisions*).

<sup>27</sup> Code of Civil Procedure, Article 353 (*The right to petition the court*).

<sup>28</sup> Code of Civil Procedure, Article 339 (*The burden of proof and evidence*).

<sup>29</sup> Code of Civil Procedure, Article 337 (*General provisions in relation to cases arising from administrative legal relations*) and Article 354 (*Filing of an appeal*).

<sup>30</sup> Code of Civil Procedure, Article 357 (*The decision of the court in relation to a petition. Enforcement of the decision*).

<sup>31</sup> Law on the Constitutional Court of the Republic of Belarus № 2914-XII of 30.03.1994, Article 6.

<sup>32</sup> Code of Criminal Procedure № 295-3 of 16 July 1999, Article 28, available at:

[http://etalonline.by/?type=text&regnum=HK9900295#load\\_text\\_none\\_1](http://etalonline.by/?type=text&regnum=HK9900295#load_text_none_1).

right, restoration of a violated right, writ of injunction, or suppression of unlawful acts leading to the breach of right.<sup>33</sup>

- C. Would such a challenge have to directly involve one or more individual child victims, or is it possible to challenge a law or action without naming a specific victim?

The Code of Civil Procedure requires that the statement of claim, which initiates the court proceedings, contains the name of the plaintiff, their place of residence and other personal details,<sup>34</sup> meaning that it is not possible to file a claim without naming the plaintiff. A claim that is filed without compliance with the requirements abovementioned is left undecided.<sup>35</sup>

- D. Is any form of collective action or group litigation possible, with or without naming individual victims?

Under Belarusian law, a collective action is a type of joinder of parties. Under the Code of Civil Procedure, one claim can unite the demands of several persons, as well as demands aimed towards several defendants.<sup>36</sup> As mentioned in part III.C, it is not possible to initiate civil proceedings without naming individual victims.

- E. Are non-governmental organisations permitted to file challenges to potential children's rights violations or to intervene in cases that have already been filed?

All non-governmental organisations must register and obtain the status of a legal entity in order to operate in Belarus. As legal entities, they can challenge unlawful actions or failures to act of state bodies, other legal entities and others in court if they consider that their rights have been infringed.<sup>37</sup> As indicated above in part II. C legal entities are entitled to file a claim for protection of child's rights in certain cases. Therefore there is a possibility for an NGO possessing the status of a legal entity to file a lawsuit to the court for protection of child's rights.

**IV. Practical considerations.** Please detail some of the practical issues, risks and uncertainties that might be involved in bringing a case to challenge a violation of children's rights, such as:

- A. Venue. In what courts could a case be filed (e.g., civil, criminal, administrative, etc.)? What would the initial filing process entail?

The judicial system of Belarus is comprised of the Constitutional Court,

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<sup>33</sup> Code of Civil Procedure, Article 3 (*Relations regulated by the civil procedure legislation*) and Article 7 (*Methods of court protection*).

<sup>34</sup> Code of Civil Procedure, Article 109 (*Requisites of the procedural documents*).

<sup>35</sup> Code of Civil Procedure, Article 111 (*Correction of a deficiency in a procedural document*).

<sup>36</sup> Code of Civil Procedure, Article 250 (*Joining and disjoining of several claims*).

<sup>37</sup> Code of Civil Procedure, Article 358 (*The right to petition the court of legal entities*).

general courts and economic courts.<sup>38</sup> Cases concerning the protection of the rights of the child, as well as cases concerning crimes and administrative offences committed by the underage children or against them are handled by the courts of general jurisdiction according to the rules of civil, administrative and criminal procedure.

According to the Code of Criminal Procedure, cases involving minors accused of a crime must be handled by specialised courts or specially trained judges.<sup>39</sup> At the moment, specialised juvenile courts are not yet established.

- B. Legal aid / Court costs. Under what conditions would free or subsidised legal aid be available to child complainants or their representatives through the court system (i.e., would the case have to present an important legal question or demonstrate a likelihood of success)? Would child complainants or their representatives be expected to pay court costs or cover other expenses?

Courts have the right to fully or partially release individuals from court fees on the basis of their property status.<sup>40</sup> Children have no special legal status when filing claims to restore their rights. At the same time, the prosecutor, state bodies, legal entities, and ordinary citizens, who turned to courts with claims in order to protect rights and legal interests of third parties (inter alia, in cases of deprivation of parental rights), are exempt from paying the state fee and costs of the proceedings.<sup>41</sup> Accordingly, if the court satisfies the plaintiff's claim, all legal expenses will be paid by the defendant, and if the claim is rejected the plaintiff in any case is not liable to pay the costs of the proceedings.

- C. Pro bono / Financing. If legal aid is not available, would it be possible for child complainants or their representatives to obtain legal assistance from practising lawyers on a pro bono basis, through a children's rights organisation, or under an agreement that does not require the payment of legal fees up front?

As explained in part II.D, legal aid is rendered to children and their parents or legal guardians by lawyers at the expense of the Bar council.<sup>42</sup>

- D. Timing. How soon after a violation would a case have to be brought? Are there any special provisions that allow young adults to bring cases about violations of their rights that occurred when they were children?

The general limitation period for civil actions in Belarus is three years.<sup>43</sup>

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<sup>38</sup> Code of judicial organisation and the status of the judges № 139-L of 29 June 2006, art. 5.

<sup>39</sup> Code of Criminal Procedure, Article 430

<sup>40</sup> Code of Civil Procedure, Article 130 (*Exemption from payment of court costs to the state*).

<sup>41</sup> Code of Civil procedure, Article 129 (*Exemption from payment of the costs of the proceedings*).

<sup>42</sup> Law on Child's Rights, Article 13 (*Protection of their rights and legal interests by children*).

<sup>43</sup> Civil Code of Belarus, Law No. 218-Z dated 7 December 1998, Article 197 (*General limitation period*), available at: <http://www.ebrd.com/downloads/legal/securities/belarcc.pdf>

With respect to crimes, the Criminal Code provides that a person will be released from criminal responsibility if the following time limits have expired since the date of the commission of a crime:

- a) 2 years after the commission of a crime representing no great social danger;
- b) 5 years after the commission of a crime of minor gravity;
- c) 10 years after the commission of a grave crime; and
- d) 15 years after the commission of an especially grave crime.

However, the court can decide to not apply the period of limitations when a crime is punished by the life imprisonment or death penalty.<sup>44</sup>

Additionally, the period of limitations is not applicable to the crimes against peace and humanity, war crimes and acts of international terrorism.<sup>45</sup>

There appears to be no provision suspending this limitation in relation to violations of children's rights in Belarusian law.

- E. Evidence. What sort of evidence is admissible/required to prove a violation? Are there particular rules, procedures or practices for dealing with evidence that is produced or presented by children?

Evidence is any information about the facts which are sought to be proved during the proceedings, obtained in accordance with the law and the order of proof established by the Code of Civil Procedure.<sup>46</sup> The presented information is considered by the court on the basis of its validity, admissibility, and relevance.

Any person can be heard as a witness as long as they have no physical or mental disability which prevents them from perceiving the facts and testifying about them accurately.<sup>47</sup> If the party to a lawsuit is a minor, the court receives explanations directly from the child, his legal representative or both.<sup>48</sup> A pedagogue with higher education must be present at the interrogation of a child witness, always if the child is below the age of 14 and at the discretion of the court if the child is between 14 and 16 years old.<sup>49</sup> A witness under the age of 16 is normally expelled from the courtroom upon completing their testimony.<sup>50</sup> Pedagogue and legal guardians are allowed to pose questions to an underage witness upon judge consent.

Similarly, under the rules of criminal procedure a victim or a witness under the age of 14, and at the discretion of the court between 14 and 16, is interrogated in the presence of a pedagogical worker or a psychologist.

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<sup>44</sup> Penal Code № 275-L of 9 July 1999, Article 83, available at: [http://etalonline.by/?type=text&regnum=HK9900275#load\\_text\\_none\\_1](http://etalonline.by/?type=text&regnum=HK9900275#load_text_none_1).

<sup>45</sup> Ibid, art. 85

<sup>46</sup> Code of Civil Procedure, Article 178 (*Evidence and means of proof*).

<sup>47</sup> Code of Civil Procedure, Article 92 (*Persons who may not appear as witnesses*).

<sup>48</sup> Code of Civil Procedure, Article 184 (*Persons providing explanations as a party*).

<sup>49</sup> Code of Civil Procedure, Article 189 (*Interrogation of a minor witness*).

<sup>50</sup> Ibid.



Parents and legal guardians have the right to participate in the interrogation as well. Victims and witnesses under the age of 16 are not warned about the liability for refusing or evading to give testimony or for giving knowingly false testimony. A child under 18 years can be interrogated in the absence of the accused. Children under 16 years are normally expelled from the courtroom upon giving their testimony.<sup>51</sup>

An underage suspect or accused is summoned to interrogation through their parents, legal guardians or the authorities of a juvenile institution where he is being held.<sup>52</sup> The interrogation cannot last for more than 2 consecutive hours or 4 hours a day in total.<sup>53</sup> The interrogation is conducted in the presence of a lawyer, as well as pedagogical worker or psychologist.<sup>54</sup> Parents or legal guardians are required to participate in the preliminary investigation and are summoned to the court hearings.<sup>55</sup>

Court hearings are typically open to the public, however, a closed trial may be held if necessary to protect the interests of a minor.<sup>56</sup>

- F. Resolution. How long might it take to get a decision from the court as to whether there has been a violation?

The judge examines the claim in three days after it is received by the court and if the grounds for refusal are absent the judge adopts a decision to initiate proceedings and prepare the case for the trial.<sup>57</sup> The duration of trial depends on the amount of information and evidence before the court and any complications of the circumstances which are to be examined by the judge. Normally, the trial lasts from three months to a year.

- G. Appeal. What are the possibilities for appealing a decision to a higher court?

A plaintiff and other persons with legal interest in the case can appeal the decision of a court of first instance to the upper court by filing a cassation complaint within 10 days. A prosecutor can present a cassation plea independently of his participation in the case.<sup>58</sup> The court acting as cassation instance has the power to consider the evidence in hand and any additional evidence and to confirm the circumstances of the case, or to determine new circumstances that are relevant to the resolution of the matter.<sup>59</sup> The court verifies the legality and validity of the decision of the court of first instance and has the power to alter the previous judgment or deliver a new judgment.

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<sup>51</sup> Code of Criminal Procedure, Article 332.

<sup>52</sup> Ibid, art. 433

<sup>53</sup> Ibid, art. 434

<sup>54</sup> Ibid, art. 435

<sup>55</sup> Ibid, art. 436, 437

<sup>56</sup> Code of Civil Procedure, Article 17 (*Publicity of judicial proceedings*).

<sup>57</sup> Code of Civil Procedure, Article 244 (*Initiation of the proceedings*).

<sup>58</sup> Ibid, art. 399

<sup>59</sup> Code of Civil Procedure, Article 423 (*Jurisdiction of the cassation court*).

Court decrees that entered into force can be challenged in supervision order by the entitled officials, for example the prosecutor.<sup>60</sup> Additionally, a court ruling can be revised upon discovering new circumstances.<sup>61</sup>

The appeals procedure outlines above is also applicable to criminal and administrative decisions.<sup>62</sup>

- H. Impact. What are the potential short-term and long-term impacts of a negative decision? Is there a possibility for political backlash or repercussions from a positive decision?

Judicial precedent is not considered a source of law in the Belarusian legal system, therefore, a negative decision compromising the implementation of children's rights will not bind lower courts to follow it.

- I. Follow up. What other concerns or challenges might be anticipated in enforcing a positive decision?

Freedom House has reported that the judicial branch in Belarus lacks any genuine independence and judges often defer decision-making to the executive branch.<sup>63</sup>

- V. Additional factors.** Please list any other national laws, policies or practices you believe would be relevant to consider when contemplating legal action to challenge a violation of children's rights.

According to the decision of the heads of states of Commonwealth of Independent States (CIS) Council "On the approval of the Establishment on the CIS Commission on Human Rights", the Commission on Human Rights can review individual and collective filings of persons and non-governmental organisations in relation to the questions connected with human rights violations, however, this complaints mechanism is not operational.<sup>64</sup>

*This report is provided for educational and informational purposes only and should not be construed as legal advice.*

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<sup>60</sup> Ibid, art. 436

<sup>61</sup> Ibid, art. 452

<sup>62</sup> See Code of Criminal Procedure, Chapters 39, 42, 43

<sup>63</sup> Freedom House, *Nations in Transit 2014 - Belarus*, 10 July 2014, available at: [http://www.freedomhouse.org/sites/default/files/NIT14\\_Belarus\\_final.pdf](http://www.freedomhouse.org/sites/default/files/NIT14_Belarus_final.pdf).

<sup>64</sup> See decision of the heads of states of CIS Council "On the approval of the Establishment on the CIS Commission on Human Rights" dated 24 September 1993., para. 1 Part III, available at: <http://cis.minsk.by/reestr/ru/index.html#reestr/view/text?doc=238>.