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OPINION

Regarding the "Constitutional Legal Position on the Protection of the Constitutional Order", adopted by the Constitutional Court of the Republic of Belarus on 25 August 2020

On 25 August 2020 the Constitutional Court of the Republic of Belarus (thereinafter – the CCRB) adopted a document entitled the "Constitutional Legal Position on the Protection of the Constitutional Order" (*Конституционно-правовая позиция по защите конституционного строя*, http://www.kc.gov.by/document-67563) (thereinafter – the Position). This document consists of a preamble (names of judges that adopted the Position, i.e. all the judges of the CCRB, and reference to the constitutional and legal grounds for the adoption of this document), followed by 4 short paragraphs (the whole document is 2 pages long).

As the CCRB referred *inter alia* to Arts. 44 and 45 of the Law on the Constitutional Judicial Proceedings, which regulate the venue and order of plenary judicial sitting of the CCRB, it should be presumed that the Position was adopted in the plenary sitting of the CCRB as an official act of that Court. However, the Position itself does not refer to the hearing of any case (legal dispute between any parties whatsoever); therefore, it can be also presumed that the CCRB has formally adopted this Position on its own initiative, i.e. without any formal nor official request from any other state organ or another person. Certainly, this does not exclude the possibility that the CCRB could have been informally requested to adopt the Position so as to act in unison with other state organs, including: 1) the Prosecutor General's Office, which on 20 August 2020 instituted a criminal case for the establishment and activities of the Coordination Council (http://prokuratura.gov.by/ru/info/novosti/nadzor-za-ispolneniem-zakonodatelstva/v-inykh-sferakh/po-faktu-sozdaniya-i-deyatelnosti-koordinatsionnogo-soveta-vozbuzhdeno-ugolovnoe-delo/) stating in advance that the establishment of such bodies as the Coordination Council is not foreseen by the Constitution and their activities are unconstitutional as well as that allegedly the activities of the Coordination Council are aimed at the seizure of state power; 2) the Central Electoral Commission, which on 14 August 2020 approved the results of the presidential elections of 9 August 2020 without any examination of massive complaints regarding unfairness of the electoral process and falsification of the voting results (e.g., see the announcements of the Central Electoral Commission of 8, 9, 14 and 17 August 2020 (http://www.rec.gov.by/sites/default/files/pdf/2020/otvet7.pdf, http://www.rec.gov.by/sites/default/files/pdf/2020/otvet8.pdf, http://www.rec.gov.by/sites/default/files/pdf/2020/inf9.pdf, http://

www.rec.gov.by/ru/novosti/14-08-2020-zasedanie-centralnoy-komissii, http://www.rec.gov.by/ru/novosti/17-08-2020-otvet-na-obrashcheniya-nosyashchie-massovyy-harakter); 3) the Supreme Court, which, one day prior to the adoption of the Position (i.e., on 24 August 2020), rejected the requests to verify and to annul the results of the presidential elections (i.e., to declare the elections invalid by annulling the opposite decisions of the Central Electoral Commission) without any examination of the complaints and refusing to even open the hearing of the case (e.g., the ruling of the judge of the Supreme Court of 24 August 2020 (one page long) to refuse in opening the case on the request of Ms Tsikhanouskaya). The latter decision of the Supreme Court also speaks for itself by certifying the absence of any real possibility to dispute the electoral results in Belarus: the Supreme Court left the complaint without examination stating an unprecedentedly absurd argument that the Supreme Court allegedly does not have the competence to declare elections invalid; this issue allegedly belongs solely to the competence of the Central Electoral Commission, which has not adopted the decision to declare the presidential elections invalid (it remains only a rhetorical question regarding how an opposite decision of the Central Electoral Commission can then be challenged).

The *provisions* of the CCRB Position are as follows:

1) the definition of the Constitution of the Republic of Belarus (thereinafter – the RB Constitution) as the social contract on the organisation of society and the State, system of State power, relationship between human beings, society and the State; as the only consequence from this definition, the CCRB underlined strict obedience of all citizens and state organs to the Constitution (para. 1);

2) the quotation of Art. 3 of the RB Constitution, according to which the people are the only source of State power and the sole possessor of sovereignty, which is exercised directly and through the representative and other state organs (para. 2);

3) the statement (which seems to be related with the latter quotation of Art. 3 of the RB Constitution) that on 9 August 2020 the people of Belarus, in accordance with the Constitution and electoral laws based on constitutional principles, expressed their free will by electing Mr. Lukashenko to the office of the President of the Republic of Belarus; as well as that the democratic nature and legitimacy of those presidential elections can allegedly be confirmed by the observance of the principles and norms of the RB Constitution in the electoral process (para. 2);

4) the quotation of a few provisions of Arts. 4 and 5 of the RB Constitution that democracy is carried out on the basis of plurality of political institutions, ideologies and views

and that political parties and associations, acting in accordance with the RB Constitution and laws, assist in the expression of the political will of citizens (para. 3);

5) the statement (which seems to be related with the latter quotation of Arts. 4 and 5 of the RB Constitution) that the RB as the “democratic state based on the rule of law” allegedly has in place the legal procedures, including through the realization of the right to judicial defence, for the protection of the constitutional rights of citizens in the electoral process (para. 3);

6) the notice by the CCRB of the fact that citizens are subjects of the constitutional legal relationships, by expressing their political will in the formation of state organs, including the election of the President (para. 4);

7) the instruction (which seems to be following from the latter notice) by the CCRB that citizens have to take into account that, according to Art. 3 of the RB Constitution, any act directed to the change of the constitutional order or the achievement of state power by violent means or by other breaches of the laws is punishable under law (para. 4);

8) the statement (which seems to be following from the previous notice and instruction) that the RB Constitution does not tolerate the establishment of public organs or associations empowered to review the results of the presidential elections (para. 4);

9) the proclamation by the CCRB (which seems to be following from the previous statement) that the establishment of the Coordination Council, which allegedly pursues the aim to review the results of the presidential elections of 9 August 2020 and which has been established in the order that is not provided by the Constitution and the electoral laws, is unconstitutional (para. 4);

10) the declaration by the CCRB that currently the obedience to the regime of constitutional legitimacy is the unconditional requirement for the activity of all the subjects of social and political relations and all the citizens, in order to prevent “the destructive impact” on the stability and sovereignty of the State, the civil peace and the constitutional order (para. 4).

Thus, *two operative points* of the Position may be distinguished:

- the confirmation of the legitimacy of the officially announced results of the 9 August 2020 presidential elections, which is based on the alleged observance of the RB Constitution during the electoral process (para. 2);

- the proclamation of the Coordination Council as an unconstitutional body, which is based on the assumption that it has been established allegedly for the review of the results of the presidential elections of 9 August 2020 as well as on the fact that this body is not foreseen by the Constitution and allegedly it has not been established according to the procedures provided by the RB Constitution and electoral legislation (para. 4).

In addition, para. 4 of the Position contains the implied *warning* that participation in the activities of the Coordination Council is regarded as criminally punishable. As a consequence, the Position is employed by Mr. Lukashenko as an argument for rejecting any dialogue with the Coordination Council as well as by the law enforcement authorities for the criminal persecution of the members of the Coordination Council and other persons involved in or related with its activities.

This Opinion further focuses on the issues of identification of the legal ground for the Position and substantial compatibility of its two operative points with the RB Constitution.

Absence of Legal Ground for the Adoption of the Position

The preamble of the Position refers to the following provisions of the RB Constitution and laws as the basis for the adoption of the Position: Art. 116 of the RB Constitution, Art. 6 of the Code on the Organisation of Judicial System and Status of Judges, the already mentioned Arts. 44 and 45 of the Law on the Constitutional Judicial Proceedings. It is relevant to examine these provisions in order to identify the legal ground for the adoption of the Position.

1. **Art. 116 of the RB Constitution** provides for the constitutional basis for the activities of the CCRB.

The mission of the CCRB is to control *the constitutionality of legal normative acts* (para. 1 of Art. 116 of the RB Constitution). This mission is revealed by the more detailed functions of the CCRB provided in paras. 4 and 6 of Art. 116 of the RB Constitution (paras. 2 and 3 of this Article regulate the formation of the CCRB, para. 5 – the legal effects of the conclusions of the CCRB). Those functions are as follows:

1) upon the request of the President, the House of Representatives, the Council of the Republic, the Supreme Court, the Supreme Economic Court, the Cabinet of Ministers, to

provide conclusions regarding: compliance of laws, decrees and edicts of the President, international obligations – with the RB Constitution and international legal instruments, ratified by the RB; compliance of acts of international entities, where the RB is a party, executive edicts of the President – with the RB Constitution, international legal instruments, ratified by the RB, laws and decrees of the President; compliance of rulings of the Cabinet of Ministers, acts of the Supreme Court, the Supreme Economic Court, the Prosecutor General – with the RB Constitution, international legal instruments, ratified by the RB, laws, decrees and edicts of the President; compliance of acts of any other state organ – with the RB Constitution, international legal instruments, ratified by the RB, laws, decrees and edicts of the President (para. 4 of Art. 116 of the RB Constitution);

2) upon the request of the President, to provide conclusions whether the chambers of the Parliament have committed systematic or grave breaches of the RB Constitution (para. 6 of Art. 116 of the RB Constitution).

Although some of the above mentioned functions of the constitutional court can be hardly imaginable in a democratic state governed by the rule of law (e.g., such as the supervision of the acts of the Supreme Court, Supreme Economic Court (as well as the Prosecutor General) with regard to their compliance, e.g., with the decrees and edicts of the President, as well as placing of judicial acts into the hierarchical system of legal normative acts), even those functions, as established by paras. 4 and 6 of Art. 116 of the RB Constitution, do not include the settlement of such issues as verification or approval of the results of elections and assessment of the establishment and activities of public institutions and associations. It must be emphasised that the settlement of those issues (results of elections and constitutionality of associations) does not follow from and is not related to the general mission of the CCRB, which is (according to para. 1 of Art. 116 of the RB Constitution) to control the constitutionality of legal normative acts. It must be also noted that in some countries where similar functions are granted to constitutional courts (e.g., verification of legitimacy of parliamentary and presidential elections in Lithuania, confirmation of the results of parliamentary and presidential elections and decisions regarding constitutionality of political parties in Moldova), they are expressly provided in the constitution as a kind of additional (extrajudicial) functions to the traditional function of the control of constitutionality of legal acts (the same can be said about the function of the CCRB to determine systematic or grave breaches of the RB Constitution by the chambers of the Parliament (para. 6 of Art. 116 of the RB Constitution), in order to determine for the President whether there is a ground to dissolve any chamber of the Parliament under para. 2 of Art. 94 of the RB Constitution).

Thus, first and foremost it may be concluded that, from the substantial point of view, under the RB Constitution, *the CCRB does not possess the competence to decide on such material issues as the confirmation of the electoral results and constitutionality of any public body or association*, including the Coordination Council (i.e., the CCRB does not have constitutional powers to decide on the issues addressed by the above mentioned operative points of the Position). It is clear that these issues do not belong to the competence (mission) of the constitutional court, the latter being the control of the constitutionality of legal (normative) acts. It is also clear from the Position that the CCRB has not exercised the function of review of legitimacy of the acts of the Supreme Court and the Central Electoral Commission, which might be seen from the wording of para. 4 of Art. 116 of the RB Constitution.

It should be noted that para. 7 of Art. 116 of the RB Constitution, according to which the competence, organization and procedure governing the activities of the CCRB have to be determined by law, cannot be seen as the constitutional ground for expanding the competence of the CCRB. *The constitutional court cannot be granted by law the powers that are in essence different from those provided by the constitution*. This is the generally accepted practice of democratic states governed by the rule of law. By the way, the same rule can be confirmed by Art. 7 of the RB Constitution, which proclaims the principle of the rule of law (para. 1), in accordance to which state organs and officials can pursue their activities only within the limits established by the Constitution and the laws enacted in accordance with the Constitution (para. 2). Therefore, under the Constitution, the legislator does not have the discretion to expand by law the powers of the CCRB that are established by the Constitution. Para. 6 of Art. 116 of the RB Constitution can be perceived as only entitling the legislative to regulate in more detail how the work of the CCRB has to be organised, including the procedure for the exercise of its constitutional powers (only those rights and powers can be granted to the CCRB by law, which are consistent with and arising out of the constitutional powers of the CCRB).

The second important conclusion is that, from the procedural point of view, Art. 116 also cannot be seen as the constitutional basis for the adoption of the Position. Art. 116 provides for the only form of an act of the CCRB – *conclusion* on both constitutionality (legitimacy) of the impugned legal acts and the assessment of the activities of the chambers of the Parliament. In addition, Art. 116 of the RB Constitution provides for *an exhaustive list of the subjects* that are entitled to apply to the CCRB (the President, the House of Representatives, the Council of the Republic, the Supreme Court, the Supreme Economic Court, the Cabinet of Ministers). Thus, under Art. 116, *the CCRB has no right to adopt on its own initiative such an act as the Position*,

i.e. it has no constitutional powers to express, when it deems necessary, any position on topical constitutional, legal and political issues.

It is worth noting that the Position cannot be regarded as an act of interpretation of the Constitution. Unlike some other states (e.g., Moldova or Ukraine), the RB Constitution does not grant to the CCRB specific powers to adopt acts of interpretation of the Constitution. On the contrary, the power to adopt acts on the official interpretation of the Constitution is granted to the Council of the Republic, which is the upper chamber of the Parliament (Art. 98(1) of the RB Constitution). In fact, the Position does not really provide any interpretation of the RB Constitution (except perhaps the statement about the Constitution being a social contract). As mentioned, it contains the quotations of several provisions of Arts. 3, 4 and 5 of the RB Constitution. It also contains the declarations of political rather than legal content, as they are more typical for the acts of political organs (e.g., the emphasis of the need to prevent "the destructive impact", allegedly produced by the activities aimed at the review of the results of the presidential elections, on the stability and sovereignty of the State, the civil peace and the constitutional order).

Finally, by adopting the Position, the CCRB made an *ultra vires* act, i.e. it *exceeded its constitutional competence*. Consequently, *Art. 116 of the RB Constitution cannot serve as a constitutional (legal) ground for the adoption of the Position*. From the standpoint of the RB Constitution, the Position can be also assessed as *a political act* (expression of the position on the current political and legal situation within the State), unconstitutionally performed by the CCRB.

2. **Art. 6 of the Code on the Organisation of Judicial System and Status of Judges** *inter alia* defines *the purpose of the CCRB* as follows: to safeguard the constitutional order, human and citizen's rights and freedoms guaranteed by the Constitution, to ensure the supremacy of the Constitution and its direct effect, the conformity of legal normative acts of state bodies to the Constitution, the maintaining of legality in law-making and law-enforcement, the settlement of other issues provided for by the Constitution, this Code and other legislative acts (para. 1).

It must be emphasised that this provision of Art. 6 of the Code on the Organisation of Judicial System and Status of Judges, including the general purpose of the CCRB to safeguard the constitutional order, human and citizen's rights and freedoms, to ensure the supremacy of the Constitution, cannot be interpreted in isolation from the constitutional competence of the CCRB as well as from other provisions of the Code on the Organisation of

Judicial System and Status of Judges defining the mission and competence of the CCRB. The purpose of the CCRB, including the safeguarding of the constitutional order, constitutional rights and freedoms, the supremacy of the Constitution, has to be achieved within the limits of the competence of the CCRB, as established by the RB Constitution. It is the generally recognised rule and practice of democratic states governed by the rule of law. It is also well known in constitutional and public law that public authorities, including courts, cannot define their own competence according to the rule that "*everything that is not forbidden is allowed*" (the latter maxim is applicable to private relations). The powers of state organs arise from constitutional provisions that are explicit and, in rare cases, implicit, but nevertheless those powers have to be established by the constitution. In particular, the constitution has to be the source of any powers of the constitutional court. If interpreted otherwise, the principle of the rule of law, which is also established by Art. 7 of the RB Constitution, declaring that state organs and officials can pursue their activities only within the limits established by the Constitution and the laws enacted in accordance with the Constitution, would become meaningless.

In addition, the distinctive feature of the judiciary is that its mission is *the administration of justice* by settling legal disputes, including constitutional disputes; therefore, the judiciary has to be composed on professional basis and separated from political authorities. Unlike political bodies, the judiciary does not enjoy full discretion to form its own agenda, i.e. to choose issues to be settled without having received a motion from any party to the dispute. Otherwise, had the judiciary such a discretion, it would resemble or even become one of the branches of political power.

In light of these considerations, Art. 6 of the Code on the Organisation of Judicial System and Status of Judges *cannot be interpreted as granting power to the CCRB to adopt on its own initiative, when it deems it necessary for the achievement of its purpose, any act on any issue*. As mentioned already, the RB Constitution (Art. 116) neither provides for the CCRB the competence to confirm the results of presidential elections or to declare unconstitutional the establishment and activities of the Coordination Council (non-governmental public body), nor it foresees the possibility for the CCRB on its own initiative, without request of any competent authority (state organs indicated in paras. 4 and 6 of Art. 116 of the Constitution), to adopt such an act as the Position, which expresses the position of the CCRB on the currently topical constitutional, legal and political issues. Such an act of the CCRB is not foreseen by Art. 6 of the Code on the Organisation of Judicial System and Status of Judges either. Therefore, the assessment of the Position as a political rather than legal act remains untouched.

Moreover, Art. 6 of the Code on the Organisation of Judicial System and Status of Judges may be interpreted together with other relevant provisions of the same Code. In Art. 5 of this Code, the CCRB is defined as an organ for *judicial control of constitutionality of legal normative acts*, which exercises judicial power through constitutional judicial proceedings. Thus, the purpose of the CCRB, as defined in Art. 6 of the Code, cannot be pursued outside the mission of the CCRB, as defined in Art. 5 of the Code, i.e. the CCRB cannot have discretionary powers to act outside the limits of its mission to control constitutionality of legal normative acts through constitutional judicial proceedings.

Art. 22 of the Code is also relevant, as it defines *the competence of the CCRB*. In comparison to Art. 116 of the RB Constitution, Art. 22 of the Code on the Organisation of Judicial System and Status of Judges significantly *expands the competence of the CCRB*. Leaving aside the issue of constitutionality of such an expansion, it must be noted that Art. 22 of the Code, by expanding the competence of the CCRB, *does not provide for the power of the CCRB to adopt on its own initiative such acts as the Position*. In addition to the constitutional competence, para. 3 of Art. 22 of the Code grants to the CCRB the competence to exercise the preliminary constitutional control of the legislative acts and international treaties, to determine the facts of systematic or gross violations of laws by the local councils of deputies, to provide an official interpretation of decrees and edicts of the President concerning constitutional rights, freedoms and duties, to express the position on the acts of foreign states and international organisations affecting the interests of the RB with regard to their compliance with generally recognised principles and norms of international law, to verify the constitutionality of guidelines by the President for law-making and law-enforcement practice of judicial, law-enforcement and other state bodies, to decide on elimination of legal gaps, collisions and legal uncertainty in legal normative acts, to adopt annual reports to the President and the chambers of the Parliament on constitutional legality, to exercise other powers in accordance with the legislative acts. As follows from para. 3 of Art. 22 of the Code (and is clearly provided by para. 2 of Art. 24 of the Code, in accordance to which the CCRB has to adopt decisions on issues, specified in para. 3 of Art. 22 of the Code), all such issues have to be decided by adopting *a decision*, i.e. apart from the conclusions that have to be adopted on issues of the constitutional competence, the Code established an another form of an act of the CCRB – decisions that have to be adopted on issues belonging to additional competence of the CCRB, as provided by the Code. Thus, Art. 22 (para. 3) of the Code on the Organisation of Judicial System and Status of Judges has neither assigned to the competence of the CCRB such issues as the confirmation of the results of elections and the assessment of constitutionality of public bodies and associations, nor provided

for the right of the CCRB to adopt on its own initiative its acts in a form of position on the currently topical constitutional, legal and political issues.

In this context mention should be made that, according to Art. 24 of the Code, the CCRB may adopt *five types of acts*: conclusions (on issues of constitutional competence), decisions (on issues of additional competence granted by the Code), rulings (on procedural and other non-material issues of constitutional proceedings), requests and submissions (on issues addressed to other state organs, organisations and officials). Thus, under the legislation, *such form of an act of the CCRB as a position does not exist*. Consequently, by adopting the Position, the CCRB also breached Art. 24 of the Code on the Organisation of Judicial System and Status of Judges.

In addition, apart from the above described inconsistency with the requirements regarding the substance and the form of the acts of the CCRB, the adoption of the Position might be considered as being in breach of para. 7 of Art. 22 of the Code on the Organisation of Judicial System and Status of Judges, in accordance to which the CCRB is prohibited from stating its position on issues that may become the matter of consideration in accordance with the constitutional proceedings. Under the RB Constitution (para. 4 of Art. 116), the CCRB is granted the competence to assess constitutionality of acts of any state organ, including the Supreme Court (provided expressly), the Prosecutor General (provided expressly) and the Central Electoral Commission. Thus, by adopting the Position, the CCRB has expressed in advance its position on the legality of presidential elections and the activities of the Coordination Council, i.e. on the issues that can theoretically be indirectly addressed to the CCRB should the constitutionality of the respective acts of the Supreme Court, the Prosecutor General or the Central Electoral Commission be challenged.

Finally, *Art. 6 of the Code on the Organisation of Judicial System and Status of Judges cannot serve as a legal ground for the adoption of the CCRB Position*, in particular for the operative points of the Position concerning the confirmation of the results of the presidential elections and the declaration of unconstitutionality of the Coordination Council.

3. **Arts. 44 and 45 of the Law on the Constitutional Judicial Proceedings**: the former foresees the venue of plenary judicial sittings of the CCRB (usually the permanent seat of the CCRB, unless otherwise decided by the CCRB); the latter regulates the order of plenary judicial sittings of the CCRB (e.g., entering of judges into the court room, the obligation of participants of the proceedings to address the court in standing, their right to fix the course of the proceedings), but not even the adoption of any act of the CCRB.

Apparently, the provisions of Arts. 44 and 45 of the Law on the Constitutional Judicial Proceedings are *of procedural nature*. They do not establish the competence of the CCRB to adopt such act as the Position, which is not foreseen in any constitutional or legislative provision; they do not also establish the power of the CCRB to decide on legitimacy of elections or associations. It is worth noting that, by adopting the Position, *the CCRB did not rely on any other procedural rules* provided by the Law on the Constitutional Judicial Proceedings, e.g., the general rules for the consideration of cases and adoption of the court's acts. It can be explained by the fact that, naturally, the Law regulates only the adoption of conclusions and decisions (Arts. 74, 75, etc.) and other documents – rulings, requests and submissions (Art. 89), i.e. only such acts that are foreseen by Art. 24 of the Code on the Organisation of Judicial System and Status of Judges. In addition, the Position clearly is not an act of official interpretation of conclusions or decisions of the CCRB, therefore, it could not have been adopted under the special procedure for the adoption of such an act, as provided by Art. 81 of the Law on the Constitutional Judicial Proceedings. Thus, in general, the adoption of the Position does not fall within the scope of any procedure or any specific procedural rules established by the Law on the Constitutional Judicial Proceedings (the Law in more detail regulates the procedure of consideration of cases and issues assigned to the competence of the CCRB by Art. 116 (paras. 4 and 6) of the RB Constitution and by Art. 22 (paras. 1, 2 and 3) of the Code on the Organisation of Judicial System and Status of Judges). It means that the adoption of the Position *cannot be grounded on any rules of the Law on the Constitutional Judicial Proceedings*. Therefore, such act of the CCRB can be also considered as adopted in breach of Arts. 3 and 4 of the Law on the Constitutional Judicial Proceedings (the former defines the scope of the Law as the regulation of the procedures of the constitutional proceedings in cases falling within the competence of the CCRB; the latter provides for the principle of legality, in accordance with which the CCRB has to carry out the constitutional proceedings on the basis of the RB Constitution, the Code on the Organisation of Judicial System and Status of Judges, this Law and other legislative acts).

Finally, *neither Art. 44, nor Art. 45 of the Law on the Constitutional Judicial Proceedings provides for any legal basis for the adoption of the Position*.

Inadequacy and Substantial Incompatibility with the RB Constitution of the Confirmation of the Results of the Presidential Elections

As already indicated, *the first operative point* of the Position is *the confirmation of the results of the presidential elections* of 9 August 2020 (para. 2 of the Position). Apart from the absence, under the RB Constitution and laws, of the CCRB powers to decide on validity of elections (including the confirmation of voting results), this operative point of the Position can also be assessed with respect to its content.

Thus, the confirmation of the results of the presidential elections of 9 August of 2020 has been expressed by two sentences of para. 2 of the Position that allegedly: 1) on 9 August 2020 the people of Belarus, in accordance with the Constitution and electoral laws based on constitutional principles, expressed their free will by electing Mr. Lukashenko to the office of the RB President; 2) the democratic nature and legitimacy of presidential elections can be confirmed by the observance of the principles and norms of the RB Constitution in the electoral process. They can both be regarded as *a bare (or bald) statement of facts*, as *they are not substantiated by any argument or proof*.

The CCRB has insisted on the existence of two interrelated facts determining its judgment regarding the alleged legitimacy of the presidential elections: *first*, that the Belarus people have freely, by means of democratic elections, elected Mr. Lukashenko to the office of the RB President; *second*, the RB Constitution was strictly observed during the whole electoral process, including the counting and determination of the voting results. However, *none of these facts have ever been verified by the CCRB*; neither have they been verified by the Central Electoral Commission or the Supreme Court. Taking into account numerous well-known documented facts about the massive character of miscalculation and falsification of the voting results, in reality it remains beyond any reasonable doubt that the officially announced (by the Central Electoral Commission) results of the presidential elections of 9 August 2020 *do not reflect and distort in essence the actual will of the Belarus people*; by the same token, it also remains beyond any reasonable doubt that the principles of democratic elections, in particular those of free and fair elections (e.g., as provided by and follows from Art. 65 of the RB Constitution), have been *grossly violated*. Therefore, the statement of fact in para. 2 of the Position concerning the legitimacy of the presidential elections is *inadequate and even opposite to the real situation*. Just a bare statement on the alleged legitimacy is not capable of legitimising unfair elections.

The same can be said about the quotation, preceding this bare statement, of Art. 3 of the RB Constitution in para. 2 of the Position: the mere reliance on the constitutional principle that the people are the only source of State power and the sole possessor of sovereignty, which is exercised directly and through the representative and other state organs, *cannot change the*

opposite factual situation in case of falsified elections. Moreover, another relevant statement of the CCRB, which resembles to a fragment of the interpretation of the RB Constitution, is in fact *fictitious*: it is the statement that the RB as the "democratic state based on the rule of law" has in place the legal procedures, including through the realization of the right to judicial defence, for the protection of the constitutional rights of citizens in the electoral process. The above-mentioned refusal by the Supreme Court, given on 24 August 2020, even to open the case upon the request to review the decisions of the Central Electoral Commission regarding the results of the presidential elections is a self-evident proof of the opposite, i.e. in reality the constitutional guarantee of judicial defence of constitutional rights by challenging the decisions of the Central Electoral Commission is *fictitious*.

The inadequacy of the confirmation by the CCRB of the results of the presidential elections should further be seen in the light of the universal principle of the rule of law, which is also provided by Art. 7 of the RB Constitution, para. 1 of which proclaims that "the principle of the rule of law is established in the Republic of Belarus". In this regard, it can be recalled that on 13 September 2017 IV Congress of the World Conference on Constitutional Justice by consensus, including the participating delegation of the CCRB, adopted the Vilnius *Communiqué*, which *inter alia* states that, "Despite the fact that the principle of the rule of law is interpreted in each state in a specific manner, it nonetheless constitutes the cornerstone of every legal system in the modern world, where it is *integrally linked to democracy and the protection of human rights*. The rule of law is a generally recognised principle, *inseparable from the constitution itself*. As a fundamental constitutional principle, it requires that *the law be based on certain universal values*, thus it is essentially inherent to every constitutional issue."

Thus, the modern concept of the principle of the rule of law, to which the CCRB adhered, is *substantial (material) rather than formal*: i.e., the rule of law means not only formal and literal observance of legal acts, but rather includes the protection of such universal values as democracy and human rights. Consequently, it must be acknowledged that the formal approach taken by the CCRB in confirming the results of the presidential elections, i.e. the reliance (if any), without any verification and argumentation, on the (also formal) decisions of the Central Electoral Commission and the Supreme Court, *is not consistent with the very core of the principle of the rule of law* (democracy and human rights).

Therefore, in conclusion, by confirming the results of the presidential elections of 9 August 2020 the CCRB acted *in breach of the principle of the rule of law*, as established by para. 1 of Art. 7 of the RB Constitution, as well as *of a number of other related constitutional provisions*, such as: Art. 3 (para. 1), which, paradoxically, the CCRB referred to and which

establishes the principle of the sovereignty of people; Art. 1 (para. 1), which establishes the RB as a democratic state governed by the rule of law; Art. 4 (para. 1), which establishes the pluralist democracy; Art. 37 (para. 1), which provides for citizens' right to take part in the governance of the State; Art. 38, which provides for citizens' right to universal and equal elections; Art. 60 (para. 1), which establishes the right to judicial defence by a competent, independent and impartial court; Art. 65, which establishes the principle of free elections; Art. 81 (para. 1), which provides that the RB President has to be elected by the people directly on the basis of universal, free, equal and direct electoral right and secret ballot. Moreover, in the current factual situation the confirmation of the results of the presidential elections by the CCRB should be assessed as an act of assistance to Mr. Lukashenko in the usurpation of the state power, i.e. in terms of para. 2 of Art. 3 of the RB Constitution – as an act, directed at the change of the constitutional order and the achievement of state power by violent means and other breaches of the laws, which is punishable under law.

Substantial Incompatibility with the RB Constitution of the Proclamation of Unconstitutionality of the Coordination Council

As already indicated, *the second operative point* of the Position is *the declaration of the unconstitutionality of the establishment and activities of the Coordination Council* (para. 4 of the Position). Apart from the absence, under the RB Constitution and laws, of the CCRB powers to decide on the constitutionality of public bodies and associations (including, as in this case, the Coordination Council), this operative point of the Position can also be assessed with respect to its content. As in the case of the first operative point on the confirmation of the results of the presidential elections, it is worth to examine the second operative point on the declaration of the unconstitutionality of the Coordination Council both with regard to its adequacy to the factual situation and the substantial compatibility with the rule of law and the relevant constitutional provisions. Undoubtedly, both aspects (factual adequacy and substantial compatibility with the RB Constitution) of the assessment of the declaration by the CCRB of the unconstitutionality of the Coordination Council are closely interrelated.

First, as regards the factual basis of the declaration of the unconstitutionality of the Coordination Council, *the CCRB did not analyse any documents or evidence*, including the founding acts of the Coordination Council and the reasons for its establishment. As follows from the wording of para. 4 of the Position, the CCRB attempts to justify the proclamation of the

unconstitutionality of the Coordination Council through a one-sentence statement of fact that the Coordination Council allegedly pursues the aim of reviewing the results of the presidential elections and has been established in the order that is not provided by the Constitution and the electoral legislation.

Meanwhile, *the founding acts and the circumstances of the establishment of the Coordination Council do not support this statement of the CCRB*. As it is clear from the public statement of the mission of the Coordination Council (provided on its website, at https://rada.vision/), the Council has been established at the initiative of Ms Tsikhanouskaya (the leading opposition candidate in the presidential elections who was denied the judicial defence against the decisions of the Central Electoral Commission) as a united *representative body* of the Belarus people, having the purpose *to overcome the political crisis and to ensure cohesion in the society as well as to protect the sovereignty and independence of Belarus*. It is emphasised that the Coordination Council carries out its activities in accordance with the fundamental principles of the RB Constitution as well as that it neither pursues the aim to seize the state power by unconstitutional means nor incites acts violating public order.

In addition to that, *the founding Resolution of the Coordination Council* of 19 August 2020 (https://rada.vision/resolucyia) states in more detail the reasons for the establishment of the Coordination Council as well as its purpose and aims. The Resolution emphasises that the Coordination Council does not have the aim to change the constitutional order or the course of foreign policy of the country.

The Resolution of 19 August 2020 indicates *the following reasons for the establishment of the Coordination Council*: numerous violations of the electoral legislation recorded during the presidential elections of 9 August 2020; thousands of people detained and arrested for political reasons following the beginning of the electoral campaign; unacceptable violence by the law enforcement authorities against the participants of peaceful protests, which led to human casualties, and torture of those who have been detained; the loss of public confidence in the current authorities, which is expressed by the call for these authorities to resign; the non-recognition of the official results of the presidential elections of 9 August 2020 by many foreign states.

The Resolution of 19 August 2020 states that *the purpose* (mission) of the Coordination Council is “to restore the status of the Republic of Belarus as a democratic state governed by the rule of law”. For the achievement of this purpose, the Resolution declares *the following aims* that have been raised as basic demands formulated in the course of mass

demonstrations and supported by the majority of the Belarus society: 1) to cease political persecution of citizens by the authorities and to hold responsible those who are guilty for this persecution; 2) to release all the political prisoners as well as to annul the corresponding illegal judicial decisions and to provide compensation for all the victims; 3) to declare invalid the presidential elections of 9 August 2020 as well as to hold the new presidential elections in accordance with international standards and with the newly formed electoral commissions, including the Central Electoral Commission.

The Resolution of 19 August 2020 further states *the position* of the Coordination Council that the only way to overcome the political crisis is to immediately start negotiations, in order to develop mechanisms for the restoration of legality and holding new elections; avoidance of the negotiations with the Coordination Council is perceived as assuming of all responsibility by the current authorities for the deepening of political and economic crisis.

The Resolution of 19 August 2020 also states the intention of the Belarus people *to continue the realisation of the following civic rights* guaranteed by the RB Constitution until the new elections are proclaimed and other demands are met: 1) the right to work and the right to strike, the prohibition of forced labour (Art. 41 of the RB Constitution); 2) the right to peaceful assembly (Art. 35 of the RB Constitution); 3) the right to judicial defence (Art. 60 of the RB Constitution); 4) the right to free expression of opinion and convictions (Art. 33 of the RB Constitution); 5) the right to receive full and reliable information (Art. 34 of the RB Constitution); 6) the right to the disposal of one's property (Art. 13 of the RB Constitution).

The Regulation (Rules of Procedure) of the Coordination Council (with the amendments of 19 September 2020, https://rada.vision/reglament) repeats that the Council is a united representative body of the Belarus people, established in order to overcome the political crisis and to ensure cohesion in the society as well as to protect the sovereignty and independence of Belarus (para. 1). The Regulation also repeats that the Coordination Council carries out its activities in accordance with the fundamental principles of the RB Constitution as well as that the Council neither pursues the aim to seize the state power by unconstitutional means nor incites acts violating public order (para. 1). Para. 2 of the Regulation states that the members of the Coordination Council acknowledge the fact of unacceptable violations committed during the electoral campaign and the calculation of the votes casted in the presidential elections of 9 August 2020; it also states about the position of the members of the Council not to recognize the officially announced results of these elections as well as to regard as criminal the violence by the law enforcement authorities and to demand the release of all political prisoners. The members of the Coordination Council have also declared their

willingness to express the unequivocal position of the civic society with respect to the events in Belarus (para. 3 of the Regulation).

Thus, taking into account the founding acts of the Coordination Council (the Resolution of 19 August 2020 and the Regulation) and the public statement of its mission, the Coordination Council can be described as *the public body representing an impressively large segment of the population* (if not the overwhelming majority of the Belarus people), which *consolidates the civic society* with a purpose of an *ad hoc* nature – to (re)establish the rule of law and the democratic constitutional order by overcoming the current deep and unprecedented political (and constitutional) crisis caused by the manifestly unfair and falsified presidential elections of 9 August 2020 and the following political persecution and repressions against those who disagree with the officially announced results of those elections. The Coordination Council, accordingly, pursues *aims necessary for the accomplishment of its purpose*, such as the end of political repressions, the declaration of invalidity of the presidential elections and the new elections, to be held in compliance with the internationally recognised democratic standards. The Coordination Council sees the realisation of its mission and aims exclusively through *peaceful means*, in accordance with the RB Constitution, by representing the demands of the people through dialogue with the authorities and by implementing constitutional rights and freedoms, including the freedom of expression, the freedom of assembly and the right to strike.

In this regard it must be emphasised that there are no other means available to the Belarus people to express peacefully their opinion and demands to the authorities, except the establishment of such *ad hoc* public bodies as the Coordination Council: as already established, contrary to the statement of the CCRB in the Position (para. 3), the Belarus people are deprived of the means of judicial defence of their constitutional rights in the electoral process (it is impossible in practice to challenge before an independent tribunal the decision of the Central Electoral Commission regarding the approval of the results of the presidential elections and the rejection of complaints against this decision). Therefore, in the context of the fictitious constitutional guarantees and the total collapse of the constitutional order due to the refusal of all the state institutions, including the Central Electoral Commission and the Supreme Court, to fulfil their constitutional duties of protecting the democratic principles of elections, the establishment and the activities of such *temporary public representative institutions* as the Coordination Council constitutes a measure of *the last resort in peaceful self-defence of the civic society* against the arbitrariness of the official state institutions.

As regards the constitutional framework for its activities, the Coordination Council has to be regarded as *a temporary public body of a representative nature* with the purpose of

expressing and realising the demands of the Belarus people regarding the (re)establishment of the democratic constitutional order by overcoming the current deep political and constitutional crisis, which was established in pursuance of the freedom of association, as guaranteed by Art. 36 (para. 1) of the RB Constitution, and which aims at the realisation of the constitutional rights of the Belarus people, including the right to take part in the settlement of state affairs directly, as guaranteed by Art. 37 (para. 1) of the RB Constitution (the latter constitutional right logically includes the right to fair elections). In terms of Art. 4 (para. 1) of the RB Constitution, which the CCRB paradoxically refers to in the Position, the Coordination Council has to be regarded as *a public body reflecting the plurality of political institutions, ideologies and views*, as the essential element of democracy; while, in terms of Art. 5 (para. 1) of the RB Constitution, which the CCRB also paradoxically refers to in the Position, the Coordination Council is *the temporary association assisting with the expression of the political will of citizens*.

In conclusion, the declaration by the CCRB of the unconstitutionality of the Coordination Council is inadequate for several reasons. Contrary to the statement of the CCRB, the Coordination Council is not pursuing the aim of reviewing the results of the presidential elections (which, according to the assessment of the CCRB, have been allegedly determined in a regular manner and allegedly reflect the will of the Belarus people); *the purpose of the Coordination Council is much broader* – to (re)establish the democratic constitutional order by overcoming the current deep political and constitutional crisis. Alongside other aims for the achievement of this purpose (such as, for instance, the cessation of political repressions against the civic society), the Coordination Council seeks *the declaration of invalidity of the whole presidential elections*, the results of which have been essentially distorted and manifestly falsified; i.e. *there is no ground for the CCRB to oversimplify the aims of the Coordination Council*. Again, contrary to the statement of the CCRB, *the Coordination Council has been established in accordance with the RB Constitution* (as established above, the Coordination Council has been established in pursuance of the constitutional freedom of association, in terms of the RB Constitution, being the temporary association assisting in the expression of the political will of citizens and reflecting the plurality of political institutions, ideologies and views), while *the electoral legislation cannot be regarded as the legal ground for the establishment and activities of the Coordination Council* (as is clear from wide representative nature, the purpose and aims of the Coordination Council clarified above, the Council is not a subject of the electoral process).

Moreover, even reading para. 4 of the Position as implying that the CCRB regards the Coordination Council as an entity whose activities should be prohibited in terms of para. 2 of

Art. 3 of the RB Constitution as allegedly directed to the change of the constitutional order or the achievement of state power by violent means or by other breaches of law, no proof nor any statement of fact whatsoever can be found in the Position, which could substantiate such a characteristic of the Coordination Council. On the contrary, as already established from the public statement of mission and the founding acts of the Coordination Council, the Council sees the realisation of its mission and aims exclusively through peaceful means and in accordance with the RB Constitution, i.e. it is not pursuing the aim to seize the state power through unconstitutional means. Thus, *there is reasonable cause to conclude that the CCRB has not provided any proof for the factual activities of the Coordination Council to be considered unconstitutional*.

Second, the obvious deficiencies in the one-sentence characterisation of the Coordination Council, to a certain extent, predetermine the further deficiencies in the assessment of the CCRB of the constitutionality of the Coordination Council. The declaration of the unconstitutionality of the Coordination Council is preceded also by a one-sentence statement of the CCRB declaring that, allegedly, the RB Constitution does not tolerate the establishment of public organs or associations empowered to review the results of the presidential elections (para. 4 of the Position). This statement seems to be the sole argument on the basis of which the CCRB attempts to justify the declaration of the unconstitutionality of the Coordination Council.

However, even without examining the validity of this one-sentence statement of the CCRB, it is clear that *this statement is not applicable to the Coordination Council* and, therefore, *cannot serve as the argument substantiating the declaration of the unconstitutionality of the Council*: as already established above, the Coordination Council is not empowered (has no powers) to review the results of the presidential elections, i.e. the Council is not taking over any powers from state organs in this field. It is only logical that solely the aim to seek the declaration of invalidity of the manifestly unfair and falsified presidential elections cannot be defined as empowerment to review the results of those elections. Thus, *the CCRB declared the unconstitutionality of the Coordination Council without any sound constitutional arguments*.

For the further assessment of the substantial compatibility with the RB Constitution of the second operative point of the Position regarding the declaration of the unconstitutionality of the Coordination Council, it must be emphasised that this declaration of the CCRB, in particular in the case of the Coordination Council, inevitably presupposes *the restriction (if not the deprivation) of such fundamental constitutional freedoms, as the freedoms of expression, assembly and association*, which are at the core of the democratic constitutional order, as well

as the restriction of such other constitutional rights sought to be implemented by the Coordination Council, as the right to judicial defence, the right to receive full and reliable information, the right to strike. Even in absence of any argumentation provided by the CCRB in this regard (except the slogan in para. 4 of the Position about the need to prevent "the destructive impact" on the stability and sovereignty of the State, the civil peace and the constitutional order), it is worth examining whether any constitutional ground for the restriction or deprivation of the above mentioned constitutional rights and freedoms exists in the case of the declaration by the CCRB of the unconstitutionality of the Coordination Council.

Several provisions of the RB Constitution are relevant in answering this question:

1. Special provision of Art. 5 (para. 3) of the RB Constitution, which prohibits public associations aimed at violent change of the constitutional order or conducting a propaganda of war or social, ethnic, religious or racial hatred. As already established, the Coordination Council pursues its mission and aims exclusively through peaceful means and in accordance with the RB Constitution. In particular, the Council emphasises that it does not have the aim to change the constitutional order, neither does it pursue the aim of seizing the state power through unconstitutional means, nor does it incite acts violating public order. There is no reason to assign to the Coordination Council such activities as the propaganda of war or social, ethnic, religious or racial hatred. Thus, *Art. 5 (para. 3) of the RB Constitution cannot serve as a constitutional ground for the declaration of the unconstitutionality of the Coordination Council*.

2. The general constitutional ground for the restriction of human rights and freedoms, as established by Art. 23 (para. 1) of the RB Constitution, according to which "the restriction of personal rights and freedoms shall be permissible only in the instances specified by law for the interests of national security, public order, the protection of the morality, public health, rights and freedoms of other persons". Thus, the constitutional freedom of association, in pursuance of which the Coordination Council has been established, as well as other constitutional freedoms, such as the freedom of expression and the freedom of assembly (and constitutional rights, such as the right to judicial defence, the right to receive full and reliable information, the right to strike), sought to be implemented by the Coordination Council, *can be restricted for the interests of national security and public order, including the protection of constitutional order*.

However, Art. 23 (para. 1) of the RB Constitution has to be interpreted in the light of other relevant constitutional provisions, such as Art. 1 (para. 1), which establishes the RB as a democratic state governed by the rule of law, and Art. 7 (para. 1), which establishes the rule of

law. As already concluded, the modern concept of the principle of the rule of law includes the protection of such universal values as democracy and human rights. Therefore, the interests of national security and public order, including the protection of constitutional order, as the ground for the restriction of human rights and freedoms, should be *interpreted in a restrictive manner* as the protection of *the democratic constitutional order*, i.e. *national security of a democratic state and public order in a democratic society*, rather than such interests based solely on the subjective perception of security and public order or the perception thereof being within the discretion of state authorities.

In particular, Art. 23 (para. 1) of the RB Constitution has to be read in conjunction with Art. 8 (para. 1) of the RB Constitution, according to which the RB acknowledges *the priority of the universally recognised principles of international law* and ensures the compliance of its legislation with those principles, and Art. 21 (para. 3) of the RB Constitution, which obliges the state to guarantee the rights and freedoms of citizens, as specified by international obligations of the state. In this regard, at least two international legal instruments codifying the universally recognised principles of human rights law are relevant. First of them is *the Universal Declaration of Human Rights*, Art. 29 (para. 2) of which proclaims that "in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare *in a democratic society*". The second relevant international legal instrument is *the International Covenant on Civil and Political Rights*, which similarly establishes the necessity in a democratic society as the criterion for the legitimacy of restrictions of relevant human rights and freedoms: 1) Art. 22 (para. 2) of the Covenant proclaims that no restrictions may be placed on the exercise of the right to freedom of association with others "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 (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others"; 2) Art. 21 of the Covenant proclaims that no restrictions may be placed on the exercise of the right of peaceful assembly "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 (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Thus, according to Art. 23 (para. 1) of the RB Constitution, as interpreted in the light of Art. 8 (para. 1) and Art. 21 (para. 3) of the RB Constitution, the restrictions placed on constitutional rights and freedoms should be *compatible with and not more stringent than the*

universally recognised standards of human rights protection, i.e. *Art. 8 (para. 1) of the RB Constitution confirms the criterion of necessity in a democratic society* of the legitimacy of the restrictions on constitutional rights and freedoms.

After identifying this constitutional criterion for the restriction of constitutional rights and freedoms, the purpose and aims as well as other relevant characteristics of the Coordination Council have to be recalled. As already established, the purpose of the Coordination Council is to (re)establish the rule of law and the democratic constitutional order, while its aims include the end of political repressions, the declaration of invalidity of the presidential elections and the new elections to be held in compliance with the internationally recognised democratic standards; the establishment and the activities of the Coordination Council constitute the measure of the last resort in peaceful self-defence of the civic society against the arbitrariness of the official state institutions. It was also established that, in terms of Art. 4 (para. 1) of the RB Constitution, the Coordination Council has to be regarded as a public body reflecting the plurality of political institutions, ideologies and views, as the essential element of democracy; while in terms of Art. 5 (para. 1) of the RB Constitution, the Coordination Council is the temporary association assisting in the expression of the political will of citizens. Consequently, *it is only logical to conclude that the declaration of the unconstitutionality of the Coordination Council whose mission is to defend, by implementing through peaceful means the constitutional rights and freedoms, the rule of law and democracy; the latter declaration of the CCRB does not meet the constitutional criterion of necessity in a democratic society and, therefore, cannot be justified by the aim of the protection of national security and public order, including the democratic constitutional order*. For these reasons *Art. 23 (para. 1) of the RB Constitution cannot serve as a constitutional ground for the declaration of the unconstitutionality of the Coordination Council*.

In conclusion, by declaring the unconstitutionality of the Coordination Council the CCRB acted *in breach of the constitutional principles of the rule of law and democracy*, as established by Art. 1 (para. 1) and Art. 7 (para. 1) of the RB Constitution, as well as in breach of Art. 5 (para. 3) of the RB Constitution, which permits specifically to prohibit only the public associations aimed at violent change of the constitutional order or conducting a propaganda of war or social, ethnic, religious or racial hatred, and in breach of Art. 23 (para. 1), Art. 8 (para. 1) and Art. 21 (para. 3) of the RB Constitution, which in general make it permissible to restrict constitutional rights and freedoms for such purposes necessary in a democratic society as to protect national security and public order. In addition, the CCRB also breached *a number of other related constitutional provisions*, such as: Art. 4 (para. 1), which establishes the pluralist

democracy including the plurality of political institutions, ideologies and views; Art. 5 (para. 1), which proclaims that public associations assist in the identifications and expression of the political will of citizens; Art. 5 (para. 3), which prohibits the public associations aimed at violent change of the constitutional order or conducting a propaganda of war or social, ethnic, religious or racial hatred; Art. 21 (para. 1), which proclaims the ensuring rights and freedoms of citizens to be the highest purpose of the state; Art. 33 (para. 1), which guarantees the freedom of expression; Art. 35, which guarantees the freedom of assembly; Art. 36 (para. 1), which guarantees the freedom of association; Art. 37 (para. 1), which provides for citizens' right to take part in the governance of the State.

In this context, it can be mentioned that, as stated in the preamble of the Universal Declaration of Human Rights, "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law". In the light of Art. 8 (para. 1) of the RB Constitution, this international legal provision once more confirms the constitutionality and legitimacy of the establishment and the activities of the Coordination Council as the means of peaceful self-defence of the Belarus people against the arbitrariness of state authorities.

Conclusion: Unconstitutionality of the CCRB Position

In conclusion, it is a paradox that the CCRB, whose constitutional mission is to safeguard the constitutional order, the supremacy of the Constitution and the rule of law, by adopting the Position, has itself committed *a manifest and grave breach of the RB Constitution and the general principle of the rule of law*. This is evident from the following argumentation.

First, the adoption of the Position has *no constitutional or any other legal ground*. The Position is aimed at the confirmation of the results of the presidential elections of 9 August 2020 and the declaration of the unconstitutionality of the Coordination Council. However, the RB Constitution (Art. 116) does not assign to the competence of the CCRB neither the settlement of electoral disputes (including verification and confirmation of voting results) nor the control of constitutionality of public bodies or associations. Such competence is not granted to the CCRB by any relevant law, including the Code on the Organisation of Judicial System and Status of Judges and the Law on the Constitutional Judicial Proceedings.

Moreover, neither the RB Constitution, nor any relevant law (including the Code on the Organisation of Judicial System and Status of Judges and the Law on the Constitutional Judicial Proceedings) grants to the CCRB the power to adopt, on its own initiative, such an act as the Position, which is the expression of the position of the court on currently topical constitutional, legal and political issues, i.e. neither the Constitution nor any law foresees the possibility of and the procedure for the adoption by the CCRB of the act of such a content and form.

Therefore, from the standpoint of the RB Constitution and the legislation in force, the adoption of the Position by the CCRB is considered to be an *ultra vires* act, exceeding the powers established by the Constitution (paras. 4 and 6 of Art. 116), the Code on the Organisation of Judicial System and Status of Judges (in particular, Arts. 5, 6, 22, 24 thereof), the Law on the Constitutional Judicial Proceedings (in particular, Arts. 3, 4, 74, 75 thereof).

Second, if assessed with respect to its content, the first operating point of the Position (para. 2) on the confirmation of the results of the presidential elections of 9 August 2020 is based on a bare statement of facts about the allegedly expressed free will of the Belarus people to elect Mr. Lukashenko and the alleged strict observance of the RB Constitution in the electoral process, which is made *without any verification and argumentation*; meanwhile, the statement on the legitimacy of the presidential elections is *inadequate and even opposite to the real situation*. By the same token, the formal approach taken by the CCRB in confirming the results of the presidential elections, i.e. the reliance (if any) on the (also formal) decisions of the Central Electoral Commission and the Supreme Court, is not consistent with the very core of the principle of the rule of law (democracy and human rights).

Third, if assessed with respect to its content, the second operating point of the Position (para. 4) on the declaration of the unconstitutionality of the Coordination Council is also inconsistent with the very core of the principle of the rule of law (democracy and human rights). Again, as in case of the confirmation of the results of the presidential elections, the CCRB decided on the unconstitutionality of the Coordination Council *without any examination of facts and without providing any constitutional arguments*. Only several bare statements, without any evidence and argumentation, cannot serve as the reason to outlaw any public body or association in a democratic state governed by the rule of law, which is proclaimed by the RB Constitution.

As regards the description of the Coordination Council, the CCRB restricted itself by stating in one sentence that, allegedly, the aim of the Council is to review the results of the

presidential elections and that, allegedly, the Council has been established not in accordance with the order provided by the RB Constitution and the electoral legislation. Apart from not being substantiated by any evidence, this statement is also *far from reality*, i.e. inadequate. Meanwhile, as follows from the public statement of its mission and its founding acts (the Resolution of 19 August 2020 and the Regulation), the Coordination Council is *a temporary public representative body*, expressing the will of the Belarus people, the purpose of which is to (re)establish the democratic constitutional order by achieving, through exclusively peaceful means taken in pursuance of such constitutional freedoms as those of expression and assembly, the following main aims necessary to overcome the current deep political and constitutional crisis: to end the political repressions against the civic society as well as to declare invalid the manifestly falsified presidential elections of 9 August 2020 and to hold the new presidential elections in accordance with international democratic electoral standards. Thus, *there is no ground to oversimplify the purpose of the Coordination Council*: the purpose is not to review the results of the presidential elections; the purpose is much broader in scope – to (re)establish the rule of law and democracy through, among other means, achieving the cessation of the political repressions and the invalidation of manifestly unfair presidential elections. Therefore, there is also *no ground to assume that the electoral legislation can be applicable to the Coordination Council*, as it does not claim to be a subject of the electoral process and has a significantly wider purpose. *Nor there is any ground to state that the Coordination Council is lacking the constitutional basis for its activities*. On the contrary, the Coordination Councils is to be presumed to be established in pursuance of the freedom of association, as guaranteed by Art. 36 (para. 1) of the RB Constitution. In terms of Art. 4 (para. 1) and Art. 5 (para. 1) of the RB Constitution, the Coordination Council has to be regarded as a public association reflecting the plurality of political institutions, ideologies and views, as the essential element of democracy, and assisting in the expression of the political will of citizens. In the current circumstances, the establishment and the activities of the Coordination Council constitutes a measure of the *last resort in peaceful self-defence of the civic society* against the arbitrariness of the official state institutions.

More important is the fact that the Coordination Council is neither granted, nor it has assumed for itself the powers to review the results of the presidential elections. Therefore, one more single-sentence statement by the CCRB that the RB Constitution, allegedly, does not tolerate the establishment of public organs or associations empowered to review the results of the presidential elections *is not applicable with regard to the Coordination Council* and, therefore, cannot serve as the argument substantiating the declaration of the unconstitutionality of the Council.

However, and most importantly, *the CCRB has failed at all to substantiate the declaration of the unconstitutionality of the Coordination Council against the background of the constitutionally permitted restrictions on the fundamental constitutional rights and freedoms*, in particular the constitutional freedoms of expression, assembly and association, which are at the core of democracy. The CCRB neither refers to, nor interprets the constitutional provisions that are relevant in this respect. Meanwhile, two important conclusions can be made which evidently demonstrate the substantial incompatibility of the declaration by the CCRB of the unconstitutionality of the Coordination Council with the fundamental constitutional principles of the rule of law, democracy and the respect for human rights. First, *the declaration of the unconstitutionality of the Coordination Council manifestly does not fall within the scope of Art. 5 (para. 3) of the RB Constitution*, which prohibits public associations aimed at violent change of the constitutional order or conducting a propaganda of war or social, ethnic, religious or racial hatred, as there is no ground to assign such activities to the Coordination Council. Second, the declaration of the unconstitutionality of the Coordination Council *does not meet the general constitutional criterion of the legitimacy of the restrictions on constitutional rights and freedoms – that of necessity in a democratic society*, which follows from Art. 23 (para. 1) of the RB Constitution, as interpreted in conjunction with Art. 1 (para. 1), Art. 7 (para. 1), Art. 8 (para. 1) and Art. 21 (para. 3) of the RB Constitution (the constitutional principles of the rule of law, democracy and the priority of international obligations). It is more than clear that the prohibition of the public body (association) whose mission is to defend, by implementing through peaceful means the constitutional rights and freedoms, the rule of law and democracy, cannot be considered necessary in a democratic society (to the contrary, one might presuppose that the activities of such public bodies and associations may be perceived as necessary for the functioning of democracy). Therefore, under the RB Constitution, *the declaration of the unconstitutionality of the Coordination Council cannot be justified by the aim of protection of national security and public order, including the democratic constitutional order*.

In general, apart from *exceeding its constitutional competence* established by Art. 116 (paras. 4 and 6) of the RB Constitution, the CCRB, by adopting the Position, has also breached *a number of other constitutional provisions*, including: Art. 1 (para. 1), which establishes the RB as a democratic state governed by the rule of law; Art. 3 (para. 1), which establishes the principle of the sovereignty of people; Art. 4 (para. 1), which establishes the pluralist democracy including the plurality of political institutions, ideologies and views; Art. 5 (para. 1), which proclaims that public associations assist in the identifications and expression of the political will of citizens; Art. 5 (para. 3), which prohibits the public associations aimed at violent change of the constitutional order or conducting a propaganda of war or social, ethnic,

religious or racial hatred; Art. 7 (para. 1), which proclaims the principle of the rule of law; Art. 7 (para. 2), in accordance to which state organs and officials can pursue their activities only within the limits established by the Constitution and the laws enacted in accordance with the Constitution; Art. 8 (para. 1), according to which the RB acknowledges the priority of the universally recognised principles of international law and ensures the compliance of its legislation with those principles; Art. 21 (para. 1), which proclaims the ensuring rights and freedoms of citizens to be the highest purpose of the state; Art. 21 (para. 3), which obliges the state to guarantee the rights and freedoms of citizens, as enshrined in the RB Constitution and laws and specified by international obligations of the state; Art. 33 (para. 1), which guarantees the freedom of expression; Art. 35, which guarantees the freedom of assembly; Art. 36 (para. 1), which guarantees the freedom of association; Art. 37 (para. 1), which provides for citizens' right to take part in the governance of the State; Art. 38, which provides for citizens' right to universal and equal elections; Art. 60 (para. 1), which establishes the right to judicial defence by a competent, independent and impartial court; Art. 65, which establishes the principle of free elections; Art. 81 (para. 1), which provides that the RB President has to be elected by the people directly on the basis of universal, free, equal and direct electoral right and secret ballot. The Position can, therefore, be considered as being in grave breach of the fundamentals of the constitutional order.

Thus, as the Position does not have any legal basis, it has to be perceived as *a political position* – a political act in support of Mr. Lukashenko, which also proves *the total dependence* of the CCRB on the said person. This is natural due to the fact that Mr. Lukashenko has been the factual leader of the state for the last 26 years with extremely wide powers (as regards the CCRB, under the RB Constitution (para. 3 of Art. 116), the President appoints half of the judges of the CCRB (6 out of 12), while another half is appointed by the upper chamber of the Parliament – the Council of the Republic, a part of which is also appointed by the President). Moreover, in the current factual situation the adoption of the Position by the CCRB, as well as similar acts of the Central Electoral Commission and the Supreme Court in approving the falsified results of the presidential elections and refusing to verify them, should be assessed as *the assistance to Mr. Lukashenko in his usurpation of the state power*, i.e. in terms of para. 2 of Art. 3 of the RB Constitution – as an act, directed at the change of the constitutional order and the achievement of state power by violent means and other breaches of the laws, which is punishable under law.

Finally, the adoption by the CCRB of the Position is *an arbitrary act*. In accordance with the general principle of law *ex injuria jus non oritur* (illegality cannot be a source of law), the

Position, as a manifest and grave breach of the RB Constitution and the general principle of the rule of law, *cannot give rise to any legal consequences*. In particular, it cannot serve as an instrument for the legitimisation of the officially announced (by the Central Electoral Commission) results of the presidential elections of 9 August 2020, i.e. it is not capable to legitimise Mr. Lukashenko as the head of the state. Nor can the Position be the basis for the repressions against those Belarus people who protest against unfair elections and demand new elections. More specifically, the Position cannot give any ground for the prosecution of the members of the Coordination Council or other persons involved in or associated with the activities of the Coordination Council.

This expert opinion reflects my personal academic view.

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Vilnius, 4 October 2020