

Mandates of the Special Rapporteur on the situation of human rights in Belarus; the Working Group on Arbitrary Detention; the Special Rapporteur on the right to education; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

REFERENCE:
AL BLR 6/2019

28 October 2019

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the situation of human rights in Belarus; Working Group on Arbitrary Detention; Special Rapporteur on the right to education; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council resolutions 41/22, 42/22, 26/17, 33/9 and 34/19.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received regarding **the situation of children arrested and detained in relation to drug offences**.

According to the information received:

Ordinance No. 6 of 28 December 2014 toughened criminal responsibility for offenses related to drugs originally spelled out in article 328 of the Criminal Code, notably by lowering the age of criminal responsibility for such offenses from 16 to 14 years. The willingness to toughen conditions of detention for drug-related offenders was explicitly stated by President Lukašenka who mentioned that “unbearable conditions need to be created for them [individuals convicted for drug-related crimes] in places where they serve their sentences” and that conditions should be made so intolerable that they would rather “ask for death”.¹

Based on this ordinance and article 328 of the Criminal Code, children have been sentenced to lengthy prison terms of 8 to 11 years often with evidence showing that the child was in possession of a small amount of drugs that would be commensurate with an amount for personal use. The national law does not establish threshold quantities to determine the difference between the possession of drugs for personal use or for trafficking, thereby criminalizing any possession of drugs. Section 4 of article 328 foresees as an aggravating circumstance the commission of the crime as part of an organized group, a provision meant to fight international drug trafficking, without however providing a clear definition of the term “organized group”. As a result of this legislation, harsh sentences have been handed down to children who are first time offenders, have committed no

¹ <https://www.interfax.by/news/belarus/1173223>

violence, have not profited economically and whose participation in a criminal organization was not clearly demonstrated in the course of the investigation.

Additionally, in some cases, procedural guarantees have not been respected, with parents or legal guardians not informed promptly of the arrest of their child, delay in the appointment of lawyers and children being detained alongside adults in the pre-trial phase. Moreover, the evidence presented to the courts to sentence some children remained vague, referring to unidentified individuals, unspecified places and to circumstances not established reliably.

Some children detained for drug-related offences have been placed in the juvenile penal colony No. 2 in Babrujsk, where conditions of detention have been reported as poor. In detention, access to health care has been reported as limited in quality and frequency. Some children suffering from chronic disease were not provided with the proper medical treatment. Additionally, a minor wrongdoing has been used by the penitentiary administration as a justification for sanctioning, such as spending several days or weeks in solitary confinement cells. The cancellation of family's visiting rights was reported as another frequent sanction. Children are forced to work long hours in physically-demanding jobs, at times without appropriate protection equipment, for a meagre wage and to the detriment of their health, access to education and access to recreational and leisure activities.

We are concerned about the strong position taken by your Excellency's Government towards drug offenders and that the issue of drug use and dependence is treated as a criminal matter as opposed to a health issue which should be addressed with rights-based measures.

Moreover, we are further concerned that the enforcement of this position seems to be applied to children without due consideration of their specific status and needs, especially in view of the Committee against Torture and the Human Rights Committee having consistently found that conditions of detention can amount to inhuman and degrading treatment. The sentences pronounced seem disproportionate and not taken with the best interests of the child in mind.

We are particularly concerned that by implementing this heavy-handed approach towards children some of their basic rights have been violated, before, during and after trial. We are equally concerned about the conditions of detention of these children since access to health care, education and recreational activities does not seem to be guaranteed, while they are forced to work in inappropriate conditions. The apparent lack of alternatives to detention for these children also raises concerns.

We welcome the announcement made in the framework of the amnesty programme launched on 25 July 2019 to reduce by one year the prison terms of individuals sentenced under parts one, two and three of article 328 and to cut by two years the terms of individuals sentenced under article 328 who were children at the time of the offense. We also take note of the public recognition of the severity of the law and its application by President Lukašenka at the beginning of September and the

announcement of a possible revision of the law. We hope this will be the opportunity to address some of the issues mentioned above.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for the observations of your Excellency's Government on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. In particular, please provide information on the way the best interest of the child is taken into consideration in cases of children sentenced under article 328 of the Criminal Code.
3. Please provide information on the steps taken to develop a fully-fledged juvenile justice system, notably alternatives to detention available to children sentenced under article 328 of the Criminal Code.
4. Please indicate what measures have been taken to ensure oversight of conditions of detention, including access to health care in detention, particularly in the case of children deprived of their liberty.
5. Please indicate what measures are in place to ensure that all detainees, and in particular detainees for whom education is compulsory under Belarus legislation, have access to education.
6. Please provide gender-differentiated statistics on the number of children sentenced under each sub-section of article 328 of the Criminal Code since the introduction of Ordinance No. 6. Please include information about the length of the sentence of these children and their age at the time of their conviction.
7. Please provide detailed gender and age-differentiated statistics on the number of children currently in detention under article 328 of the Criminal Code. In addition, please provide information on the location of their detention.
8. Please provide information on the measures taken to provide medical treatment for people who use drugs and how these measures are evidence-based and respectful of the rights of drug users.
9. Please indicate how public health, harm reduction and gender-sensitive approaches are incorporated into Belarus' drug strategies.

This communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their recurrence, and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

We would like to inform your Excellency's Government that having transmitted the information contained in the present communication to the Government, the Working Group on Arbitrary Detention may also transmit specific cases relating to the circumstances outlined in this communication through its regular procedure in order to render an opinion on whether a deprivation of liberty was arbitrary or not. The present communication in no way prejudices any opinion the Working Group may render. The Government is required to respond separately for the urgent appeal procedure and the regular procedure.

We may publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

Please accept, Excellency, the assurances of our highest consideration.

Anaïs Marin
Special Rapporteur on the situation of human rights in Belarus

Leigh Toomey
Vice-Chair of the Working Group on Arbitrary Detention

Koumbou Boly Barry
Special Rapporteur on the right to education

Dainius Puras
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

Nils Melzer
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw your attention to relevant articles of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) both ratified by Belarus on 12 November 1973, to articles of the Convention on the Rights of the Child (CRC) ratified by Belarus on 1 October 1990, to rules of the United Nations Standard Minimum Rules for the Treatment of Prisoners (so-called Mandela Rules) adopted by the General Assembly resolution 70/175, to rules of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (so-called Beijing Rules) adopted by General Assembly resolution 40/33 of 29 November 1985, to rules of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty adopted by General Assembly resolution 45/113 of 14 December 1990 (so-called Havana Rules), and to rules of the United Nations Standard Minimum Rules for Non-custodial Measures (so-called Tokyo Rules).

Article 1 of the CRC defines a child as “human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”. A juvenile is defined in rule 2.2 (a) of the Beijing Rules as “a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult”.

There are several considerations regulating the decision-making process leading to deprive a child of his or her liberty. First and foremost, the arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time (CRC, art. 37 (b); Havana Rule 1). This decision should be imposed only after careful consideration and shall be limited to the possible minimum (Beijing Rule 17 (b)). Moreover, as in all decisions affecting children, such a decision must be taken with the best interests of the child in mind as the primary consideration (CRC, art. 3). This is equally valid for juveniles since their well-being shall be the guiding factor in the consideration of her or his case (Beijing Rule 17.1 (d)). Moreover, deprivation of liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response (Beijing Rule 17.1 (c)).

States shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law (CRC, art. 40.3). In particular, State Parties are requested to develop measures dealing with such children without resorting to judicial proceedings (CRC 40.3 (b)). This means that States shall make available to children a variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence (CRC, art. 40.4). The necessity to provide a wide range of non-custodial measures is further stressed in the so-called Tokyo Rules (Rules 2.3 and 2.4).

If placed in detention, children and juveniles shall be treated in a manner which takes into account the need of persons of his or her age (CRC, art 37 and ICCPR, art 10.3). Children also have the right to maintain contact with their family through correspondence and visits (CRC, art. 37). Treatment of children in detention should be consistent with the promotion of their sense of dignity and worth and it should encourage their reintegration and constructive role in society (CRC, art. 40). Moreover, their detention should not prejudice their right to the enjoyment of the highest attainable standard of physical and mental health (ICESCR, art.12). The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health stressed the negative impact the placement in penal institutions could have on the mental well-being of children. (A/HRC/38/36, para. 62)

Article 13 of the ICESCR recognizes the right of everyone to education. In accordance with subparagraph 2(b) of this article, secondary education shall be made generally available and accessible to all by every appropriate means. Additionally, under subparagraph 2(d) fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

As exposed above, due to their specific status, children and juveniles enjoy a higher degree of protection. However, in all cases, States should also bear in mind the rules spelled out in the Standard Minimum Rules for the Treatment of Prisoners (so-called Mandela Rules). These foresee, among a range of other provisions, access to proper health care (Rules 24-35), regular contacts with friends and family (Rules 58-63) and the provision of education (Rules 104-105).

As such we wish to draw your Excellency's government to the reviewed Standard Minimum Rules for the Treatment of Prisoners (as amended and adopted by the UN General Assembly on 5 November 2015 and renamed the "Mandela Rules") provide inter alia for a separation of prisoners taking into account of their sex, age, criminal record, the legal reasons for their detention and the necessities of their treatment (rule 11). We also refer to paragraph 28 of the General Assembly resolution 68/156 (2014) which emphasizes that conditions of detention must respect the dignity and human rights of persons deprived of their liberty and calls upon States to address and prevent detention conditions that amount to torture or cruel, inhuman or degrading treatment or punishment.

Regarding children who use drugs, the right to health as contained in article 12 of the ICESCR in conjunction with article 2.2 of the same Covenant, imposes the immediate obligation on States to respect, protect and fulfil the right to health of all people without discrimination. Drug use or drug dependence cannot constitute grounds for curtailing a person's right to access medical treatment.

The Special Rapporteur on the right to physical and mental health has highlighted that incarceration discourages people who use drugs from seeking and accessing medical services and treatment when required. In addition, the imposition of criminal penalties for drug use and possession lead to an increased risk of illness among people who use drugs

and perpetuates many of the major risks associated with drug use, including stigma. Stigma impedes access to treatment and worsens health conditions, violating the right to health of people who use drugs. The right to health requires States to adopt the least restrictive approach where alternative limitations on the enjoyment of the right to health are available. Less restrictive approaches to drug control, including decriminalization or depenalization, should be considered to effectively prevent risky behavior by people who use drugs and to reduce the harmful effects associated with drug use (See A/65/255).

Finally, the United Nations Office on Drugs and Crime (UNODC) jointly with the World Health Organization (WHO) have recognized the ineffectiveness of imprisonment by itself in addressing drug use and dependence and have stressed that providing treatment and care as alternatives to conviction or punishment are as important to recognizing the right to health of people who use drugs. They consider treating drug use and dependence as the best way for interrupting the drug use/criminal justice cycle (see “Treatment and care for people with drug use disorders in contact with the criminal justice system. Alternatives to Conviction or Punishment”).