

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Working Group on Arbitrary Detention; the Special Rapporteur on the situation of human rights in Belarus; the Special Rapporteur in the field of cultural rights; and the Special Rapporteur on the rights to freedom of peaceful assembly and of association

REFERENCE:
AL BLR 3/2021

12 March 2021

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Working Group on Arbitrary Detention; Special Rapporteur on the situation of human rights in Belarus; Special Rapporteur in the field of cultural rights; and Special Rapporteur on the rights to freedom of peaceful assembly and of association, pursuant to Human Rights Council resolutions 43/4, 42/22, 44/19, 37/12 and 41/12.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the practice of prosecuting individuals displaying white-red-white flags and other symbols of the civic protest movement, as well as the lack of legal proceedings to investigate, prosecute and punish offences committed against individuals displaying such symbols.

Concerns regarding allegation of torture and ill-treatment against detained protesters in the aftermath of the August 2020 Presidential elections were raised in a communication BLR 6/2020, sent to your Excellency's Government on 27 August 2020. We thank your Excellency's Government for its reply dated 31 August 2020, however we remain concerned in light of the new information received.

According to the information received:

After the presidential election on 9 August 2020 in Belarus, one way in which individuals expressed their disagreement with the election outcomes was by displaying the white-red-white flag associated with the political opposition, referring to what was the Belarusian Republic's national flag during its early years of independence, in 1918-1919, and in 1991-1995.

As a response, police have over the last months reportedly sought to remove such flags, and have arrested and fined numerous individuals for publicly displaying them. The authorities have justified the practice with reference to article 23.34 of the Code of Administrative Offences, which penalises the breach of the rules for the organisation or execution of mass events.

On 15 September 2020, the head of the administration of the Central district of Minsk, Dmitry Petrusha, reportedly made a public statement indicating that flags can be legally hung inside of an apartment, but not on the facades of houses or buildings. It is reported that individuals who had complied with these instructions were nevertheless arrested and fined. In some districts of Minsk, law enforcement reportedly visited apartments in the evenings to demand that residents remove anything that may be in white and red from the windows. Homes displaying flags or white-red-white symbols have reportedly also been vandalised.

In response to complaints about allegations of undue intrusions into homes, law enforcement agencies have reportedly refused to investigate incidents and charge those responsible.

Under the new Code of Administrative Offences, which entered into force on 1 March 2021, the use of prohibited symbols now reportedly constitutes an administrative offence, which carries a penalty of fines in Belarusian Roubles up to the equivalent of 225 USD for private persons and the equivalent of 680 USD for legal entities.

Without prejudice to the accuracy of the information received, we express concerns regarding the criminalisation of public expressions of political dissent in Belarus. In this regard, we recall that UN Special Procedure mandate holders have previously expressed their concern regarding alleged mass violations against political opposition and individuals expressing political dissent. These allegations included serious restrictions on the freedom of expression, to take part in the development of the community to which a person belongs, the absolute freedom to hold opinions of any kind as well as freedom from arbitrary detention. In this regard, we remind your Excellency's Government that the freedoms of opinion and expression as well as the right of the person to liberty and security are indispensable for the full development of the person, and are essential for the principles of democracy and for human rights. In particular, we wish to highlight our concerns at the new restrictions contained in the Code of Administrative Offences, which may be used to prosecute political dissent.

We are further concerned about the lack of action from law enforcement officials concerning alleged undue interference into people's right to privacy. We are seriously concerned that the lack of legal proceedings against such abuse will *de facto* provide impunity for harms committed against individuals holding dissenting political opinions.

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 your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide information on the steps taken, if any, to ensure the protection of those expressing political opinions, including through the display of flags or other symbols.
3. Please provide information on the measures taken to investigate allegations that law enforcement may have refused to investigate, prosecute or punish harms committed by private individuals against individuals expressing political dissent.

4. Please provide information on the measures taken to ensure that the revised Code of Administrative Offences is compliant with international human rights norms and standards.

We would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). 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 re-occurrence 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.

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

Irene Khan
Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Elina Steinerte
Vice-Chair of the Working Group on Arbitrary Detention

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

Karima Bennoune
Special Rapporteur in the field of cultural rights

Clement Nyaletsossi Voule
Special Rapporteur on the rights to freedom of peaceful assembly and of association

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we refer to the International Covenant on Civil and Political Rights (ICCPR), ratified by Belarus on 12 November 1973.

Without expressing at this stage an opinion on the facts of the case and on whether the reported detentions were arbitrary or not, we would like to appeal to your Excellency's Government to take all necessary measures to guarantee the right of detained individuals in this case not to be deprived arbitrarily of his or her liberty and to fair proceedings before an independent and impartial tribunal, in accordance with articles 9, 10 and 11 of the Universal Declaration of Human Rights (UDHR) and articles 9 and 14 of the ICCPR.

In this connection, we also recall that Human Rights Committee's General Comment no. 35 affirms that arrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the Covenant is arbitrary, including freedom of opinion and expression (art. 19 of the ICCPR), freedom of peaceful assembly (art. 21) and freedom of association (art. 22).

We would also like to refer to Article 19 of the ICCPR which protects the rights to freedom of opinion and expression. The freedom of opinion is enshrined in article 19 (1). The provision states that "everyone shall have the right to hold opinions without interference". As highlighted by the Human Rights Committee "[t]his is a right to which the Covenant permits no exception or restriction" (Human Rights Committee, General Comment no. 34 (2011) para 9). The Committee further highlights that

"No person may be subject to the impairment of any rights under the Covenant on the basis of his or her actual, perceived or supposed opinions. All forms of opinion are protected, including opinions of a political ... nature. It is incompatible with paragraph 1 to criminalize the holding of an opinion. The harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of article 19, paragraph 1.

Any form of effort to coerce the holding or not holding of any opinion is prohibited." (*id.* paras. 9 and 10)

The right to freedom of expression in article 19 (2) includes the "expression and receipt of communications of every form of idea and opinion capable of transmission to others" (*Id.* para. 11). It "protects all forms of expression and the means of their dissemination. Such forms include spoken, written and sign language and such non-verbal expression as images and objects of art." (*Id.* para. 12).

Any restriction on the right to freedom of expression must be compatible with article 19 (3) of the Covenant. The Committee has highlighted that "Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights." (*id.* para. 23) Any such restrictions would constitute a violation of the obligations incumbent on the State under article 19.

In order to be compatible with the Covenant, any restriction to the freedom of expression must satisfy the following three conditions:

- Be provided by law: “A norm, to be characterized as a “law”, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution (*id.* para. 25). In this regard, we note that with respect of the use of criminal law or punitive measures, the Committee has highlighted that article 15 of the Convention enshrines a principle of legal certainty, relevant also in the determination of the compatibility of the restriction with article 19 (3).
- Pursue a legitimate aim. That is, it must be introduced to safeguard the respect of the rights or reputations of others, the protection of national security or of public order (*ordre public*), or public health or morals.
- Be necessary and proportionate. The principle of necessity precludes restrictions to the freedom of expression if the legitimate purpose can be achieved without such a restriction (*id.* para. 33). The principle of proportionality entails that restrictions must not be overbroad. “They must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected...The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law” (*id.* para. 34)

The State has the burden of proof to demonstrate that any given restriction is compatible with article 19 (*id.* paras. 27 and 35)

The ICCPR further guarantees the right to an effective remedy, in its article 2 (3). As highlighted by the Human Rights Committee, this includes the obligations of the State to cease ongoing violations, provide reparations, in the form of restitution, compensation and just satisfaction, and provides guarantees of non-repetition. Importantly, the Committee has long acknowledged a duty to investigate alleged violations, with a view to prosecuting and punishing those responsible (see Human Rights Committee, General Comment no. 31 (2004) paras. 15 ff, and General comment 34 para. 23).

In connection with the above alleged facts and concerns, we also refer to the International Covenant on Economic, Social and Cultural Rights, ratified by Belarus on 12 November 1973.

According to Committee on Economic, Social and Cultural Rights’ General Comment No. 21, the right to take part in cultural life includes the right to choose one’s own cultural identity and the right to freedom of expression through various means, including artistic and symbolic expressions that, in accordance with international human rights standards, contribute to the “free flow of ideas by word and image” (E/C.12/GC/21, para. 40). The right to take part in cultural life also includes

the right of everyone to contribute in shaping culture and the society they live in, and “to be involved in creating the spiritual, material, intellectual and emotional expressions of the community. (ibid. para. 15 c).

In this regard, in its concluding observations of the 4th and 6th periodic reports of Belarus, the Committee on Economic, Social and Cultural Rights “expresse[d] its concern at reported incidents of practical restrictions to full participation in cultural life for certain individuals and groups” and recommended “that the State party take steps to ensure the full and unrestricted exercise of the right of everyone to promote, preserve and fully participate in cultural life, taking into account the Committee’s general comment No. 21 (2009) on the right of everyone to take part in cultural life.” (E/C.12/BLR/CO/4-6, para. 30).