

Mandate of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights

Ref.: AL USA 7/2022
(Please use this reference in your reply)

4 May 2022

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights pursuant to Human Rights Council resolution 45/53.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the fact that the joint stock companies Belaruskali, a state-owned enterprise in the Republic of Belarus which mines potash, and Belarus Potash Company (BPC), a state-owned enterprise that markets and exports the potash, have been listed under U.S. sanctions on the basis of Executive Order 14038 of 9 August 2021, resulting in the blocking of their assets and transactions over which the United States of America claims jurisdiction. I am concerned **that these listings are separately and jointly having a detrimental effect on human rights internationally, particularly the right to adequate food in a number of countries, but also other rights that are associated with it.**

According to the information received:

Potash is an essential mineral component of chemical fertilizers that increase crop yields. Nearly all potash mined in the world is used for this purpose.¹ Potash is considered vital for achieving food security and eliminating hunger internationally. Note that I do not express at this point, any judgement about the ecological merits or value, good or bad, of the use of potash as a fertilizer, or about its effects long-term on the soil or the political economy of food production. These important matters are outside my sphere of expertise.

Potash is mined in large quantities in only a few countries, with two-thirds of the world's output concentrated in Canada, Russia and Belarus. In 2020, Belarus was the third largest producer and second largest exporter of potash, accounting for 17.6% of global output and 21% of global exports.²

Potash mines and factories that process it into fertilizer take months or years to adjust their output, so shortages from one source cannot be eased rapidly or replaced by others.³

Potash produced in Belarus is mined by Belaruskali, a state-owned enterprise. Belaruskali is the main shareholder in Belarus Potash Company (BPC), which markets and exports the potash. Other state-owned enterprises hold the remaining shares in BPC.

¹ Newcastle University, "Sustainable Use of Potassium for Feeding the World," <https://www.ncl.ac.uk/globalchallenges/food-security/using-potassium-for-feeding-the-world/>

² Government of Canada, "Potash Facts," <https://www.nrcan.gc.ca/our-natural-resources/minerals-mining/minerals-metals-facts/potash-facts/20521>
International Fertilizer Association, "Fact Sheet – Global Food Security," 2021, file:///C:/Users/asus/Downloads/2021_IFA_Fact_Sheet_Global_Food_Security_.pdf

Belarusian potash is mostly exported through Lithuania. It is taken by rail to the seaport at Klaipeda, where it is put onto vessels for destinations around the world.

BPC has been a supplier of potash to most countries classified by the UN Food and Agriculture Organization as “hunger hotspots” in recent years, including Chad, Mali, Nigeria, Madagascar, Kenya, Nigeria, Myanmar, Venezuela, Colombia and Honduras, among others. Some of these hotspots (Chad, Mali and Madagascar) as well as other countries with food insecurity (Malawi)⁴ have relied almost 100% on Belarus for potash supplies. Venezuela imported up to 84% of its potash needs from Belarus before unilateral sanctions against that country blocked imports in 2019.

On 9 August 2021, the United States imposed sanctions against Belaruskali under Executive Order 14038, “Blocking Property of Additional Persons Contributing to the Situation in Belarus,” relating to concerns about human rights and democracy. Belaruskali’s assets over which the U.S. made jurisdictional claims were frozen, and transactions with the company were blocked.⁵ On 2 December 2021, the United States added BPC to its sanctions list.⁶

Amid concerns about the extraterritorial enforcement of the U.S. sanctions through the imposition of secondary sanctions (sanctions against parties doing business with sanctioned entities) and other penalties, there is a high degree of over-compliance. Most non-U.S. banks, clients, ship owners, container lines and others doing business with Belaruskali terminated these relations. Companies that continued their business with Belaruskali have been reported to face obstacles from banks, including extensive delays in payment transactions, refusals to conduct transactions and refusals to open credit lines in U.S. dollars or other currencies. Companies interacting with BPC also reported such treatment even before BPC was added to the U.S. sanctions list.

On 17 December 2021, Lithuanian Railways, a state-owned enterprise, said it received a letter of assurance from the U.S. Department of the Treasury’s Office of Foreign Assets Control (OFAC) that secondary sanctions would not be imposed against it for transporting potash produced by Belaruskali to Klaipeda.

On 21 December 2021, Lithuanian Prime Minister Ingrida Šimonytė said the letter from OFAC did not, in fact, completely rule out the potential for Lithuanian Railways to be targeted by U.S. secondary sanctions if it continued to transport the Belarusian potash.

On 1 February 2022, the Lithuanian Government stopped allowing potash from Belarus to transit through Lithuania. It declared the contract between Belaruskali and Lithuanian Railways to be void as of that date and rejected

⁴ Food and Agriculture Organization, “Malawi: Acute Food Insecurity Situation Update,” 7 January 2021, <https://www.fao.org/in-action/kore/publications/publications-details/en/c/1371396/>

⁵ Executive Order 14038, 9 August 2021. General License No. 4 of 9 August 2021 gave counterparties until 8 December 2021 to wind down transactions with Belaruskali. Department of the Treasury, “Treasury Expands Sanctions Against Belarusian Regime with Partners and Allies,” press release, 2 December 2021, <https://home.treasury.gov/news/press-releases/jy0512>. General License No. 5 of 2 December 2021 gave counterparties until 1 April 2022 to wind down transactions with BPC.

initial applications by other companies to transport Belaruskali products through Lithuania.

Without prejudging the accuracy of the information received, I wish to express my grave concerns about the global impact of the sanctions imposed by your Excellency's Government against Belaruskali and BPC. By impeding financing and transactions for, and transportation of, a significant portion of the world's potash, these actions are a key factor in the current worldwide shortage of fertilizers. This is highly damaging to the enjoyment of the right to adequate food and other human rights by many millions of individuals in many countries dependant on it to produce their food.

It must be emphasized that the range of human rights affected by the shortage of fertilizers and their resulting high prices on the international market is rather wide. The right to food is part of the right to a decent standard of living, and when food is insufficient the right to health and the right to life are prejudiced. The right to education is also harmed as hunger and malnutrition have been identified as obstacles to children's learning.⁷ Some of these rights are enshrined in the International Covenant on Civil and Political Rights (ICCPR), which the United States ratified on 8 June 1992, and others are elaborated in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Most are also recognized in the Universal Declaration of Human Rights. While I am cognizant that the United States has not ratified the ICESCR, that the UDHR is a non-binding document and that the U.S. Supreme Court has judged that the UDHR does not "of its own force" create international legal obligations for the United States,⁸ I wish to recall that the United States is obliged to ensure these rights on broader grounds, as they may be deemed to constitute customary international law, and as the United States' membership in the United Nations entails acceptance of its obligation under the UN Charter to promote universal respect for and observance of human rights for all.⁹

The paramount importance of the right to food was affirmed by the United Nations when it stated that "(t)he human right to adequate food is of crucial importance for the enjoyment of all rights."¹⁰ Meanwhile, the right to freedom from hunger is today considered a norm of customary international law that is binding on all states.¹¹ The Food and Agriculture Organization and the World Food Programme expect acute food insecurity to worsen in many countries ranging from numerous African states to Afghanistan, Myanmar, Yemen, Syria, Haiti and Colombia and others by May 2022, and say urgent fertilizer shipments are needed to address these emergencies¹² as a critical good.

Insufficient fertilizer also impedes the achievement of the Sustainable Development Goals, most directly SDG 2: "End hunger, achieve food security and

⁷ OHCHR, "OHCHR and the right to food," <https://www.ohchr.org/En/Issues/ESCR/Pages/food.aspx>

⁸ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004).

⁹ See Gillian MacNaughton and Mariah McGill, "Economic and Social Rights in the United States: Implementation Without Ratification," *Northeastern University Law Journal* 4 (2), 2012, pp. 367-69, notably citing Ian Brownlie and Guy Goodwin-Gill, *Basic Documents on Human Rights*, 5th ed. (2006), in which it is stated that the UDHR, while not a legally binding instrument, is an authoritative guide to the interpretation of the human rights to which the UN Charter commits all of its members.

¹⁰ Economic and Social Council, General Comment No. 12, "The Right to Adequate Food," 1999, p. 1, <https://undocs.org/E/C.12/1999/5>

¹¹ OHCHR, "The Right to Adequate Food," p. 9, <https://www.ohchr.org/Documents/Publications/FactSheet34en.pdf>

¹² FAO and WFP, "Hunger Hotspots," February to May 2022 outlook, <https://www.fao.org/3/cb8376en/cb8376en.pdf>

improved nutrition and promote sustainable agriculture.” The United Nations refers to “boosting yields on existing agricultural lands” as a means to achieve this goal.¹³ Progress toward other SDGs is also affected, particularly SDG 1 (no poverty) and SDG 3 (good health and well-being).

I further wish to highlight that decline in crop yields can lead to large-scale food shortages, malnutrition, and in the worst case, famine and related emigration and internal displacements,¹⁴ prolonging and expanding the range of human rights problems that arise from insufficient food, particularly for vulnerable groups such as women, children, the elderly and persons with disabilities or diseases. Migrants can be exposed to hunger and ill health while not being able to legally work, obtain housing or access health care, education or other basic services.¹⁵

I also note that reduced crop output due to fertilizer being unavailable or too costly not only harms the enjoyment of human rights in the countries where the crops are grown but also in other countries whose populations rely on imports of these crops.

Moreover, I express my deep concerns about reports of jobs lost or jeopardized at Belaruskali, BPC, Lithuanian Railways, the Klaipeda port and jobs at ports, transport companies and fertilizer manufacturers in importing countries, that depend on shipments of Belarusian potash. Besides the rights to work and to freely choose one’s employment, particularly for persons with specialized jobs in state entities for which no alternative employers exist, this erodes the rights of their families to health, education and an adequate standard of living when these are linked to the jobs.

Additionally, the human right of the Belarusian people to freely dispose of a natural resource that acts as a means of subsistence is being violated by the sanctions against Belaruskali and BPC. This right is enshrined in both the ICESCR and the ICCPR, and is given effect through the UN Convention on the Law of the Sea, which grants land-locked countries like Belarus the right of access to the sea via freedom of transit through the territory of a transit state. Belarusian potash exports in 2020 totaled more than \$2.4 billion U.S. dollars, accounting for 4% of the country’s gross domestic product.¹⁶

I further call your Excellency’s attention to the fact that Belaruskali has developed “its own unique technologies, innovative products and a research and production cluster.”¹⁷ The right to conduct research unimpeded by sanctions is essential to satisfying the right of all individuals to benefit from scientific progress, as

¹³ UN Department of Economic and Social Affairs, “Food security and nutrition and sustainable agriculture,” <https://sdgs.un.org/topics/food-security-and-nutrition-and-sustainable-agriculture#:~:text=The%20Sustainable%20Development%20Goal%20to,rural%20poverty%2C%20ensuring%20healthy%20lifestyles%2C>

¹⁴ Shuaizhang Feng, Alan B. Krueger and Michael Oppenheimer, “Linkages among climate change, crop yields and Mexico-US cross-border migration,” *Proceedings of the National Academy of Sciences* 107 (32), 2010, pp. 14257-62, <https://www.pnas.org/content/pnas/107/32/14257.full.pdf>

¹⁵ Report of the Office of the United Nations High Commissioner for Human Rights, “Situation of migrants in transit,” 27 January 2016, para. 28, document A/HRC/31/35, <https://undocs.org/en/A/HRC/31/35>

¹⁶ Medha Bhardwaj, “Potash War: Double-edged sword for Lithuania and Belarus,” *Modern Diplomacy*, 29 January 2022, <https://moderndiplomacy.eu/2022/01/29/potash-war-double-edged-sword-for-lithuania-and-belarus/>

¹⁷ OAO Belaruskali, “About company,” <https://webcache.googleusercontent.com/search?q=cache:lt2u-sTyCWoj:https://kali.by/en/company/+&cd=1&hl=en&ct=clnk&gl=de> (Google cache of <https://kali.by/en/company/> as it appeared on 3 April 2022).

elaborated in the ICESCR and the UDHR; The ICESCR further obliges states to actively affirm this right by taking steps necessary for the development of science. This also pertains to external research related to Belaruskali's potash operations, some of which address concerns of your Excellency's Government, such as the storage of radioactive waste.¹⁸

It bears mention that a noted scholar of international law considers that "scientific research is of utmost importance for development and poverty reduction," adding that "there is an inherent link between the right to enjoy the benefits of scientific progress and other human rights, in particular the right to an adequate standard of living, the right to education, the right to health, the right to information and the right to food."¹⁹

I wish to emphasize to your Excellency's Government that unlike other factors in the current global fertilizer shortage (including, *inter alia*, greater demand, rising energy costs, higher freight costs, supply chain disruptions, export controls by countries seeking to ensure domestic supplies²⁰ and ongoing sanctions against the Russian Federation that impede the fertilizer exports authorized by OFAC General License No. 6A of 24 March 2022), lifting the sanctions against Belaruskali and BPC with assurances of no secondary sanctions against their banks and transporters can have an immediate downward influence on fertilizer prices by restoring some of the world's blocked production and supplies, thereby alleviating some of the damage to human rights that these factors collectively induce. Such a measure would comply, moreover, with the UN Secretary-General's call on 23 March 2022 for "urgent action" to help all countries, especially the most vulnerable, address causes of the worsening global food crisis.²¹

Finally, by creating uncertainty as to the potential application of secondary sanctions, your Excellency's Government allows fears of U.S. penalties to proliferate among banks and other service providers to Belaruskali and BPC. As illustrated by the blockage of Belarusian potash shipments via Lithuanian Railways, this is prompting over-compliance with the sanctions, impeding adherence by companies to the UN Guiding Principles on Business and Human Rights and further damaging the right to food and the other human rights elaborated above.

In connection with the above information and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter, which cites additional international human rights instruments and standards relevant to the issues discussed.

¹⁸ L. Fuks, I. Herdzik-Konienko and L. Moskalchuk, "Clay-salt slimes of the "Belaruskali" prospective sorbents for management of the liquid radioactive wastes and decontamination of aqueous solutions," *Sakharov readings 2019: Environmental problems of the XXI century*, Belarusian State University, 2019, p. 103-105, https://inis.iaea.org/collection/NCLCollectionStore/_Public/50/071/50071434.pdf?r=1

¹⁹ Yvonne Donders, "The Right to Enjoy the Benefits of Scientific Progress and its Applications," UNESCO document SHS/RSP/HRS-GED/2007/PI/H/3, 10 December 2007, <https://unesdoc.unesco.org/ark:/48223/pf0000158691>

²⁰ See, e.g., Laura Cross, "Why are fertilizer prices so high?" International Fertilizer Association, https://www.fertilizer.org/Public/News_Events/IFA_Blog/2022_02_07_Why_are_Fertilizer_Prices_so_High.aspx; American Farm Bureau Federation, "Too Many to Count: Factors Driving Fertilizer Prices Higher and Higher," 13 December 2021, <https://www.fb.org/market-intel/too-many-to-count-factors-driving-fertilizer-prices-higher-and-higher>; Chris Clayton, "Producers Face Fertilizer Price Squeeze," *Progressive Farmer*, 30 September 2021, <https://www.dtnpf.com/agriculture/web/ag/crops/article/2021/09/30/china-phosphate-fertilizer-export>

²¹ United Nations, "Secretary-General's opening remarks to the Steering Committee of the Global Crisis Response Group on Food, Energy and Finance [as delivered]," 23 March 2022, <https://www.un.org/sg/en/node/262571>

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I 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 explain the nature, extent and form of any human rights due diligence and due process of law that your Excellency's Government conducted prior to implementing Executive Order 14038 with respect to Belaruskali and BPC.
3. I would be grateful to know if your Excellency's Government has made, or will make, assessments of how food security in countries that rely on Belarusian potash is affected by the sanctions against Belaruskali and BPC, and whether it has taken, or will take, measures to halt or mitigate any damage to the right to adequate food or other rights in the countries concerned.
4. Please explain if any legal proceedings against Belaruskali or BPC have been initiated by the United States or any other state for any alleged criminal or other illegal conduct; if so, please specify the alleged act(s), and if not, please explain the legal ground(s) for imposing penalties against them.
5. Please indicate what measures have been taken by your Excellency's Government to ensure that the sanctions are compliant with the United States' obligations under the UN Charter, international human rights law and other international obligations to guarantee that the rule of law is observed.
6. Kindly provide information regarding any step that is being taken to assess the impact of blocking the transit of potash from Belarus, on such fundamental rights to food, life and health globally, and about any steps to review that policy in accordance with your State's obligations under international human rights law.

While awaiting a reply, I urge that all necessary steps be promptly considered by the Government, to measure, assess and remedy the adverse impact on the human rights to food and subsistence of millions of people worldwide, of blocking the sale internationally of potash and other fertilizers products of which depends food production in numerous countries. Such review of both due diligence and due process, which are critical to any human rights guided policy should evaluate responsibilities and determine accountability for possible violations of human rights.

Given the importance of this matter, I may consider to publicly express its concerns in this regard. Although the information at hand has been verified and appears to be reliable, I would appreciate, before considering this possible step, any clarification that Your Excellency's Government may be willing to share with my mandate and, through it, to the United Nations Human Rights Council. I believe that the matter raised in this letter is not a light one, and ought to be considered at the

highest level with undivided attention. I believe that is, indeed, a matter for the international public to be aware of. Any public expression of concern on my part will reflect that we have been in contact with Your Excellency's Government to seek clarification.

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.

Please be informed that a letter on the same subject has also been sent to the European Union and to the government of Lithuania.

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

Alena Douhan
Special Rapporteur on the negative impact of unilateral coercive measures on the
enjoyment of human rights

Annex

Reference to international human rights law

In connection with the above concerns, I would like to refer your Excellency's Government to the relevant international norms and standards that are applicable to the issues brought forth by the situation described.

With respect to the right to adequate food, I refer to the International Covenant on Economic, Social and Cultural Rights (ICESCR), which enshrines "the right of everyone to an adequate standard of living for himself and his family, including adequate food" (article 11(1)).

The role of chemical fertilizer, and thus of potash, in ensuring this right is covered by an obligation in the ICESCR for states to take measures "to improve methods of production (...) of food by making full use of technical and scientific knowledge" (article 11(1)(a)).

The ICESCR also alludes to the necessity of a state's freedom to export goods that are essential to the process of producing food abroad, stating that the obligation above is intended "to ensure an equitable distribution of world food supplies in relation to need" (article 11(1)(b)).

With respect to the right to health, I refer to article 25 of the Universal Declaration of Human Rights, in which paragraph 1 states that "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including (...) medical care (...)." The ICESCR recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" (article 12(1)).

Intricately linked to the right to health is the right to life, which is addressed by the International Covenant on Civil and Political Rights (ICCPR) in its recognition that "Every human being has the inherent right to life" (article 6(1)). I refer to the UN Human Rights Committee's General Comment No. 36 (2018), in which it states that the right to life "should not be interpreted narrowly" and that it "concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death."

Referring to the impact of adequate food on learning, I note that the ICESCR enshrines "the right of everyone to education" (article 13).

With respect to labor rights, I refer to the Universal Declaration of Human Rights, which states that "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment" (article 23(1)).

Regarding the right of the Belarusian people to freely dispose of the country's potash, I refer to the ICESCR and the ICCPR, which both state that "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence" (common article 1(2)). The UN Convention on the Law of the Sea gives effect to this right by

recognizing for Belarus, as a land-locked state, “the right of access to and from the sea” and the right to enjoy “freedom of transit through the territory of transit States by all means of transport” (article 125(1)).

Regarding the right to conduct research, I refer to the ICESCR, in which states recognize “the right of everyone (...) (t)o enjoy the benefits of scientific progress and its applications” (article 15(1)(b)). Additionally, “The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for (...) the development (...) of science” (article 15(2)). Moreover, the States Parties “undertake to respect the freedom indispensable for scientific research (...)” (article 15(3)). This right is also embodied in the UDHR, which states that “Everyone has the right freely to (...) share in scientific advancement and its benefits” (article 27(1)).

I additionally call your attention to the UN Guiding Principles on Business and Human Rights, which outlines the responsibility of business enterprises to ensure human rights throughout their activities and business relationships, and recognizes the obligation of states to guarantee that this occurs as part of their broader obligation to respect, protect and fulfil human rights. Guiding principle 1 outlines the duty of states to “protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises.” Guiding principle 2 encourages this protection to be made extraterritorial, calling on states to “set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.”

With regard to a state that impedes another state from fulfilling its human rights obligations under the guiding principles, thereby exposing the latter to potentially committing an internationally wrongful act, I bring to the attention of your Excellency’s Government article 16 of the Articles on State Responsibility for Internationally Wrongful Acts: “A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.”

As for the obligation of every member state of the United Nations to promote universal respect for and observance of human rights for all, this is found in the Charter of the United Nations (Article 55). I equally refer to the pledge of each member state to “take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55 (Article 56).

Finally, I refer to the Sustainable Development Goals and the objective of achieving them by 2030, agreed under the auspices of the United Nations. Besides SDG 2, “End hunger, achieve food security and improved nutrition and promote sustainable agriculture,” others that bear particular mention are SDG 1, “End poverty in all its forms everywhere,” and SDG 3, “Ensure healthy lives and promote well-being for all at all ages.” These goals contribute to the aims of the Declaration on the Right to Development, in which states are called upon to take “all necessary measures” to ensure access to food (article 8(1)).