

Mandates of the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the situation of human rights in Belarus and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Ref.: OL BLR 3/2022
(Please use this reference in your reply)

23 May 2022

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on extrajudicial, summary or arbitrary executions; Special Rapporteur on the situation of human rights in Belarus and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, pursuant to Human Rights Council resolutions 44/5, 44/19 and 49/10.

In this connection, we express our serious concern about the **proposed amendments to the Criminal Code of Belarus (Law No. 275-Z of 9 July 1999) adopted by the two chambers of the Belarusian Parliament on 27 April 2022, and signed into law by the President of Belarus on 13 May 2022, which provide for an extension of the application of the death penalty for “attempted” crimes related to terrorism, including activities that do not fall under the category of “most serious crimes” established by international law for the imposition of capital punishment.** The fact that the proposed amendments would extend the death penalty to acts beyond intentional killing, as well as seemingly broad and vague definitions of “terrorist acts,” raise concerns that they could be interpreted to include acts aimed at the legitimate exercise of fundamental rights.

We offer comments concerning the compliance of the proposed amendments with Belarus' international human rights obligations with a view to encouraging a thorough and independent review of the proposed amendments, particularly with respect to the International Covenant on Civil and Political Rights (ICCPR), and the United Nations Safeguards guaranteeing protection of the rights of those facing the death penalty, approved by Economic and Social Council resolution 1984/50 of 25 May 1984. We also note that best international practice encourages States to fully and independently review counter-terrorism and emergency law regularly to ensure that it remains both necessary and international law compliant. In our view, these amendments passed by Parliament, and signed by the President, could result in irreversible harm and blatant violations of the right to life.

Overview of international human rights law standards applicable

We would like to reiterate the obligation of your Excellency's Government to respect and protect individual rights guaranteed under the Universal Declaration of Human Rights (UDHR). The Republic of Belarus also signed the ICCPR on 19 March 1968 and ratified it on 12 November 1973. It ratified the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT) on 13 March 1987.

I. Context

On 22 April 2022, the proposed amendments to the Criminal Code were introduced by a deputy of the House of Representatives of the National Assembly and subsequently adopted by the House of Representatives of the National Assembly in two readings on 27 April 2022. On 4 May 2022, the amendments were approved by the Council of the Republic and signed by the President of Belarus on 13 May 2022. The new Law No.165-Z of 13 May 2022 was officially published on 18 May 2022, thereby entering into force 10 days later, on 29 May 2022.

No public discussion of the extension of the death penalty was reportedly held in the run-up to the latest constitutional reform; instead, its abolition was envisioned. On 28 September 2021, at an expanded meeting of the Constitutional Commission, the issue of abolishing the death penalty was raised by the President, who reportedly allowed for the possibility of a referendum on the issue.

We are concerned about the process of adoption of these amendments, which reportedly lacked transparency and civic dialogue, as they were initiated and adopted by the Parliament in just five days, passed by the Council of the Republic just five working days later, and signed by the President just two weeks later, raising concerns that no appropriate timeframe was provided for consultation with experts and civil society. Moreover, the information about the signing of the law was not disclosed to the public so that this became known only on 18 May 2022, when Law No.165-Z of 13 May 2022 was officially published in the National Register of Legal Acts of the Republic of Belarus. Accordingly, the alleged lack of transparency in the adoption process could have precluded the possibility of making pertinent changes to the amendments or preventing their adoption if they were found to be inconsistent with international human rights standards. In its post-adoption comment, the House of Representatives of the National Assembly indicated that the purpose of the amendments was “to exert a deterrent effect on destructive elements, as well as to demonstrate the state's resolute struggle against terrorist activities.”¹

We recognize the State's obligation to ensure the security of its citizens, including through preventive measures. However, we note with concern that these amendments were adopted in a context in which Belarus does not appear to be a target of international terrorism. According to the 2022 Global Terrorism Index, Belarus is among the countries which are not impacted with terrorism.² Yet Belarusian authorities are reportedly referring to civil society activists expressing opposition to the war in Ukraine and the supportive role of the Government of Belarus (A/ES-11/L.1 p.10) as “terrorists.” Such use is inconsistent with the understanding of terrorism as set out in UN Security Council Resolution 1566, the sectoral convention on terrorism, and the model definition of terrorism established by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Against this backdrop, concern has been expressed that the expansion of the scope of the death penalty through these amendments may be aimed at targeting civil society actors, including the political opposition and citizens expressing critical views of the Government's policies.

¹ See <https://t.me/s/housegovby>.

² The Index rates Belarus at “0” meaning that terrorism has not impacted the country.
https://www.visionofhumanity.org/wp-content/uploads/2022/03/GTI-2022-web_110522-1.pdf

II. Concerns

i. *Application of death penalty for “preparing and attempting” terrorism-related crimes*

Contrary to the international trend of reducing the scope of crimes punishable by death, the amendments to the Criminal Code would extend the application of the death penalty to persons found guilty of “preparing and attempting to commit a crime of terrorism”. The proposed amendment introduces exceptions to Article 67(2) of the Criminal Code, which had previously stated that “the death penalty for preparation for a crime and attempted crime is not imposed.”³ These exceptions, which enter into force with the amendments, include “*an attempt to commit crimes provided for in part 2 of article 124 (An act of terrorism against a representative of a foreign State or an international organization); part 3 of article 126 (Act of international terrorism); part 3 of article 289 (An act of terrorism committed by an organized group, either with the use of nuclear energy facilities or with the use of radioactive substances or nuclear materials, potent, toxic chemical or biological substances or involving the murder of a person); part 2 of article 359 (Murder of a state or public figure committed in connection with his state or public activities in order to influence decision-making by authorities).*”

The provisions of the Criminal Code, in force in Belarus until the proposed amendments, provided for the death penalty only for particularly serious crimes involving the intentional killing of individuals under aggravating circumstances as defined in Article 59(1) of the Criminal Code. The version of this article introduced by the proposed amendment indicates that the death penalty may additionally be imposed for crimes related to terrorism provided for in the above-mentioned articles (part 2 of Article 124, part 3 of Article 126, part 3 of Article 289 and part 2 of Article 359 of the Criminal Code of Belarus), which, could allow for a far-reaching criminalization of activities subject to the death penalty. Against this background, we raise serious concern that the proposed amendments may heighten the risk that the death penalty will be imposed in an arbitrary, unlawful, and discriminatory manner, and that the overly broad definition of such offenses may give rise to adverse consequences for human rights.

In this connection, we recall that the death penalty has long been regarded as an extreme exception to the fundamental right to life (General comment No. 6, para. 7). We would like to recall the international human rights obligations binding on Belarus, namely Article 3 of the UDHR and Article 6 of the ICCPR, which constitute an international customary law and *jus cogens* norm from which no derogation may be made by invoking exceptional circumstances such as internal political instability or other public emergency as provided for in Article 4(2) ICCPR. While the right to life is not absolute, the right is non-derogable, which means that states cannot in any circumstances permit arbitrary deprivations of the right to life, and cannot reduce the protections afforded to those facing the death penalty. Article 6(2) of the ICCPR provides that in countries that have not abolished the death penalty, the latter may be imposed only for the most serious crimes, and even then only in the most exceptional cases and under the strictest conditions. This provision has consistently been interpreted

³ Article 67(2) of the Criminal Code of Belarus (Law No. 275-Z of 9 July 1999).

by the Human Rights Committee, the highest international body of experts in this field, as meaning that the death penalty may only be imposed for crimes that result in the loss of life (CCPR/C/79/Add.25) and that crimes not resulting directly and intentionally in death, such as attempted murder, although serious in nature, can never serve as the basis, within the framework of Article 6, for the imposition of the death penalty (CCPR/C/GC/36 para. 35). This is confirmed by the United Nations Safeguards guaranteeing protection of the rights of those facing the death penalty (para. 1).

Similarly, the Special Rapporteur on extrajudicial, summary or arbitrary executions has made clear that the interpretation of the concept of “most serious crimes” requires a “systematic and normatively persuasive response”, as “a subjective approach to this (...) issue is not viable” limiting the extent to which a State can unilaterally determine what it considers to be a “most serious crime”. The Special Rapporteur concluded that a death penalty can only be imposed in cases where it can be proven that there was an intent to kill that resulted in the loss of life (A/HRC/4/20, para. 53). In this regard, the Commission on Human Rights determined that, amongst others, victimless crimes, activities of a political nature and offences, including treason, espionage or other acts vaguely defined as “crimes against the State” do not meet the required threshold of “most serious crimes” (E/CN.4/2001/9, para. 83). We also recall that the UN High Commissioner for Human Rights expressed serious concern about the use of the death penalty in counter-terrorism cases where the acts being prosecuted commonly “may not meet the threshold of ‘most serious crimes’”.⁴

We express concern about the broad scope of Article 289 (“Act of terrorism”), which appears to be vaguely and ambiguously worded and could potentially cover activities such as expressing dissent and the defence of human rights. We remind your Excellency's Government that various Special Procedures experts have recently expressed concern about the inclusion of several individuals on the “terrorist list” for their journalistic, advocacy, or human rights work, raising fears of a broad interpretation of this provision (A/HRC/WGAD/2021/50, A/HRC/49/71). While the death penalty cannot be applied retroactively to individuals charged with or convicted for acts of terrorism, in accordance with the principle of legality (*nulla poena sine lege*), we express our concern that death sentences may be imposed in the future on individuals involved in activities similar to those mentioned above. In this regard, we submit that the proposed amendments would expand the scope of the death penalty to such an extent that its application may no longer be considered exceptional and, consequently, would no longer be based on a clear definition of the crime in question. We recall that crimes punishable by the death penalty, like any other crime, must be clearly defined in the law in accordance with the principle of legal certainty.

We respectfully remind your Excellency's Government that, while the concept of “terrorism” remains undefined in international law, States must ensure that counter-terrorism legislation is limited to criminalising terrorism conduct which is properly and precisely defined on the basis of the provisions of international counterterrorism instruments and is strictly guided by the principles of legality, necessity, proportionality and non-discrimination. Counter-terrorism legislation should be sufficiently precise to comply with the principle of legality recognised in international human rights law, so as to prevent the possibility that it may be used to target civil society on political,

⁴ UN Human Rights Council, 24th Session, Question of the death penalty: Report of the Secretary-General (Secretary-General's report), 1 July 2013, A/HRC/24/18.

religious or other unjustified grounds.⁵ Furthermore, it should also comply with the principle of legal certainty under Article 15(1) of the ICCPR, which requires that criminal laws are sufficiently precise so it is clear what types of behaviour and conduct constitute a criminal offence and what would be the consequence of committing such an offence.⁶ This principle recognizes and seeks to prevent that ill-defined and/or overly broad laws, which are open to arbitrary application and abuse, and may lead to arbitrary deprivation of liberty. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has highlighted the dangers of overly broad definitions of terrorism in domestic law that fall short of international treaty obligations.⁷ The failure to restrict counter-terrorism laws and implementing measures to the countering of conduct which is truly terrorist in nature, has the potential to restrict and infringe upon the enjoyment of rights and freedoms in absolute ways including exercising freedoms of expression, opinion, and assembly.⁸

We recall that the Special Rapporteur on the promotion and protection of human rights while countering terrorism has established that an act can only qualify as a "terrorist act" when the means used are lethal and the intention is to cause death, serious injury or hostage-taking. This intention is a fundamental element of the definition of a terrorist act. We express concern about the broad scope and the vagueness of the language used in the Criminal Code to qualify an act as "terrorist". We further note with extreme concern that the new legislative amendment extends the application of the death penalty to persons convicted of "preparing and attempting to commit a terrorist offence". The fact that any violation of Articles 124, part 2 of Article 126, part 3 of Article 289, and part 2 of Article 359 of the Criminal Code, from the least serious to the most serious, can ultimately lead to the death penalty is *prima facie* disproportionate. We recall that only in the case where the abovementioned terrorism-related crimes relate to intentional killing, the scope of the offense would fall under "most serious crimes", and even in this case we caution from the further expansion of the scope of death penalty against the global tendency towards abolition.

We respectfully remind your Excellency's Government of the relevant provisions of the UN Security Council resolutions 1373 (2001), 1456(2003), 1566 (2004), 1624 (2005), 2178 (2014), 2242 (2015), 2341 (2017), 2354 (2017), 2368 (2017), 2370 (2017), 2395 (2017) and 2396 (2017); as well as Human Rights Council resolution 35/34 and General Assembly resolutions 49/60, 51/210, 72/123 and 72/180. All of these resolutions require States to ensure that any measures taken to combat terrorism and violent extremism, including incitement of and support for terrorist acts, comply with all of their obligations under international law, in particular international human rights law, refugee and humanitarian law.

We further note that although the amended Constitution of Belarus, which entered into force on 15 March 2022, does not abolish the death penalty, Article 24 stipulates that its use should be limited to "an exceptional punishment for particularly serious crimes". In this connection, we recall that the Human Rights Committee evokes the accepted principle of the ICCPR that all States parties (including retentionist ones)

⁵ A/70/371, para. 46(c).

⁶ Human Rights Committee, General Comment 34, para. 25; E/CN.4/2006/98, para. 46, UA G/SO 218/2 Terrorism.

⁷ A/73/361, para. 34. Other human rights mechanisms have also commented on the Anti-Terrorism law being overly broad and infringing on the fundamental freedoms of ordinary citizens, journalists, and NGOs. *See, e.g.*, A/HRC/WG.6/34/EGY/2, para. 12-14.

⁸ E/CN.4/2002/18, Annex, para. 4(b).

must not increase the rate or extent of the application of the death penalty. It concluded that “Article 6, paragraph 6, reaffirms the position that States parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty, *de facto* and *de jure*, in the foreseeable future ... It is contrary to the object and purpose of Article 6 for State parties to take steps to increase *de facto* the rate and extent in which they resort to the death penalty” (CCPR/C/GC/36). We further recall that Special Rapporteur of extrajudicial, summary or arbitrary executions cautioned that the extension of the scope of application of the death penalty “contravenes the spirit and purpose of Article 6 of the ICCPR, as well as the international trend towards the progressive restriction of the number of offences for which the death penalty may be imposed” (E/CN.4/1998/68/Add.3, para. 145; E/2010/10, para. 54). The reintroduction, extension, or application of the death penalty in relation to inadequately defined and overly broad terrorism-related offenses through the introduction of the proposed amendments of 27 April 2022 would run counter to the conclusion that various United Nations human rights mechanisms have progressively reaffirmed: The death penalty is not only ineffective in deterring crime and poses a serious risk of miscarriages of justice, but also involves a *per se* violation of the non-derogable right to protection from torture and other cruel, inhuman and degrading treatment or punishment.

ii. *Due process and guarantees of fair trial*

Our concern about the development of seemingly regressive legislation pertaining to capital punishment is heightened by previous reports indicating systematic violations of the right to a fair trial of individuals facing the death penalty.⁹ We note that the Human Rights Committee, in its concluding observations on the fifth periodic report of Belarus (see CCPR/C/BLR/CO/5), regrets that the death penalty continues to be imposed and enforced against individuals before the Committee has completed its examination of their communications and that, in this context, the interim measures adopted would not be respected. These concerns are compounded by the violations of fair trial guarantees identified by the Committee, which include violations of the right to effective legal counsel, the presumption of innocence, and the right to review by a higher court. Persons on death row and their relatives would not be informed of the execution date, the body of executed persons would not be returned to the relatives, and the place of burial would not be disclosed according to the Committee’s observations.¹⁰ In this regard, we note that States where the death penalty may continue to be imposed as a punishment, despite the evolving international norm prohibiting it, must, without exception and because of the exceptionally grave and irreparable nature of the punishment, strictly and rigorously monitor compliance in these cases with the judicial guarantees enshrined in Articles 9 and 14 of the ICCPR, so that these guarantees are not violated and a human life is not arbitrarily taken as a result. This is reiterated in the above Safeguards indicating that the death penalty may only be imposed after a legal process which upholds strict fair-trial guarantees, and anyone sentenced to death shall have the right to appeal and seek pardon or commutation of sentence (paragraphs 5, 6 and 7). The Human Rights Committee has found that “violation of the fair trial guarantees provided for in Article 14 of the Covenant in proceedings resulting in the imposition of the death penalty would render the sentence arbitrary in nature, and in violation of Article 6 of the Covenant” (CCPR/C/GC/36, para. 41; see also A/67/275,

⁹ CCPR/C/BLR/CO/5 paras. 27-28

¹⁰ CCPR/C/GC/36, paragraph 60 and CCPR/C/BLR/CO/5, paragraph 27 (b).

para. 25). Similarly, considering the reported flaws in terrorism-related trials, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism stated that any authority looking to use the death penalty for terrorist crimes is obliged to ensure that full fair trial rights under Article 14 of the ICCPR are guaranteed, both during the trial and for all stages preceding and succeeding the trial (A/63/223).

Given the reported deficiencies in the application of the death penalty, we further note that secrecy surrounding the date of execution, giving little or no prior warning to condemned prisoners and their families as well as the refusal to hand over the body of an executed individual for burial, as reported in relation to previous cases in Belarus, amounts to inhuman treatment of the family in violation of Article 7 of the ICCPR and Article 16 of the CAT (A/67/279, CCPR/C/106/D/2120/2011; A/67/279, para. 80 (c)). The failure to be transparent in the application of the death sentence in line with Article 14 of the ICCPR risks violating Article 6 of the ICCPR (A/67/275). We also recall that if a person under sentence of death has been granted provisional measures by a court or an international human rights monitoring body, no execution until a final decision has been taken on the merits of the case should be enforced.¹¹

We share the view of Special Rapporteur on extrajudicial, summary or arbitrary executions that States which cannot ensure fair trial guarantees, should immediately impose a moratorium on the application of the death penalty for all offences (A/HRC/14/24, para. 51(a)).

iii. Final Remarks

We concur with the standing recommendation by the Special Rapporteur on the situation of human rights in Belarus that the State should demonstrate political will and engage in education and advocacy, and facilitate public dialogue, in favour of abolishing the death penalty and, as an interim measure, to promptly introduce a moratorium on executions.¹²

We submit for your consideration of the proposed amendments' review that the death penalty should only inflict the minimum possible suffering and that the Special Rapporteur on Torture has taken the view that most methods of execution amount to ill-treatment, if not torture, and that States applying the death penalty can generally not guarantee that the prohibition of torture or ill-treatment is scrupulously observed (A/67/279, paras. 75-77.) The Special Rapporteur on Torture has indeed argued that conditions on death row in themselves amount to ill-treatment, if not torture (A/67/279, paras. 42- 51; 78).

Finally, we would like to call the attention of your Excellency's Government to the evidence of an evolving standard within international bodies and a robust State practice to frame the debate about the legality of the death penalty within the context of the fundamental concepts of human dignity and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment (A/67/279). This evolving standard, along with the resulting illegality of the death penalty under such prohibition,

¹¹ Communications No. 869/1999, *Piandiong v Philippines*, Views adopted by the Human Rights Committee on 19 October 2000, para. 8

¹² A/HRC/47/49 paras 29-32

is developing into a norm of customary law, if it has not already done so (A/67/279, para. 74). The Special Rapporteur on torture has called upon all States to reconsider whether the use of the death penalty per se respects the inherent dignity of the human person, causes severe mental and physical pain or suffering and constitutes a violation of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment (A/67/279, para. 79).

Considering the concerns expressed that the adopted amendments to the 1999 Criminal Code of Belarus, if enacted, may result in violations of Belarus' international human rights obligations, particularly with respect to the right to life, we offer technical assistance to support a process of harmonizing the legislation with international human rights standards and to engage in a constructive dialogue with your Excellency's Government for this purpose. We encourage the establishment, without delay, of a moratorium on the death penalty and a ratification of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.

In view of these observations and given the imminent entry into force of the amendments on 29 May 2022, we encourage your Excellency's Government to halt this enactment and, in turn, thoroughly review the proposed amendments, open a public space for discussion of their content with civil society and experts on the matter, and allocate additional time for legislative and public consideration to ensure that the proposed amendments align with international human rights norms and the standards described herein and if found to be in breach thereof, to immediately reverse their adoption.

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 issues.
2. Please provide detailed information on how the proposed amendments comply with the requirement that the death penalty shall only be imposed for "most serious crimes", and the steps being taken to ensure that the updated legislation is compatible and closely aligned with international human rights obligations, in particular the International Covenant on Civil and Political Rights and the United Nations Safeguards guaranteeing protection of the rights of those facing the death penalty.
3. Please provide detailed information on the scope of application of part 2 of Article 124, part 3 of Article 126, part 3 of Article 289 and part 2 of Article 359 of the Criminal Code of Belarus, for which the death penalty would be imposed according to the proposed amendments. Please indicate how many people are currently charged with these offenses in Belarus and under what circumstances. Please also provide information, in detail, of how your Excellency's Government's counter-terrorism efforts comply with the United Nations Security Council resolutions 1373 (2001), 1456(2003), 1566 (2004), 1624 (2005), 2178 (2014), 2341

(2017), 2354 (2017), 2368 (2017), 2370 (2017), 2395 (2017) and 2396 (2017); as well as Human Rights Council resolution 35/34 and General Assembly resolutions 49/60, 51/210, 72/123 and 72/180, in particular with international human rights law.

4. Please indicate the manner in which the new legislative amendment extending the application of the death penalty to persons convicted of "preparing and attempting to commit a terrorist offence" complies with the principles of legality, necessity, proportionality and non-discrimination.
5. Please provide further details on the negotiation process on the proposed amendments to the Criminal Code and the steps taken to ensure the transparency of the process and that relevant experts, Belarusian civil society and all other relevant stakeholders have the opportunity to participate at all stages of the process.
6. Please provide information on the measures that your Excellency's Government has taken or intends to take to limit the scope of the death penalty, in line with the global trend and ongoing development of an emerging customary law standard prohibiting the death penalty as a form of cruel, inhuman, or degrading punishment, and to work towards its ultimate abolition. Please also provide detailed information on how many individuals are currently held on death row.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

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

Morris Tidball-Binz

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Anaïs Marin

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