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No. 39/2012 (Belarus)

Communication addressed to the Government on 20 April 2012

Concerning Aleksandr Viktorovich Bialatski

The Government replied to the communication on 22 May 2012.

The State is a party to the International Covenant on Civil and Political Rights.

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed that mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. In accordance with its methods of work (A/HRC/16/47, annex and Corr.1), the Working Group transmitted the above-mentioned communication to the Government.

2. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to the detainee) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards, or can result in, ignoring the equality of human rights (category V).

Submissions

Previous urgent appeal concerning Aleksandr Viktorovich Bialatski

3. The case was reported to the Working Group on Arbitrary Detention as follows. Aleksandr Viktorovich Bialatski, a citizen of Belarus, usually residing at Prospekt Nezavisimosti, Minsk, Belarus, is a human rights defender, founder and President of the Human Rights Centre Nasha Viasna (Viasna) and a vice-president of the International Federation for Human Rights (FIDH).

4. On 15 August 2011, the Rapporteur of the Working Group on Arbitrary Detention together with other Special Procedures mandate holders sent an urgent appeal[1] to the Government of Belarus. The relevant content of the urgent appeal is reproduced below :

> On 4 August 2011, at approximately 2:00 p.m., a group of individuals in plain clothes reportedly surrounded the offices of the HRC "Viasna" in Minsk. Staff members of HRC "Viasna" allegedly evacuated the office and locked the door. While evacuating the office, one of them heard a plain clothed individual talking on his mobile phone, saying that Mr. Bialatski was not to be found at the office. On the same day, at approximately 4:30 p.m., Mr. Bialatski was arrested in Minsk city centre by police representatives of the Department of Financial Investigations. A search was conducted at his home by police officers. Mr. Bialatski was subsequently taken to the Viasna office which was also searched by the police. On 5 August 2011, Mr. Bialatski was allegedly transferred from a cell at the Financial Investigation Department of the State Control Committee to the detention centre of the Ministry of Interior, where he remains to date.
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> Mr. Bialatski was allegedly being held in detention for having failed to declare the existence of a private foreign account registered in his name. As a result, a tax evasion case was allegedly opened against Mr. Bialatski for "concealment of profits on an especially large scale" under Article 243(2) of the Criminal Code of the Republic of Belarus, which provides for up to seven years of imprisonment and confiscation of property.
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> According to the information received, the purpose of the foreign account was to receive donations registered in the name of Mr. Bialatski, to finance the human rights activities of "Viasna". In June 2011, Mr. Bialatski was reportedly informed that an investigation on his private financial matters was being carried out by the authorities. In view of his alleged detention, serious concern is expressed for the physical and psychological integrity of Mr. Ales Bialatski. Further concern is expressed that his detention may be directly related to his work in defence of human rights, in particular with HRC "Viasna".

[1] See A/HRC/19/44, p. 57, case No. BLR 9/2011.

5. The Government replied on 31 October 2011, and the Working Group welcomes the cooperation. The content of the officially translated reply received from the Government of Belarus is reproduced below:

> On 4 August 2011, criminal proceedings were instituted against Mr. Bialatski by an investigator from the State Control Committee Financial Investigation Department's pretrial investigation team for an offence under article 243, paragraph 2, of the Criminal Code (evasion of duties and taxes by concealment and deliberate understatement of the tax base, or by refusal to submit a tax declaration (calculation) or knowingly introducing into it false information, leading to losses on an especially large scale).
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> This crime, covered by article 243, paragraph 2, of the Criminal Code, is categorized as a serious offence, for which penalties include restriction of liberty for a period of up to five years or deprivation of liberty for a period of three to seven years, with or without confiscation of property and with or without forfeiture of the right to hold certain posts or engage in certain activities.
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> The case was brought on the grounds of material gathered during preliminary inquiries.
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> According to information from the Ministry of Justice of Lithuania received by the State Control Committee Financial Investigation Department from the Ministry of Justice of Belarus on 4 April 2011, a total amount of no less than 295,733 euros entered Mr. Bialatski's account with AB DnB NORD Bankas bank during the period 2009–2011.
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> According to information from the Ministry of Justice of Poland received by the State Control Committee Financial Investigation Department from the Ministry of Justice of Belarus, a total amount of no less than 335,787 euros entered Mr. Bialatski's account with Bank Śląski during the period 2007–2011.
>
> In violation of current legislation, Mr. Bialatski did not declare these amounts to the tax authorities and did not pay income tax on the income received.
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> Under article 153, paragraph 1.1, of the Tax Code, income received from sources in Belarus and/or abroad by physical persons recognized under article 17 of the Tax Code as resident in Belarus for tax purposes is subject to personal income tax.
>
> Under article 17 of the Tax Code, physical persons who are present in Belarus for more than 183 days in a calendar year are considered to be resident in the country for tax purposes, which was Mr. Bialatski's case.
>
> On 23 September 2011, after a tax audit, a final charge was filed against Mr. Bialatski under article 243, paragraph 2, of the Criminal Code for evasion of taxes on an especially large scale, to a total amount of 352,274,360 Belorusian roubles (more than 10,064 base amounts).
>
> The investigation found no confirmation of reports that the above-mentioned sums in the Lithuanian and Polish banks were intended to fund the Viasna human rights centre and other organizations.
>
> Mr. Bialatski was detained at 4.58 p.m. on 4 August 2011, by members of the State Control Committee Financial Investigation Department at 36, Nezalezhnasci Avenue, Minsk, on suspicion of the above-mentioned offence. In accordance with article 41 of the Code of Criminal Procedure, Mr. Bialatski was informed at the time of his detention of his rights and obligations, including his right to defence.

As crimes under article 243, paragraph 2, of the Criminal Code are categorized as serious offences, for which penalties include deprivation of liberty for a period of more than two years, Mr. Bialatski was remanded in custody as a preventive measure under article 126, paragraph 1, of the Code of Criminal Procedure.

Mr. Bialatski was placed in the temporary holding facility of the Minsk Municipal Executive Committee Central Internal Affairs Department.

Mr. Bialatski did not plead guilty to the charge brought against him and refused to give testimony. During questioning as a suspect during the initial stage of the investigation, he confirmed that he had opened foreign bank accounts in his own name and that he managed and operated them personally.

On studying the case file, the Minsk procuratorial authorities found that the preliminary investigation had been carried out thoroughly, objectively and comprehensively, the acts of the accused had been correctly classified, the accusation was substantiated and based on evidence found during the investigation, all possible investigative action had been taken, the preventive measures adopted were correct, and that there had been no violation of criminal procedural legislation, including in respect of Mr. Bialatski's detention and the gathering of evidence.

On 5 August 2011, Mr. Bialatski was placed in remand centre No. 1 of the Ministry of Internal Affairs Penal Enforcement Department, where he is still being held.

Mr. Bialatski made no complaints about his health and had no bodily injuries when he entered the remand centre and was examined by a doctor. Mr. Bialatski has not requested medical assistance during his detention in remand centre No. 1.

Mr. Bialatski is being held in a cell designed for six persons. As of 10 October 2011, four persons were being held in the cell. The conditions meet the requirements of the Detention Procedure and Conditions Act of 16 June 2003.

On 4 October 2011, the Minsk Procurator's Office referred the case to the Pervomai district court in Minsk.

No change was made to Mr. Bialatski's preventive remand in custody.

No complaints or applications were received during the pretrial investigation either from Mr. Bialatski personally or on his behalf.

Mr. Bialatski is making use of his right to defence under article 17, paragraph 1, of the Code of Criminal Procedure, with the assistance of a professional lawyer as defence counsel.

During the pretrial investigation, the counsel submitted three complaints (on the unlawful bringing of charges, on the need to halt the criminal proceedings, and on release from custody); after consideration, the complaints were rejected as unfounded.

Since Mr. Bialatski's arrest and detention were based on provisions of Belarusian criminal and criminal procedural law, they cannot be considered to be arbitrary in the sense of article 9 of the Universal Declaration of Human Rights or article 9 of the International Covenant on Civil and Political Rights. Those articles and other norms related to criminal investigation and detention in those instruments were observed during the pretrial investigation in respect of Mr. Bialatski.

Information from the competent authorities concerning Mr. Bialatski's situation convincingly confirms that his detention and remand in custody are not related to his work as a human rights defender, including in the context of the activities of the Viasna human rights centre.

6. In accordance with paragraph 23 of its methods of work, "[a]fter having transmitted an urgent appeal to the Government, the Working Group may transmit the case through its regular procedure in order to render an Opinion on whether the deprivation of liberty was arbitrary or not. Such appeals – which are of a purely humanitarian nature – in no way prejudge any Opinion the Working Group may render. The Government is required to respond separately for the urgent appeal procedure and the regular procedure." In its submission, the source has expressly requested the Working Group to transmit a case of Mr. Bialatski, following its regular procedure.

Communication from the source

7. The source submitted the following information on further developments in the case. On 28 October 2011, following the closure of the investigation, the Pervomaiski District Court decided to prolong Mr. Bialatski's detention.

8. On 24 November 2011, Mr. Bialatski was sentenced to four and a half years' imprisonment with confiscation of property by the Pervomaiski District Court of the City of Minsk. The Court found Mr. Bialatski guilty of non-payment of taxes by not filing tax returns and of filing tax returns with false information, thus causing damages in a particularly high amount pursuant to article 243, paragraph 2 of the Criminal Code of Belarus. The Court ordered his sentence to be served in a high security correctional facility. Mr. Bialatski was also levied a fine of 721,454,017 Belorusian roubles (approximately US$90,000) and restitution to the federal budget in the amount of 36,072,700 Belarusian roubles (approximately US$4,500).

9. On 2 December 2011, Mr. Bialatski was transferred to Prison No. 8, Zhodina. On 24 January 2012, the Minsk City Court upheld Mr. Bialatski's sentence. On 17 February 2012, Mr. Bialatski was transferred to Babruisk penal colony No. 2 where he remains.

10. The source states that during the judicial proceedings, Mr. Bialatski was represented by defence lawyers who argued and presented evidence showing that the charges were unsubstantiated and pointed out to procedural irregularities, including the illegal reception of evidence by the prosecution, uncertified documents and instigation of the case by the KGB.

11. The source submits that the money transfers, which were considered by the Belarusian tax authorities, had a legitimate purpose of funding ordinary human rights activities of Viasna and was never used as the personal funds of Mr. Bialatski.

12. It is reported that a number of independent human rights organizations, including Viasna, have been closed by the authorities and confronted with systematic refusal of registration since 2003. In its Communication No. 1296/2004, *Belyatsky et al.* v. *Belarus*, the Human Rights Committee concluded that the dissolution of Viasna constituted a violation of article 22, paragraph 1 of the International Covenant on Civil and Political Rights and that the co-authors of the complaint were "entitled to an appropriate remedy, including the re-registration of Viasna" (para. 9). According to the source, the authorities of Belarus refuse to implement this decision and have denied re-registration to Viasna.

13. Notwithstanding the position of the authorities, Mr. Bialatski and members of Viasna have tried to continue their activities in promoting respect for international human rights and freedoms, providing legal and material assistance to victims of human rights violations. In order to maintain such activities, members of Viasna decided that the funds dedicated to Viasna's human rights activities had to be transferred to a bank account regularly opened and declared under the Lithuanian domestic law.

14. The source stresses that Mr. Bialatski and Viasna's independent activities in the promotion and protection of human rights in Belarus have been recognized both

domestically and internationally. Viasna and Mr. Bialatski have been awarded several prizes, including the Czech Homo Homini Award in 2005, the Norwegian Helsinki Committee Andrei Sakharov Freedom Award and the Swedish Government Per Anger Prize in 2006, the Atlantic Council Freedom Award, the Freedom Award of the Danish daily newspaper Politiken and the Polish Foreign Ministry Pro Dignitate Humana Award in 2011. Over the past decade, Mr. Bialatski has travelled across Eastern Europe, observing trials, investigating human rights abuses, supporting prisoners' families and observing elections.

15. Mr. Bialatski's arrest was preceded by his statements at the Council of Europe in April 2011, about the deteriorating situation of human rights activities in Belarus; his participation at the FIDH International Board meeting held in Paris in June 2011; and his speech on the occasion of a hearing on the situation in Belarus before the European Parliament, in which he called for sanctions against those responsible of human rights violations in the country.

16. In light of the foregoing, the source submits that the sentencing and continued detention of Mr. Bialatski are a direct result of his peaceful exercise of the rights and freedoms guaranteed under international human rights law, in particular those enshrined in articles 19 and 22 of the International Covenanat on Civil and Political Rights. According to the source, Mr. Bialatski's detention is solely aimed at sanctioning and preventing his activities as a human rights defender.

17. The source further states that following sentencing by the first instance court on 24 November 2011, Belarusian NGOs launched a campaign to collect money in order to cover material damages allegedly done to the State and court budgets, amounting to a total of 757,526,717 Belarusian roubles (approximately US$95,000), equivalent to the fine levied against Mr. Bialatski. Days before his appeal in January 2012, the entire amount of the fine was paid.

18. In its response to an urgent appeal, the Government mentioned that "[t]he investigation found no confirmation of reports that the … sums [on the basis of which Mr. Bialatski was prosecuted] in the Lithuanian and Polish banks were intended to fund the Viasna human rights centre and other organizations." In the same response, the Government submits that "[i]nformation from the competent authorities concerning Mr. Bialatski's situation convincingly confirms that his detention and remand in custody are not related to his work as a human rights defender, including in the context of the activities of the Viasna human rights centre."

Response from the Government

19. On 20 April 2012, the Working Group requested the Government of Belarus to respond to the aforementioned allegations. On 22 May 2012, the Government of Belarus provided its reply. The Government stated that, in a spirit of constructive collaboration, in October 2011, it had provided the Working Group with exhaustive arguments showing the unfounded nature of the allegation that Mr. Bialatski's arrest and detention could be of an arbitrary nature. Specifically, the Government stated that its response showed that Mr. Bialatski's arrest and detention were based on specific provisions of the Criminal Code and Code of Criminal Procedure of Belarus and hence could not be considered arbitrary under article 9 of the Universal Declaration of Human Rights nor article 9 of the International Covenant on Civil and Political Rights. The provisions of these articles, as of other norms in these documents related to criminal prosecution and detention in custody, were respected during the preliminary investigation regarding Mr. Bialatski.

20. The Government maintains that Mr. Bialatski was informed of his rights and responsibilities, including his right to defence, immediately upon his arrest. He used the

services of a lawyer, who represented his interests during the court hearing of the criminal case, and he had adequate time and possibilities to prepare his defence.

21. In November 2011, the Pervomaiski district court in Minsk sentenced Mr. Bialatski to four years and six months' deprivation of liberty to be served in a strict regime colony, with confiscation of property.

22. According to the Government's response, the court sentence is related exclusively to his violations of the tax legislation. Mr. Bialatski did not declare substantial financial resources that he had received from sources outside of Belarus, which is a serious violation of current the tax legislation (more detailed information may be found in the Government's response of 31 October 2011 to the previous urgent appeal).

23. Specifically, under article 153, paragraph 1.1., of the Tax Code, income received from sources in Belarus and/or abroad by physical persons recognized under article 17 of the Code as being resident in Belarus for tax purposes is subject to personal income tax. Under article 17 of the Tax Code, physical persons who are present in Belarus for more than 183 days in a calendar year are considered to be resident in the country for tax purposes, which was Mr. Bialatski's case.

24. The Government notes that tax evasion is punishable by law, as it is a criminal offence in all European countries. Some countries of the European Union provide more serious penalties than Belarus for violations of the tax legislation. Everybody, without exception, is prosecuted in the case of tax evasion, regardless of their political or social status. The legislation of European countries does not contain any guarantee of tax immunity for persons involved in human rights activities.

25. The Government conveys that there is no legal basis for the Working Group's continued consideration of Mr. Bialatski's case. The Government submits that Mr. Bialatski's detention and the subsequent court decision were based on clear legislative provisions that are in conformity with the applicable international legal instruments.

26. The Government further states that the information provided to the Working Group by the source perversely interprets the situation in respect of the Bialatski case and tries to give it a political hue. According to the Government, the source has not presented a single convincing fact in support of the argument concerning a possible violation of the provisions of international legal instruments.

27. The Government emphasizes that the source of the information should be aware that, although the Working Group on Arbitrary Detention has a special thematic mandate, it cannot replace the domestic judicial system and revise decisions adopted by the judicial bodies of a Member State of the United Nations.

Further comments from the source

28. By letter dated 23 August 2012, the source provided further comments. According to the source, the Government of Belarus vaguely refers to article 9 of the Universal Declaration of Human Rights and article 9 the International Covenant on Civil and Political Rights, and fails to demonstrate (1) the degree of compliance, by the authorities, with all the provisions of article 9 of the Covenant, including in the light of the jurisprudence of the Human Rights Committee and other international bodies and mechanisms; and (2) the reasons why it considers that the detention of Mr. Bialatski does not fall within the scope of the mandate of the Working Group on Arbitrary Detention.

29. The source refers to the following guarantees under article 9 of the Covenant: the provisions of the domestic legislation that, in its turn, must comply with the principles of international instruments, must be observed during the detention; the custody must not only be lawful, but also reasonable and necessary in all respects (for instance, to prevent escape,

manipulation of evidence or repetition of earlier crimes); the custody cannot be assessed in abstract but must be analysed in the light of the concrete circumstances of each case, and all factual information about the accused; the suspicion that a person committed a criminal offence is not in itself sufficient ground for holding the detainee in custody during the investigation and the run up to the trial; the custody must not be considered as a standard measure to be applied to all individuals suspected of committing a criminal offence. This measure should be used only as a last resort, only when less strict measures cannot ensure the proper behaviour of the accused. The source submits that the custodial placement of Mr. Bialatski during the preliminary investigation was in violation of the aforementioned standards.

30. The source submits that any decision taken by the investigative organ and by the court about the extension of the period of custody, must contain motivations for resorting to custodial placement, for instance on grounds of necessity, reasonableness and commensurability. This was not done in the present case and amounts to a violation of the provisions of article 126, paragraph 2,, of the Criminal Procedure Code of Belarus and article 9, paragraph 1, of the International Covenant on Civil and Political Rights. Moreover, the decisions of the courts on the question of the legality of the custodial placement are based on article 126, paragraph 1 of the Criminal Procedure Code of Belarus, according to which "the measure of restraint in the form of custodial placement can be applied to persons who are suspected of committing hard or especially hard crimes solely on the basis of the graveness of the offence". However, in the present case, neither the decision of the investigator, nor any court decision concerning the custodial placement of Mr. Bialatski contain any reasoning for the use of such a restrictive measure towards Mr. Bialatski. In addition, the source submits that not a single piece of concrete evidence was provided to demonstrate the likelihood of the danger that the accused could evade justice, destroy evidence or violate the law. Therefore, the legal norm that allows custodial placement solely on the basis of the graveness of the offence fails to meet the international standards, since this approach is not based on the individual assessment of the possibility of an unlawful behaviour of the accused during the investigation of the case and its consideration by the court. In the light of the foregoing, the source submits that the custodial placement of Mr. Bialatski violated article 9, paragraph 1 of the International Covenant on Civil and Political Rights.

31. The source further invokes the breach of article 9, paragraph 3, of the Covenant. It notes that according to the provisions of the Criminal Procedural Code of the Republic of Belarus, the custodial placement is conducted on the basis of decision of the investigator, sanctioned by the prosecutor or other organs of criminal prosecution (article 126, paragraph 4, of the Criminal Procedure Code). When considering cases related to Belarus, the Human Rights Committee has twice stated that the State prosecutor is not a person who possesses the necessary institutional independence and impartiality to be considered as an "other officer authorized by law to exercise judicial power" as stated in article 9, paragraph 3, of the Covenant, since due administration of the judicial power can only be conducted by an organ that is independent, objective, impartial and unbiased with the regard to the questions being considered. Consequently, the source submits that the placement of Mr. Bialatski in custody by the deputy prosecutor of the city of Minsk on 5 August 2011 constitutes a breach of article 9, paragraph 3 of the International Covenant on Civil and Political Rights.

32. Furthermore, the source contends that when considering the appeals against the custodial placement of Mr. Bialatski, the Pervomaiski District Minsk Court and the Court of the City of Minsk did not observe the requirements of article 9, paragraph 4, of the Covenant. According to the source, the decisions of the courts do not contain references to the consideration of any evidence providing sufficient grounds to hold Mr. Bialatski in custody (such as criteria of necessity, reasonableness and expediency of the use of this measure towards the relevant individual in the relevant circumstances). Moreover, the court

assessment was conducted in the absence of Mr. Bialatski, who was thus deprived of the opportunity to defend himself.

33. In parallel, the source submits that, in its response, the Government failed to demonstrate the reasons for which it considers that the detention of Mr. Bialatski does not fall within the scope of the mandate of the Working Group on Arbitrary Detention. The Government merely refers to article 153, paragraph 1.1, of the Tax Code, which states that "income received from sources in Belarus and/or abroad by physical persons recognized under article 17 of the Code for tax purposes is subject to personal income tax". The source stresses that Mr. Bialatski was placed in custody under charges of tax evasion (see article 243, paragraph 2, of the Criminal Code) after the Belarusian tax authorities wrongly considered that money in accounts located in Lithuania and Poland to be Mr. Bialatski's personal income, and accused him of concealing it. This money, which was transferred by major international organizations for the purpose of funding ordinary human rights activities, was never used by Mr. Bialatski as personal funds, but rather to finance the legitimate activities of the Human Rights Centre "Viasna".

34. According to the source, Mr. Bialatski has always maintained his innocence with regard to the accusations brought against him. During the preliminary investigation and throughout the court proceedings, he repeatedly stated that the money, which a number of foreign funds and organizations had transferred in accounts opened in his name in Poland and Lithuania were used exclusively to finance the human rights activities of the Human Rights Centre "Viasna". The right to freedom of association, guaranteed under article 22 of the Covenant, covers not only the creation of associations, but also all their subsequent activities. There is no effective way to conduct those activities without access to funds.

35. The right of human rights workers and organizations to solicit, receive and utilize resources specifically to foster and protect human rights and fundamental freedoms by peaceful means is enshrined in article 13 of the Declaration on human rights defenders[2]. The Declaration provides special protection to human rights defenders, including the right to solicit, receive and utilize resources for the purpose of protecting human rights (including the receipt of funds from overseas).

36. The source recalls that the authorities cancelled the official registration of the Human Rights Center "Viasna" in 2003, then again in 2007, before eventually denying it official re-registration in 2009. The denial of registration prevented the organization from opening a bank account in Belarus to receive funds and to pay (or be exempted from) taxes on the funds received. Moreover, the Criminal Code of Belarus strictly restricts the right of organizations to receive charitable contributions from overseas that can be used only for explicitly limited purposes, which exclude human rights-related activities.

37. The Government has thus cut off all possibilities for the organization to finance its human rights activities. This legislation is contrary to article 13 of the Declaration on human rights defenders and violates article 22 of the International Covenant on Civil and Political Rights. Therefore, the funds dedicated to the human rights activities of the Human Rights Centre "Viasna" were channelled through Lithuanian and Polish bank accounts, only because the organization had systematically been denied registration in Belarus, in violation of article 22 of the Covenant and because article 193, paragraph 1, of the Criminal Code of Belarus criminalizes its activities "as being part of an unregistered organization".

[2] Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by the General Assembly in its resolution 53/144 of 9 December 1998.

38. Consequently, the source reiterates that the sentencing and detention of Mr. Bialatski are arbitrary as they result from the exercise of his universally recognised human rights that are criminalized by the legislation of Belarus.

Discussion

39. Mr. Bialatski was sentenced to four and a half years' imprisonment with confiscation of property in 2011, and this judgment was upheld on appeal earlier this year (2012). Central to the case, as stated by the source, are Mr. Bialatski's claims that the funds received in a bank account abroad were part of the fundraising for the non-governmental organization, Viasna, that the Government had deregistered and taken steps to dissolve.

40. In its Communication No. 1296/2004, *Belyatsky et al.* v. *Belarus*, the Human Rights Committee held that the dissolution of Viasna was in violation of the freedom of association, as guaranteed by article 22 of the International Covenant on Civil and Political Rights.

41. The Special Rapporteur on the situation of human rights defenders dealt with the case in her report of 24 February 2010, and set out the background as follows:

> Concern was expressed that the continuous and sustained refusal to register the human rights organization Viasna might be related to its activities in the promotion and defence of human rights, in particular its campaign for the abolition of the death penalty in Belarus. Further concern was expressed that this verdict, and repeated refusal to register the organization, is in violation of international standards, in particular article 22 of the International Covenant on Civil and Political Rights, to which Belarus is a party, and runs counter to the decision of the Human Rights Committee and the resolution of the Parliamentary Assembly of the Council of Europe.[3].

42. In the report of the United Nations High Commissioner for Human Rights on the situation of human rights in Belarus, the following is set out:

> The Human Rights Centre Viasna has also been repeatedly targeted by the authorities. Since cancelling its registration in 2003, the Belarusian authorities threatened Viasna Chairman Ales Bialatski (also the Vice-President of the International Federation for Human Rights and a member of the Belarusian Association of Journalists) with criminal prosecution for "unauthorized NGO activity" (Criminal Code, art. 193.1). The latest warning was issued in April 2011. On 20 December 2010, KGB officers reportedly raided the Viasna offices, seized computers and documentation, and detained 10 staff members, who were released later the same day. On 4 August 2011, Mr Bialatski was again arrested, placed in a pretrial detention centre of the Ministry of the Interior and charged with tax evasion.
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> On 24 November, he was sentenced by the Pervomaiski District Court in Minsk to four and a half years of maximum security imprisonment and his property confiscated. Mr Bialatski was convicted for "concealment of incomes on an especially large scale" (Criminal Code, art. 243.2). The court ruled that Mr Bialatski had intentionally avoided paying taxes from the money he allegedly kept in bank accounts abroad; the court disregarded the fact that the money was not Mr Bialatski's personal income. He appealed against the verdict, which was, however, confirmed on 24 December 2011 by the Minsk City Court. In February 2012, Mr. Bialatski was taken to Babruysk correctional colony No. 2. Another Viasna member,

[3] See A/HRC/13/22/Add.1, para. 140.

> Valiantsin Stefanovich, was also found guilty of tax evasion and, on 16 December 2011, the court in Minsk sentenced him to a fine for having concealed income.[4]

43. In her report on the situation of human rights in Belarus, the United Nations High Commissioner for Human Rights made the following recommendation:

> Put an immediate end to all forms of pressure on and harassment of civil society organizations, as well as individual human rights defenders; and release immediately and unconditionally Ales Bialatski, and withdraw charges brought against him and other human rights defenders.[5].

44. The Working Group has reviewed the submissions made to it and, in particular, the Government's information about the first instance and appeal judgements against Mr. Bialatski in 2011 and 2012, respectively. It has also considered the source's information and Mr. Bialatski's claims that the funds received in the bank account abroad were part of the fundraising for the non-governmental organization Viasna.

45. The Working Group notes that there is no immunity for human rights defenders against criminal charges of the kind in this case. However, government action has to respect the exercise of human rights, and Governments have specific duties to protect human rights defenders against different forms of harassment that they may encounter in their activities. When there are claims of human rights violations in this context, including a pattern of harassment, domestic authorities and international supervisory bodies should apply the heightened standard of review of government action. Domestic authorities have a duty to investigate, and the inquiry must be independent, both institutionally and in practice, and prompt.

46. There is no support for such a review being undertaken by the domestic authorities in the present case. This is despite the fact that there is a close link between continuous harassment against the work of Mr. Bialatski and his colleagues at Viasna and the organization was impaired by the authorities from undertaking its activities. This is particularly striking in the light of the strong criticism expressed by international bodies as referred to above, as well as the finding of the Human Rights Committee of violation of article 20 of the Universal Declaration on Human Rights and article 22 of the International Covenant on Civil and Political Rights in respect of the dissolution of Viasna.

47. The judgements rendered against Mr. Bialatski do not address his claims that the funds received in the bank account abroad were part of the fundraising for the activities of Viasna, nor does the Government's submission assist the Working Group in this respect. The Working Group emphasizes that criminal liability cannot be based on prior government action to deregister and dissolve the non-governmental organization Viasna, in violation of article 20, paragraph 1, of the Universal Declaration on Human Rights and article 22 of the International Covenant on Civil and Political Rights. Such government action will not have effect in public or private law, and will not provide the basis for subsequent criminal proceedings.

48. Moreover, the Working Group notes that the criminal law provisions in Belarus applied to Mr. Bialatski's case do not list human rights-related activities among the purposes that allow tax exemption. In this respect, the Working Group emphasizes that under article 22 of the Covenant, States parties are not only under a negative obligation not to interfere with the founding of associations or their activities but also under a positive obligation to ensure and provide the legal framework for the incorporation of juridical

[4] See A/HRC/20/8, para. 62.

[5] Ibid., para. 75 (e).

persons. In the Working Group's view, measures such as facilitating the tasks of associations by public funding or allowing tax exemptions for funding received from outside the country, fall within the scope of the positive obligation under article 22 of the Covenant. Finally, States are required to protect the establishment or activities of associations from interference by private parties.

49. The Working Group further recalls that in accordance with article 22, paragraph 2, of the International Covenant on Civil and Political Rights, any restriction on the right to freedom of association must cumulatively meet the following conditions: (a) it must be provided for by law; (b) it may only be imposed for one of the purposes set out in paragraph 2; and (c) it must be "necessary in a democratic society" for achieving one of these purposes. The Government has not established any of these conditions to justify its action of de-registering Viasna, harassing its members and impairing its activities.

50. Under these circumstances, the Working Group finds that the fundraising undertaken by Mr. Bialatski for the purposes of allowing the very existence of Viasna, and continuation of its activities, is in conformity with the rights contained in article 20, paragraph 1, of the Universal Declaration on Human Rights and article 22 of the International Covenant on Civil and Political Rights. The Working Group notes with concern that the criminal provisions as applied to Mr. Bialatski's case do not take account of the aforementioned standards. The Working Group concludes that the sentencing and ongoing detention of Mr. Bialatski are in breach of article 20, paragraph 1, of the Universal Declaration on Human Rights and article 22 of the International Covenant on Civil and Political Rights.

Disposition

51. In the light of the foregoing, the Working Group on Arbitrary Detention renders the following opinion:

> The deprivation of liberty of Aleksandr Viktorovich Bialatski, being in contravention of article 20, paragraph 1, of the Universal Declaration on Human Rights and article 22 of the International Covenant on Civil and Political Rights. Is arbitrary and falls within category II of the arbitrary detention categories referred to by the Working Group when considering the cases submitted to it.

52. Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy Mr. Bialatski's situation and bring it into conformity with the standards and principles set forth in the Universal Declaration on Human Rights and the International Covenant on Civil and Political Right.

53. The Working Group emphasizes that the adequate remedy is to release Mr. Bialatski and accord him an enforceable right to compensation pursuant to article 9, paragraph 5, of the International Covenant on Civil and Political Right.

[Adopted on 31 August 2012]