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Human Rights Council
Working Group on Arbitrary Detention

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Opinion No. 64/2023 concerning Vitali Braginiec (Belarus)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 51/8.

2. In accordance with its methods of work,¹ on 13 July 2023 the Working Group transmitted to the Government of Belarus a communication concerning Vitali Braginiec. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

3. 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 him or her) (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 Covenant (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 on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

¹ [A/HRC/36/38](#).

1. Submissions

(a) Communication from the source

4. Vitali Braginiec, born on 19 August 1973, is a national of Belarus. His usual place of residence is the settlement of Ratomka, in Minsk Region. Before his detention, he was a lawyer at the Minsk Regional Bar Association.

5. According to the source, Mr. Braginiec was arrested on 23 May 2022, at his place of residence, by forces from the Department of the State Security Committee for Minsk and the Minsk Region, who did not show a warrant or other decision by a public authority ordering the deprivation of his liberty. In addition, it is alleged that the agents concerned did not provide any information about the reasons for the arrest.

6. Reportedly, the grounds for Mr. Braginiec's criminal prosecution were not publicly reported by the authorities, and his lawyers were forbidden to disclose that information, since they had to sign a non-disclosure pledge in respect of the information relating to the preliminary investigation and the trial. Criminal liability for the disclosure of such data is established in article 407 of the Criminal Code. According to the established practice, lawyers may not disclose the essence of the charges, the content of procedural documents, the content of investigative and procedural actions, the content of complaints and motions of counsel, the course of the trial, the content of the verdict and other court decisions. Therefore, the source stresses that this complaint is based on information from public sources and that the materials relating to the criminal case are under the control of Minsk City Court.

(i) Context

7. The source reports that, on 9 August 2020, the results of the presidential election were announced in Belarus. The source alleges that the period of the pre-election campaign and after the announcement of the election results was marked by numerous protests against the rigging of the election results, violence against protesters, and the detention of the main presidential candidates. More than 30,000 people were detained during 2020. The vast majority of people were punished for "participation in an unsanctioned mass event".

8. Peaceful protesters were subjected to violence at the time of their detention and afterwards. Between 9 August and 23 November 2020, more than 2,600 people were injured; in addition, at least four people were killed during the protests. Between 2020 and 2023, authorities did not investigate some 5,000 complaints of torture and other acts of ill-treatment against peaceful protesters and others detained for expressing their dissent.

9. Reportedly, the period before and after the presidential elections was characterized by unprecedented pressure on lawyers defending people from persecution by the State because of their political opinion and for speaking out against human rights violations. It is alleged that between 9 August 2020 and 6 February 2023, 92 lawyers were disbarred arbitrarily.

10. According to the source, since the 2020 presidential elections, Belarusian lawyers working on sensitive cases have been subjected to judicial harassment, arbitrary arrest, detention, administrative sanctions, criminal prosecution, and disciplinary sanctions, including disbarment. The authorities not only failed to fulfil their duty to protect lawyers from such harassment for performing their professional duties, they were in fact the source of the harassment. As a result, lawyers in Belarus are reportedly prohibited from carrying out their professional duties independently.

11. The source claims that in her report concerning the period from 1 April 2021 to 31 March 2022, the Special Rapporteur on the situation of human rights in Belarus noted an increase in reports of intimidation, administrative and criminal charges, disciplinary measures, and disbarment of lawyers. At least 50 lawyers had been prevented from practising their profession because of disbarment, and that trend had continued. That intimidation and punishment of lawyers had had a devastating effect on the administration of justice and the rule of law in Belarus as a whole.²

² See [A/HRC/50/58](#).

12. The information provided suggests that from September 2020 to February 2023, there were at least 23 cases of deprivation of liberty of lawyers. Such cases show that lawyers who represented political opponents of the current regime or publicly expressed their position on issues of the rule of law and human rights were detained.

(ii) *Administrative proceedings against Mr. Braginiec*

13. According to the information received, Mr. Braginiec worked as a lawyer representing individuals against whom criminal and administrative proceedings had been brought in connection with the protests in Belarus before and after the presidential elections in 2020. At the time of his detention, he was providing legal assistance and representation to human rights defenders, political prisoners, philosophers and lawyers.

14. On 23 May 2022, officers from the Committee for State Security reportedly detained Mr. Braginiec at his home and took him to the Partyzanski District Police Department in Minsk. Once there, he was charged with disobedience of a lawful order or demand of an official in the exercise of their authority, under article 24-3 of the Code of Administrative Offences.

15. Mr. Braginiec pleaded not guilty to the charges, stressing that he had not disobeyed, because as a lawyer he well understood the consequences of such behaviour.

16. On 25 May 2022, Partyzanski District Court allegedly found Mr. Braginiec guilty of disobedience, for his supposed refusal to follow officers to the building of the Partyzanski District Police Department, defiant behaviour and shouting, and sentenced him to 15 days of administrative detention.

17. According to the source, on 7 June 2022, after serving 15 days of administrative detention, Mr. Braginiec was not released. Subsequently, it became known that he had been sentenced to a further 15 days of arrest.

(iii) *Criminal prosecution of Mr. Braginiec*

18. According to the source, in June 2022, it became known that Mr. Braginiec had been transferred from the Minsk City Detention Centre to the pretrial detention centre, and information about his prosecution on criminal charges emerged.

19. On 31 August 2022, Mr. Braginiec's lawyer was detained. The court found Mr. Braginiec's lawyer guilty of disobedience of a lawful demand of a police officer and sentenced him to 14 days of administrative detention. On 3 November 2022, the Ministry of Justice terminated Mr. Braginiec's lawyer's licence to practise his profession.

20. On 9 September 2022, the authorities reportedly declared the "Belarusian advocates" chat room on Telegram to be an "extremist formation". This chat room, at different times, consisted of 150 to 170 lawyers and Mr. Braginiec was purportedly part of it.

21. In January 2023, it became known that Mr. Braginiec had been charged with committing the following crimes under the Criminal Code: (a) inciting racial, national, religious or other social enmity or discord (art. 130, part 3); (b) calling for restrictive measures (sanctions), other actions aimed at causing harm to the national security of Belarus, (art. 361, part 3); (c) setting up or taking part in extremist formations (art. 361-1 (1)); and (d) organizing and preparing, or actively participating in, actions that seriously violate public order (art. 342, part 1).

22. It is reported that the exact content of the charges is unknown, as Mr. Braginiec's lawyer was obliged to sign a non-disclosure pledge.

23. On 16 January 2023, the trial of Mr. Braginiec at Minsk City Court commenced. The court closed the hearing to the public.

24. According to the source, the website of the Supreme Court of Belarus shows that, on 2 February 2023, Minsk City Court found Mr. Braginiec guilty of all charges and sentenced him to eight years' imprisonment in a strict regime penal colony.

25. Mr. Braginiec appealed against the verdict. On 5 May 2023, the Supreme Court dismissed the appeal and upheld the verdict.

(iv) *Legal analysis*

26. The source claims that the criminal prosecution of Mr. Braginiec was in violation of articles 9, 14, 19, 21 and 26 of the International Covenant on Civil and Political Rights and that his detention is therefore arbitrary under categories I, II, III and V.

a. Category I

27. The source claims that the two administrative arrests of Mr. Braginiec were in fact pretrial detention in a criminal case. The practice of repeatedly arbitrarily bringing administrative charges to find grounds for a criminal case is widespread in Belarus, as many human rights defenders, politicians, writers, lawyers, bloggers and other individuals have been among those detained in such a way.

28. It is alleged that the administrative arrests were in fact pretrial detention, because the grounds for the arrests were false. At first, Mr. Braginiec was charged under article 24-3 of the Code of Administrative Offences with “disobeying” a police officer on the evening of 23 May 2022, after he had been restricted in his movements by officers from the Committee for State Security. Article 24-3 of the Code of Administrative Offences, apart from administrative arrest, provides for less severe punishments. Nevertheless, the court sentenced Mr. Braginiec to 15 days of administrative detention, the most severe measure. The source claims that the imposition of 15 days of administrative detention was not fair, reasonable, necessary or proportionate, and that as such it was in violation of the requirements of the Covenant and therefore constituted an arbitrary deprivation of liberty.

29. Furthermore, the circumstances of the second administrative case are unknown, therefore it is alleged that two consecutive administrative arrests, when the first one was already arbitrary, are a means of pressure. This was reportedly a measure taken to immediately suspend Mr. Braginiec from his human rights work.

30. The source stresses that a person must be brought physically before a judge or other officer authorized by law to exercise judicial power. At the hearing of 25 May 2022, Mr. Braginiec was not brought physically before the judge, as the hearing was held via Skype. This practice has been widespread since 2020. The court session in the second administrative offence case against Mr. Braginiec was also reportedly held without him being physically present in court.

31. During the preliminary investigation into the criminal case, Mr. Braginiec was held in custody. Under article 9 (3) of the Covenant, anyone arrested or detained on a criminal charge is to be brought promptly before a judge or other officer authorized by law to exercise judicial power and is to be entitled to trial within a reasonable time or to release. This condition applies in all cases without exception and does not depend on the detainee choosing or being available to claim it. This condition applies even before formal charges have been filed, from the moment a person is detained or taken into custody on suspicion of committing a criminal act. Forty-eight hours is generally sufficient to bring an individual before a judge and for the preparation of the court hearing, and any delay beyond 48 hours must be exceptional and justified by specific circumstances.

32. This right is designed to place the detention of those who are under investigation or have been accused in criminal cases under judicial control. Inherent in the proper exercise of judicial power is the principle that it should be exercised by a body that is independent, objective and impartial in respect of the matters being dealt with. Therefore, the Public Prosecutor cannot be regarded as an official competent to exercise judicial power under article 9 (3) of the Covenant.

33. The source reports that the country’s Code of Criminal Procedure does not provide for the immediate transfer of a detainee to a judge. In accordance with the Code of Criminal Procedure, the arrest order is made by an investigator, and the pretrial detention order is made by an investigator with the authorization of a prosecutor. In violation of article 9 of the Covenant, Mr. Braginiec was not brought before a judge or other body authorized by law to exercise judicial power within 48 hours, or even later. The fact that his pretrial detention was authorized by a prosecutor did not absolve the authorities from complying with the

requirements of the Covenant to bring a detained person before a judge to verify the lawfulness and validity of the detention.

34. Mr. Braginiec was not physically brought before a judge during the administrative trials; the legislation of Belarus does not provide for the immediate transfer of a detainee in a criminal case to a judge. Therefore, Mr. Braginiec was reportedly detained on 23 May 2022, and was physically brought before a judge for the first time on 16 January 2023. This allegedly does not fulfil the obligation to bring a detainee promptly before a judge.

35. The source therefore argues that these facts demonstrate that there were violations of article 9 (1) and (3) of the Covenant, and that Mr. Braginiec's pretrial deprivation of liberty was arbitrary under category I.

b. Category II

36. According to the source, the imputation of the crimes under articles 342, 130, 361 and 361-1 of the Criminal Code, even in the absence of the text of the court judgments, is sufficient to conclude that the persecution of Mr. Braginiec was motivated by his opinions and his participation in peaceful assemblies. This conclusion follows from the fact that these provisions of the Criminal Code are used to persecute critics of the authorities.

37. Mr. Braginiec was convicted under article 342 of the Criminal Code. It is reported that this provision has only been used to punish participants in the peaceful protests of 2020 and 2021. However, criminal punishment for participation in peaceful assemblies is incompatible with article 21 of the Covenant. Deprivation of liberty as punishment for the legitimate exercise of freedom of assembly is inherently arbitrary. While the right to peaceful assembly may in certain cases be restricted, the onus is on the authorities to justify any restrictions. Authorities must be able to show that any restrictions meet the requirement of legality and are also both necessary for and proportionate to at least one of the permissible grounds for restrictions enumerated in article 21. When this onus is not met, article 21 is violated.

38. Article 342 of the Criminal Code is allegedly incompatible with article 21 of the Covenant. In 2021, the Council of Europe's Venice Commission reportedly noted:

Article 342 of the Criminal Code criminalizes group behaviour of a non-violent character. The (serious) disruption of public order, including the disruption of the work of transport services, companies, institutions or organizations, is an almost inevitable consequence of a mass demonstration. If participation in such a large-scale demonstration remains peaceful, such participation is firmly protected by human rights standards. The mere fact that the demonstration causes inconvenience to the public does not suffice to criminalize the participation of a person in such an event.³

39. The source claims that the protests in Belarus were peaceful. Mr. Braginiec was not charged with committing violent acts, so it is obvious that he did not carry out any violent actions. In such a case, criminal liability for participation in a peaceful assembly is incompatible with the guarantees of article 21 of the Covenant.

40. Article 130 of the Criminal Code has been used in Belarus after the 2020 elections to punish critics of the authorities. The Government has often used this article – which criminalizes inciting hatred – against people who publicly criticize State officials. However, there are no statements by Mr. Braginiec that contain incitement to hatred.

41. Article 361 of the Criminal Code criminalizes calling for sanctions against Belarus. For the source, after the 2020 elections in Belarus, representatives of law enforcement bodies violated fundamental human rights, such as the right to life and the right to freedom from torture, and remained unpunished, while people were arbitrarily detained en masse and imprisoned for taking part in peaceful assemblies. In such a context, the calls for "restrictive measures" or "sanctions" were reportedly the only non-violent means of protecting human rights that could influence authorities to stop the violence. It was the impunity since August 2020 that made it necessary to ask for restrictive measures to be imposed. Thus, if

³ See [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2021\)002-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)002-e).

Mr. Braginiec called for sanctions, those statements would be protected by article 19 of the Covenant.

42. Article 361-1 of the Criminal Code reportedly criminalizes the establishment of or participation in an “extremist formation”. It is alleged that the term “extremist formation” is vaguely defined by the authorities and used to persecute dissenters. The Criminal Code refers to the Law on Countering Extremism for the definition of extremism. However, it is allegedly impossible to even briefly describe the definition of extremism provided in the Law, since that definition is contained in 18 subparagraphs. According to the source, the concept of extremism in the Law can be subsumed under any sphere of human activity, not only any form of peaceful protest but the entire activity of civil society – because of the broad wording and the wide range of powers of State bodies. According to the Ministry of Internal Affairs, as at 1 April 2023 there were 121 informal groups recognized on the national list of extremist materials as “extremist formations”; the source reports that all of these were included for political reasons.

43. The source claims that the deprivation of Mr. Braginiec’s liberty, in the context of continuing detentions of peaceful protesters, activists, journalists, human rights defenders and lawyers since 2020, as well as in the context of the charges brought against him, the clients he was advising and representing, his disbarment, the recognition of the lawyers’ chat room as an “extremist formation”, and the atmosphere of secrecy that surrounded the criminal case with the authorities never voicing specific charges against him, indicate that the criminal prosecution was in fact motivated by Mr. Braginiec’s political views and professional activities in defence of dissidents. The conviction of Mr. Braginiec on charges used to punish participants in peaceful assemblies and critics of the authorities, allegedly leaves no doubt that his deprivation of liberty is the result of exercising the rights guaranteed by articles 19 and 21 of the Covenant. The source argues that the detention is therefore arbitrary under category II.

c. Category III

(v) *Independence and impartiality of the court*

44. According to the source, judges in Belarus, including the judge in the first instance court in Mr. Braginiec’s case, are not independent and impartial within the meaning of article 14 of the Covenant.

45. According to article 14 of the Covenant, the requirement of independence relates to the manner and conditions of appointment of judges, the guarantees of their security of tenure, the conditions governing promotion, transfer, and suspension and termination of their functions, and the actual independence of judges from political interference by the executive and legislative branches. Laws should establish clear procedures and objective criteria for the appointment, remuneration, retention, promotion, suspension and termination of judges and for the disciplinary sanctions applicable to them.

46. The source reports that, under article 84 (10) of the Constitution of Belarus, judges of general courts are appointed by the President.

47. By virtue of article 81 (3) of the Code on the Judiciary and the Status of Judges, the President appoints judges for a term of five years and then may reappoint them indefinitely or not reappoint them. In its concluding observations on Belarus,⁴ the Human Rights Committee reportedly drew attention to the fact that five years was too short a period to comply with the guarantee of the irremovability of judges under the Covenant. Moreover, article 81 (3) of the Code on the Judiciary and the Status of Judges does not set out clear and objective criteria on the basis of which judges may be reappointed, or the criteria governing the term of office of reappointed judges.

48. Judges may be subjected to disciplinary sanctions. According to article 99 of the Code on the Judiciary and the Status of Judges, final decisions in cases involving disciplinary sanction are taken by the President of the Court or the President, depending on the

⁴ CCPR/C/BLR/CO/5.

disciplinary sanction to be applied. Under article 102 of the Code, the President may impose a disciplinary sanction on a judge without initiating disciplinary proceedings. The Code does not provide for the possibility to appeal the decisions of the President.

49. According to the Covenant, laws should establish clear procedures and objective criteria for the remuneration of judges. In Belarus, judges' salaries are not determined by law, but by a decree of the President. The Human Rights Committee in its concluding observations on Belarus expressed concern over this.

50. Reportedly, the role of the President in the judicial appointment process has been criticized in the past. In 2000, the Special Rapporteur on the independence of judges and lawyers stated in a report on Belarus that giving the President full discretion in appointing and dismissing judges was inconsistent with judicial independence.⁵

51. In 2018, the Human Rights Committee pointed out that the President's role in appointing judges hindered judicial independence in Belarus, and called upon the State to reconsider the role of the President in the process, in order to comply with article 14 of the Covenant.⁶ In 2020, the Special Rapporteur on the situation of human rights in Belarus noted that for almost three decades, Belarus had failed to ensure the independence of its judiciary, due to excessive control of the judiciary by the executive branch, which was evident in the appointment, tenure and dismissal of judges.⁷

52. In 2022, the Special Rapporteur on the situation of human rights in Belarus noted in her report that in 2021, the authorities had further strengthened their control over the judiciary and the court system.⁸ The administration of justice had deteriorated during the reporting period, as the authorities had systematically violated the right to a fair trial and used the judiciary and the courts as repressive tools to suppress dissent.⁹ In a report issued in 2023, the United Nations High Commissioner for Human Rights stated that:

Violations of the rights to due process and a fair trial in both administrative and criminal proceedings continue to be numerous and systematic in Belarus, since the August 2020 protests. The judiciary in Belarus lacks independence, given the President's role in, and control over, the appointment, promotion and dismissal of judges and prosecutors. Decisions on whether an investigation should be opened and whether a person will be detained, charged and convicted to prison terms are taken exclusively by investigators and State security forces, including the Main Directorate for Combating Organized Crime and Corruption and the Committee for State Security. The Office of the Prosecutor approved such decisions in almost all cases, with judges simply implementing the decisions.¹⁰

53. The source claims that the totality of the above-mentioned elements – the appointments by the President, the term of the appointments, the possibility of disciplinary action, the determination of the procedure and the amount of the remuneration – shows the dependence of all judges on the President of Belarus.

54. Mr. Braginiec's case in the first instance was reportedly conducted by a judge who has repeatedly convicted people in politically motivated cases. In Mr. Braginiec's case, the judge's dependence on the President prevented an impartial ruling, contrary to article 14 of the Covenant.

(vi) *Lack of a public hearing*

55. According to the information received, Mr. Braginiec was tried in a closed session. The basis for the case being heard in a closed session was apparently the prevention of dissemination of information from information sources included in the national list of

⁵ E/CN.4/2001/65/Add.1, p. 4.

⁶ CCPR/C/BLR/CO/5, paras. 39 and 40.

⁷ See <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26423&LangID=E>.

⁸ A/HRC/50/58, para. 82.

⁹ Ibid.

¹⁰ A/HRC/52/68, para. 26.

extremist materials and the prevention of disclosure of information concerning those involved in the case. Mr. Braginiec objected to the closed trial.

56. Article 14 of the Covenant provides for the possibility of limiting the right to a public trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court, in special circumstances where publicity would prejudice the interests of justice. The source claims that there were no such circumstances in the trial of Mr. Braginiec and that the alleged reason demonstrates the arbitrary closure of the trial.

57. Even in cases where the public is denied access to a trial, the court ruling, including the main findings, the evidence and the legal reasoning, must be made public. In the trial of Mr. Braginiec, only the operative part of the verdict was announced (the guilty verdict and the sentence), from which the main conclusions, the evidence and the legal reasoning were not discernible. Thus, Mr. Braginiec's right to a public trial, guaranteed by article 14 (1) of the Covenant, was allegedly violated.

58. These facts reportedly show that the trial of Mr. Braginiec was conducted in violation of article 14 of the Covenant. The source claims that the violation of the right to a fair trial was so serious that it gives the deprivation of liberty an arbitrary character, and that the deprivation of liberty is therefore arbitrary under category III.

d. Category V

59. According to the source, since the 2020 elections and the related protests, lawyers who defend actual or perceived political opponents of the Government and/or publicly criticize the authorities are subjected to various reprisals, such as disbarment, and arbitrary detention in administrative and criminal cases. Mr. Braginiec was the defender of numerous protesters and political prisoners. After the 2020 elections, one of the groups persecuted by the authorities was lawyers assisting persons prosecuted in politically motivated cases.

60. The source reports that the President said, on 21 April 2022, that he had to actively intervene and control the work of the bar and notaries.¹¹ He reportedly said that the bar should be controlled and that lawyers must understand that they were public persons and their actions should be based on the rules of law and not upon some invented norms related to freedom of speech and other freedoms.¹² The Minister of Justice reportedly also stated in a speech that lawyers were "State people".¹³ The Chairman of the Belarusian Republican Bar Association, under the Ministry of Justice, allegedly said that the duty of a lawyer was to protect the interests of the State and society.¹⁴

61. Since 2020, lawyers who have defended presidential candidates, as well as the most significant political figures, have been disbarred, including by using arbitrary detention as a pretext.¹⁵ The persecution of lawyers representing critics of the Government entails depriving these individuals of the possibility of legal assistance from their chosen lawyers, and a violation of their right to a fair trial. This allegedly constitutes a denial of equality of citizens in the exercise of their rights, depending on their political views. Mr. Braginiec reportedly defended political prisoners, human rights defenders and public figures who have openly criticized the Government and the President.

62. Taking into consideration statements by the authorities and the Chairman of the Bar Association, the disbarment of lawyers who provide legal assistance to critics of the Government and the charges imputed to Mr. Braginiec, the source claims that the prosecution

¹¹ See <https://www.belta.by/president/view/lukashenko-advokatura-dolzha-byt-pod-kontrolem-i-dejstvovat-po-zakonu-497418-2022/> and <https://archive.ph/h0gKl>.

¹² Ibid.

¹³ See <https://www.belta.by/society/view/glava-minjusta-advokaty-i-notariussy-eto-prezhde-vsego-gosudarstvennye-ljudi-497453-2022/> and <https://archive.ph/xbdzF>.

¹⁴ See <https://pravo.by/novosti/obshchestvenno-politicheskie-i-v-oblasti-prava/2022/july/70726/> and <https://archive.ph/9iIEf>.

¹⁵ See https://cchr.online/wp-content/uploads/2023/03/The-Crisis-of-the-Legal-Profession-in-Belarus_Final.pdf.

of Mr. Braginiec is based on his political views and his legal support for those opposed to the authorities and is, therefore, discriminatory.

63. The source alleges that the deprivation of liberty of Mr. Braginiec is the result of discrimination based on his political opinion and professional affiliation, and the fact that he defended people who criticized the authorities, which reportedly gives the imprisonment an arbitrary character under category V.

(b) Response from the Government

64. On 13 July 2023, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 11 September 2023, detailed information about the current situation of Mr. Braginiec and to clarify the legal provisions justifying his continued detention, as well as its compatibility with the obligations of Belarus under international human rights law, and in particular with regard to the treaties ratified by the State.

65. The Working Group regrets that the Government did not submit a reply, nor did it seek an extension in accordance with paragraph 16 of the Working Group's methods of work.

2. Discussion

66. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

67. In determining whether Mr. Braginiec's detention is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has established a prima facie case for breach of international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.¹⁶ In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

68. The source has argued that the detention of Mr. Braginiec is arbitrary and falls under categories I, II, III and V. The Working Group shall proceed to examine these in turn.

(a) Category I

69. According to the source, the two administrative arrests of Mr. Braginiec were in fact pretrial detention in a criminal case.

70. The Working Group observes that the two consequent periods of administrative detention, under the provision on disobedient conduct but without any further details being specified, were followed immediately by the arrest on criminal charges. In the absence of any indication to the contrary, the Working Group agrees with the source that Mr. Braginiec's administrative detention was in reality also part of the longer uninterrupted period of his detention as a criminal suspect. Thus, the Working Group cannot but conclude that Mr. Braginiec's administrative detention was used to ensure his availability as a criminal suspect without, however, safeguarding the procedural rights he would have had as a suspect. In the Working Group's view, the above-mentioned conduct on the part of the investigating authorities is arbitrary and runs counter to the principle of the rule of law. Therefore, the Working Group finds that there was a violation of articles 3 and 9 of the Universal Declaration of Human Rights and article 9 of the Covenant during this period.¹⁷

71. The Working Group also notes the source's submission that Mr. Braginiec appeared before the judge on 25 May 2022, that is, within two days of the arrest, via video link, and not physically as required by article 9 (3) of the Covenant. The Working Group cannot share such an interpretation of article 9 (3). It also recalls its deliberation No. 11¹⁸ on prevention of arbitrary deprivation of liberty in the context of public health emergencies, in which it

¹⁶ A/HRC/19/57, para. 68.

¹⁷ See, for example, European Court of Human Rights, *Doronin v. Ukraine* (application No. 16505/02), judgment of 19 February 2009, para. 55. See also, *mutatis mutandis*, opinion No. 68/2022, para. 51, in respect of security preventive detention.

¹⁸ A/HRC/45/16, annex II.

suggested that if the exigencies of the prevailing public health emergency required restrictions on physical contact, States must ensure the availability of other measures, including secured online communications.¹⁹ In the absence of any allegation that Mr. Braginiec suffered any disadvantage related to the online hearing, the Working Group does not find that this aspect of article 9 (3) was breached.

72. The Working Group further recalls that article 9 (2) of the Covenant requires that anyone who is arrested is also promptly informed of any charges against them. Given that on 25 May 2022 Mr. Braginiec was informed about the administrative charges against him, and not criminal charges, and in view of the above-mentioned finding that his administrative detention constituted a part of his detention under criminal charges, the Working Group finds that this provision was breached.

73. Finally, the Working Group recalls that it is a well-established norm of international law that pretrial detention is to be the exception and not the rule and that it should be ordered for as short a time as possible.²⁰ Article 9 (3) of the Covenant provides that it is not to be the general rule that persons awaiting trial are to be detained, but release may be subject to guarantees to appear for trial and at any other stage of the judicial proceedings. It follows that liberty is recognized as a principle and detention as an exception in the interests of justice.

74. In the present case, according to the source, Mr. Braginiec spent about ten months in pretrial detention, without alternative preventive measures being examined, contrary to article 9 (3) of the Covenant. In the absence of any argument to the contrary, the Working Group finds his detention to be in violation of article 9 (3).

75. Accordingly, the Working Group considers that the arrests and subsequent detention of Mr. Braginiec were arbitrary under category I.

(b) Category II

76. The source alleges that the persecution of Mr. Braginiec was motivated by his opinions and his participation in peaceful assemblies. The source refers to the imputation of crimes under articles 342, 130, 361 and 361-1 of the Criminal Code, and stresses that it is a widely known fact that these provisions of the Criminal Code are used to persecute critics of the authorities.

77. The Working Group observes that while the Government had the opportunity to explain which specific actions by Mr. Braginiec amounted to crimes, it chose not to do so.

78. The Working Group also notes that some of the charges against Mr. Braginiec were brought under article 361-1 of the Criminal Code, and in this regard recalls that in one of its previous opinions concerning Belarus,²¹ it relied on a report of the United Nations High Commissioner for Human Rights which criticized the broadened scope under this provision for persecuting those expressing dissenting views; the Working Group concluded that this provision had been used against those seeking to exercise their rights to freedom of expression, peaceful assembly and association and their right to participate in public affairs.²² The Working Group also notes the report of the Venice Commission referred to by the source (see para. 38 above),²³ in which the Commission emphasized that article 342 of the Criminal Code, another provision that Mr. Braginiec was accused of breaching, criminalized group behaviour of a non-violent character relating to mass demonstrations, and stressed that the mere fact that a demonstration caused inconvenience to the public was not sufficient to criminalize the participation of a person in such an event.

79. In the absence of any allegation to the contrary and given the general context of the case, it is quite clear to the Working Group that the basis for the arrest and subsequent

¹⁹ Ibid., para. 21.

²⁰ Opinions No. 8/2020, para. 54; No. 1/2020, para. 53; No. 57/2014, para. 26; No. 49/2014, para. 23; and No. 28/2014, para. 43. See also Human Rights Committee, general comment No. 35 (2014), para. 38; and *A/HRC/19/57*, paras. 48–58.

²¹ Opinion No. 24/2022, paras. 86–91.

²² *A/HRC/49/71*, para. 68.

²³ See [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2021\)002-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)002-e).

detention of Mr. Braginiec was in fact the exercise of his rights to freedom of expression and freedom of assembly, guaranteed by articles 19 and 20 of the Universal Declaration of Human Rights and articles 19 and 21 of the Covenant.

80. The Working Group further recalls that the Human Rights Committee, in its general comment No. 37 (2020), clarified that the protection under article 21 of the Covenant extended to participating in an “assembly” by organizing or taking part in a gathering of persons for a purpose such as expressing oneself, conveying a position on a particular issue or exchanging ideas. It is thus clear to the Working Group that the arrest and detention of Mr. Braginiec was based solely on the exercise of his rights to freedom of expression and assembly, following the pattern identified by different human rights bodies as noted above. No indication of any violent behaviour on his part was presented to the Working Group.

81. The Working Group concludes that the arrest and detention of Mr. Braginiec is arbitrary and falls under category II. The Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the rights to freedom of peaceful assembly and of association, for appropriate action.

(c) Category III

82. Given its finding that the deprivation of liberty of Mr. Braginiec is arbitrary under category II, the Working Group wishes to emphasize that no trial of Mr. Braginiec should have taken place. Nevertheless, as the trial took place and Mr. Braginiec was convicted, the Working Group will proceed to examine the source’s submissions concerning the denial of fair trial rights to Mr. Braginiec.

83. The Working Group has already established that by placing Mr. Braginiec in administrative detention to ensure his availability for questioning as a criminal suspect, the authorities failed to ensure his procedural rights as a criminal suspect and notably his defence rights under article 14 (b) of the Covenant.

84. The source also complains under this category that Mr. Braginiec was not tried by an independent and impartial tribunal and that he did not have a public hearing.

85. As regards independence of the judiciary, the Working Group recalls that this is a *sine qua non* for the right to a fair hearing enshrined in article 10 of the Universal Declaration of Human Rights and article 14 of the Covenant. The notion of the separation of powers between the political organs of government and the judiciary, as well as the necessity of safeguarding the independence of the judiciary, have assumed growing importance. The Working Group refers to the report of the Special Rapporteur on the situation of human rights in Belarus, submitted to the Human Rights Council, covering the period in question,²⁴ which states:

The Special Rapporteur observed in her latest report to the General Assembly (A/75/173) that institutional deficiencies and politically motivated interference and pressure on courts and the judiciary undermined judicial independence and negatively affected the realization of the right to a fair trial in Belarus. As much became evident in the context of the deterioration in the situation of human rights in 2020 and 2021.

86. The independence of judges has been systemically restricted in Belarus. In politically sensitive cases, judges are apparently expected to implement the requests of the General Prosecutor, whose role is to implement the executive’s repressive policy of harshly punishing dissent. Judges therefore often conduct a prosecution trial, denying defendants their rights to the presumption of innocence or to present witnesses in their defence. In the context of arrests and deprivation of liberty, consistent testimonies about delays in access to a lawyer and to other legal and procedural safeguards increase concerns. Lawyers are obliged to sign a non-disclosure agreement, which makes it difficult to get information on the charges and the corresponding legal provisions. Penitentiary authorities repeatedly deny lawyers access to their defendants being held in pretrial detention, invoking health precautions, even though no

²⁴ A/HRC/47/49, para. 53.

preventive measures or restrictions related to coronavirus disease (COVID-19) have been officially enacted by the Government to date.

87. In view of these findings, given the submissions of the source, and with reference to a previous case submitted to the Working Group relating to the same context,²⁵ and in the absence of any reply from the Government, the Working Group cannot but find that Mr. Braginiec was not tried by an independent and impartial tribunal, contrary to article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant.

88. Furthermore, article 14 (1) of the Covenant provides that, in the determination of any criminal charge, everyone is to be entitled to a public hearing. Article 10 of the Universal Declaration of Human Rights similarly guarantees the right to a public hearing. As the Human Rights Committee explained in its general comment No. 32 (2007): “The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large.”²⁶ Although the right to a public hearing is not absolute, it may only be restricted “for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice”, and, in the absence of such exceptional circumstances, “a hearing must be open to the general public, including members of the media”, without entrance being limited to a select group of people.²⁷

89. It is alleged by the source that the authorities closed Mr. Braginiec’s trial to the public and the media in violation of the above provisions. Given that no explanation for these restrictions was provided by the Government, the Working Group finds that hearing Mr. Braginiec’s case behind closed doors violated his rights under article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant.

90. In view of all of the above, the Working Group considers that the violations of Mr. Braginiec’s right to a fair trial are of such gravity as to give his deprivation of liberty an arbitrary character, falling under category III.

(d) Category V

91. The source has also submitted that Mr. Braginiec is being prosecuted and imprisoned as a result of his role as a lawyer defending the opposition, which shows that he has been deprived of his liberty for reasons of discrimination based on political opinion. The Government has chosen not to address these allegations.

92. The Working Group observes that it has already examined a number of cases relating to the context of the presidential election in Belarus in 2020 that have been brought to its attention concerning the arrest and detention of those who have been part of the political opposition or have exercised their right to speak against the incumbent President.²⁸ The Working Group also notes that its opinions on these cases reflect the very recent findings of the report of the United Nations High Commissioner for Human Rights on the situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath.²⁹

93. The Working Group also recalls the 2022 report of the Special Rapporteur on the situation of human rights in Belarus, and specifically the following observations: “The harassment and persecution that has forced lawyers into exile, especially lawyers working with politically sensitive cases or cases of human rights violations, is having a devastating effect on the administration of justice and the overall rule of law in Belarus ... Lawyers are exposed to the threat of disbarment and termination of their licences, with the aim of preventing the discharge of their professional duties.” The Special Rapporteur also noted that international organizations representing the profession had identified a pattern of

²⁵ Opinion No. 45/2023.

²⁶ *Ibid.*, para. 28.

²⁷ *Ibid.*, para. 29.

²⁸ Opinions No. 23/2021, No. 50/2021, No. 24/2022 and No. 43/2023.

²⁹ A/HRC/49/71, para. 62.

intimidation and harassment reportedly applied against lawyers solely for activities carried out in the legitimate exercise of their responsibilities.³⁰

94. The Working Group thus observes a clear pattern as regards the attitude displayed by the Belarusian authorities towards Mr. Braginiec on the basis of his political opinion and of him acting as a lawyer for the opposition. Noting all of the above, and especially its findings under category II, the Working Group finds that the arrest and detention of Mr. Braginiec was based on discrimination resulting from his political opinion and his status as a lawyer for the opposition, in violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant. His detention is therefore arbitrary under category V. The Working Group refers the present case to the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the situation of human rights in Belarus, for appropriate action.

3. Disposition

95. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Vitali Braginiec, being in contravention of articles 2, 3, 7, 9, 10, 19 and 20 of the Universal Declaration of Human Rights and articles 2 (1), 9, 14, 19, 21 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

96. The Working Group requests the Government of Belarus to take the steps necessary to remedy the situation of Mr. Braginiec without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

97. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Braginiec immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

98. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Braginiec and to take appropriate measures against those responsible for the violation of his rights.

99. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the situation of human rights in Belarus, for appropriate action.

100. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

4. Follow-up procedure

101. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether Mr. Braginiec has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Braginiec;
- (c) Whether an investigation has been conducted into the violation of Mr. Braginiec's rights and, if so, the outcome of the investigation;

³⁰ See [A/77/195](#).

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Belarus with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

102. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

103. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as of any failure to take action.

104. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.³¹

[Adopted on 14 November 2023]

³¹ Human Rights Council resolution 51/8, paras. 6 and 9.