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Submission of Penal Reform International and the Belarusian Helsinki Committee

The application of the death penalty and alternative sanctions by the Republic of Belarus

Introduction

This submission focuses on the use of the death penalty and life imprisonment by the Republic of Belarus, on prison monitoring, and on due process related (primarily) to death penalty-applicable cases.

Penal Reform International considers the death penalty to constitute cruel, inhuman or degrading punishment per se. The conditions of imprisonment prior to execution can also independently constitute cruel, inhuman or degrading punishment, due to the length of time that prisoners may be held on death row, the often more restrictive conditions in which they live compared to other prisoners and the ‘death row phenomenon’ of mental and physical ill health brought on by isolation, lack of human contact and the (sometimes very prolonged) foreknowledge of death at the hands of the state. The way in which the death penalty is administered in Belarus, particularly the secrecy surrounding execution and post-execution periods, raises additional country-specific issues.

The 2012 report to the General Assembly by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/67/279) focused on the relationship between the death penalty and the prohibition of torture and cruel, inhuman and degrading treatment. In it, the Special Rapporteur detailed jurisprudence from around the world related to whether the death penalty, or specific aspects related to its use, constituted cruel, inhuman or degrading treatment; he concluded that there is an evolving international norm that the death penalty per se breaches the prohibition on cruel, inhuman or degrading treatment and that even if the creation of such a norm is still underway, ‘most conditions under which capital punishment is actually applied renders the punishment tantamount to torture’.¹

Life or long-term imprisonment, whether or not it is linked to a death sentence, can constitute cruel, inhuman or degrading punishment, due to factors including the length, isolation, lack of human contact, lack of activity and harsh treatment by prison officials. Such conditions may be imposed due to the nature of the sentence rather than the security risk that an individual is deemed to pose.

¹ A/67/279, p. 20.

The absence of independent oversight of prisons infringes on the obligation to prevent torture, as required in Article 2 of CAT as well as being the focus of the OPCAT.

For more detail on the issues raised here, please consult Penal Reform International's 2012 publications *The abolition of the death penalty and its alternative sanction in Eastern Europe: Belarus, Russia and Ukraine*, available at <http://www.penalreform.org/resource/abolition-death-penalty-alternative-sanction-eastern-europe-belarus/> and *National mechanisms for the prevention of torture in Eastern Europe*, available at <http://www.penalreform.org/resource/national-mechanisms-prevention-torture-eastern-europe-belarus-russia/>.

Death penalty: current law and practice

The death penalty is a non-mandatory sentence for 12 peacetime offences and two wartime offences in Belarus.² Life imprisonment is an alternative to the death penalty for offences associated with intentional infliction of death under aggravating circumstances. Women, men over 65 at point of sentencing and those under 18 at the time the offence was committed are exempt from execution; mental ill health can eliminate criminal liability, be a mitigating factor when determining sentence and/or suspend the application of a sentence, depending on the time and severity of the ill health.

The last two executions were in March 2012. The number of executions has decreased dramatically in the last ten years, from 47 in 1998 to an average of two per year since 2008. In 2013, three death sentences are known to have been passed. No executions are known to have taken place as of 30 August.

Since 1989 the death penalty has mainly been applied for intentional aggravated murder (Article 139 of the Criminal Code). The only exception since 1995 was the 2011 sentencing of two people to death for terrorism (Article 289(3)).

According to the Ministry of the Interior, 156 persons sentenced to death have had their sentences commuted to life imprisonment between 1998 and 2010.

Death row inmates are held in the basement of pre-trial detention centre No. 1 in Minsk, which is classified as a correction colony of special regime, with higher security requirements and stricter conditions for inmates than other types of prison. Executions are carried out in the same place.

² The offences are:

1. Initiation or waging of aggressive war: Article 122(2).
2. Act of terrorism against a representative of a foreign state: Article 124(2).
3. International terrorism: Article 126.
4. Genocide: Article 127.
5. Crimes against human security: Article 128.
6. Use of weapons of mass destruction: Article 134.
7. Violation of the laws or customs of war [associated with intentional murder]: Article 135(3).
8. Aggravated murder: Article 139(2).
9. Terrorism [associated with murder or committed by an organised group]: Article 289(3).
10. Treason [associated with murder]: Article 356(2).
11. Conspiracy or other acts committed with the aim of seizing state power [resulting in death or associated with murder]: Article 357(3).
12. Act of terrorism: Article 359.
13. Sabotage [committed by an organised group or resulting in death]: Article 360(2).
14. Murder of a police officer: Article 362.

The conditions of imprisonment for those sentenced to death are set out in Article 174 of the Criminal Executive Code. A prisoner on death row is entitled to visits from their defence lawyer or other persons having the right to provide legal assistance, without limitation in number and duration; to send and receive letters without limits; to have one short family visit per month (up to four hours); to have visits from a priest; to receive parcels ever three months; and to receive necessary medical assistance. In recent years, there has been no official information regarding death row conditions in Belarus, and researchers were unable to visit these prison cells. However, reports indicate that death row inmates are being held in solitary confinement, with limited access to fresh air or exercise. Death sentenced prisoners typically stay on death row for six months to a year and a half.³

Dr. Philippov, chairman of the 'Pravovaia Initsiativa' (Legal Initiative) NGO, visited two death wards during 1990–2000 and reported that conditions were harsh. The size of one of them was two by three metres, the other one was a little bigger. Each of the cells had two bunk beds, a bed-side chest for personal belongings, and a hole in the ground for a toilet that was not in any way separated from the rest of the cell. No daylight penetrated the cell, but a lightbulb was on 24 hours a day. Death sentenced prisoners were taken for a walk once a week; they did not work in the prison. They were not allowed to have any correspondence (they were prohibited from writing anything at all), to receive parcels or to have access to TV.⁴

In November 2011, the Committee against Torture expressed concern at reports of the poor conditions of persons sentenced to death in Belarus and that some death row prisoners were not provided with fundamental legal safeguards.⁵ The Committee called on Belarus to take all necessary measures to improve the conditions of detention of persons on death row; to ensure they are afforded all the protections provided by the CAT, and to consider ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.

Secrecy surrounding implementation of the death penalty

The secrecy surrounding executions in Belarus, criticised in previous Concluding Observations of the Committee Against Torture, continues. Condemned prisoners are not informed of the date of their impending executions. Their families are not given the opportunity for a last visit to the prisoner and are only informed about the execution after it has taken place. Bodies of executed prisoners are not returned to the family, nor is the place of burial disclosed. The mother of Anton Banderenko, whose ICCPR Article 7 rights were found by the Human Rights Committee in *Banderenko v. Belarus* to have been violated by the refusal of the authorities to tell her about her son's execution and the refusal to let her know the place of burial, has still not been informed of her son's burial site.

In 2011, the Committee Against Torture recommended that Belarus 'remedy the secrecy and arbitrariness surrounding executions so that family members do not experience added uncertainty and suffering'.⁶ In a resolution on the situation of human rights in Belarus, the former UN Commission on Human Rights urged the Government of Belarus 'to provide public information regarding the execution of those sentenced to death'.⁷ The Human Rights Committee has also expressed its concern at the secrecy surrounding the procedures

³ FIDH and Human Rights Centre "Viasna", Conditions of Detention in Belarus, Report available at <http://www.fidh.org/IMG/pdf/Belarus500ang2008.pdf> (accessed 28 August 2013), p. 31.

⁴ FIDH and Human Rights Centre "Viasna", Conditions of Detention in Belarus, Report available at <http://www.fidh.org/IMG/pdf/Belarus500ang2008.pdf> (accessed 28 August 2013), p. 31.

⁵ Concluding observations of the Committee against Torture, 7 December 2011, CAT/C/BLR/CO/4, para. 27.

⁶ CAT/C/BLR/CO/4, para. 27

⁷ Situation of human rights in Belarus, 12 April 2005, E/CN.4/2005/L.32, item 2(j).

relating to the death penalty at all stages.⁸ The Special Rapporteur on extrajudicial, summary or arbitrary executions recommended that Belarus publish annual statistics on the death penalty, and provide the names or details of individuals who have already been executed.⁹

On 15 March 2012, Dzmitry Kanavalau and Uladzislau Kavalyou were reportedly executed soon after President Alexander Lukashenka refused clemency appeals.¹⁰ Kanavalau and Kavalyou were sentenced to death by the Supreme Court, acting as the Court of first instance, for an alleged series of bomb attacks in Belarus, including an explosion in a Minsk metro station on 11 April 2011. According to Amnesty International,¹¹ their sentence followed a flawed trial that fell short of international fair trial standards and left no recourse for appeal, other than to the President for clemency. There were allegations that the two men were forced into confessing and there was no forensic evidence linking either of them to the Minsk explosion, including no traces of explosives on either of them. During the trial Kavalyou retracted his confession. His mother claimed that both men were beaten during interrogation.

Life imprisonment: current law and practice

The Criminal Code permits a non-mandatory life sentence to be imposed for each of the 14 offences for which the death penalty may also be applied. The restrictions on the application of life imprisonment (exemption of women, men over 65 at sentence, children under 18 at time of offence, persons with mental health issues) are the same as for the death penalty. Petitions for pardon of persons sentenced to life imprisonment are only considered by the President if there is a positive recommendation by the Commission on Pardon Issues.

According to the Ministry of Internal Affairs,¹² in the period from 1998 to 2010 144 life sentences were issued and 156 death sentences were commuted to life imprisonment, meaning at least 300 men are currently serving a life sentence in Belarus. Statistical information for 2011 onwards is unavailable.

A life sentence in Belarus lasts for the entirety of a person's life. According to Article 58(4) of the Criminal Code, a person sentenced to life imprisonment may have that sentence substituted by a definite term of imprisonment after serving a minimum of 20 years' imprisonment. The court takes into account the prisoner's health, behaviour and age. Life imprisonment was only introduced in Belarus in 1998, so no lifers have yet served the minimum 20 years and there is no experience of parole applications and decisions for such prisoners.

Those sentenced to life imprisonment are incarcerated in:

- Pre-trial detention centre No. 8 in Zhodino (approximately 45km from Minsk).
- Colony No. 13 in Glubokoye (approximately 160km from Minsk).

Zhodino was established in 2000 and has facilities for 100 prisoners. By 2003 the institution was overcrowded and the administration had to place four prisoners in cells built for two. In

⁸ UN Human Rights Committee Concluding Observations: Belarus, 19 November 1997, CCPR/C/79/Add.86, para. 8.

⁹ Report on the transparency and imposition of the death penalty, Special Rapporteur on extrajudicial, summary or arbitrary killings (Philip Alston), 24 March 2006, E/CN.4/2006/53/Add.3, para. 17.

¹⁰ Statement by the International Commission against the Death Penalty on Belarus: Execution of Dmitry Kononov and Vladislav Kovalyov, 19 March 2012, <http://www.icomdp.org/cms/wp-content/uploads/2012/03/ICDP-Statement-on-Belarus-March-2012.pdf> (accessed 27 August 2013).

¹¹ Death Sentences and Executions 2011, Amnesty International, ACT 50/001/2012, p. 30.

¹² Official website of the Ministry of Internal Affairs, <http://mvd.gov.by/ru/main.aspx?guid=9091> (accessed 27 August 2013).

2008 it was decided to transfer lifers who have served at least ten years without breaching the prison rules or committing additional crimes to the colony in Glubokoye, where the regime is less strict. The colony in Glubokoye has subsequently also become overcrowded, meaning that the living conditions for lifers do not reflect international standards.¹³

The conditions of imprisonment for 'lifers' are described in Article 173 of the Criminal Executive Code. Lifers are housed in cells and are required to wear dark robes marked by the first letters of the words 'life imprisonment'. Legally, prisoners are to be incarcerated two persons per cell; in practice in Zhodino colony there are usually four or more prisoners per cell, while in colony No. 13 of Glubokoye, there may be four or even six prisoners per cell.¹⁴ Overcrowded cells have become the norm over the last ten years. At the request of the prisoner, or if there is a threat to the safety of a prisoner, he may be placed in solitary confinement subject to the decision of the prison administration.

The living conditions of lifers during the first ten years of their sentence are especially harsh. They are entitled to two short visits per year (visits can be up to two or three hours through a glass partition), to receive two parcels per year, to walk for 30 minutes per day and to spend a specific amount of money from their accounts on food and essentials. According to the Criminal Executive Code, lifers may spend up to 300,000 Belarusian roubles from their personal account on food and essentials. However, this has to be donated by relatives or others as lifers are unable to work, due to authorities being unable to arrange work placements that comply with safety regulations related to this category of prisoners.

From the time they wake up until the time they go to bed, life sentenced prisoners can walk or sit at a table on benches screwed to the floor. Lying on their bed is forbidden. When a prisoner is taken out of their cell (for a walk, for a visit or to talk with a prison official) he is only allowed to move in a certain position – with arms held behind his back in handcuffs, bending down and looking at the floor. Those who violate the prison rules can be deprived of visits, parcels, moved to a disciplinary cell, or sent to solitary confinement for up to six months.

If a lifer has served at least ten years of their sentence without any violations of the prison rules or committing any further criminal offences, they may be transferred from the special regime colony to a correction colony which has slightly less harsh conditions and a reduced security regime. Transfer decisions are made by the court on the basis of an application submitted by the prison administration and approved by a local monitoring commission. Following a transfer, a lifer would be entitled to one additional visit per year, to spend additional money from his account (in the amount of four basic amounts), to receive an additional two more parcels per year and to exercise for up to one hour per day.

The sanitary conditions of the cells are very poor. Prisoners have requested that they be allowed to use their own tableware and clothes, that they can remove their coats when it is hot and that they be permitted to wash their uniforms themselves. There is a lack of time or facilities for washing and drying clothes and bed linen. Prisoners have also complained about the sleeping facilities ('the legs of another convict are in front of my face').¹⁵

There is a lack of well-balanced and nutritional food for prisoners. This is caused by a lack of appropriate resources as well as various problems in the food supply chain. Lifers are only

¹³ It should be noted that the increase in those imprisoned for life is happening against a backdrop of a reduction in the general prison population: from nearly 78,000 in 2007 to 53,000 in 2012. Information from <http://news.tut.by/society/352069.html> (accessed 30 August 2013).

¹⁴ How Belarusian Lifers Serve Their Sentences, Olga Antsipovich, Komsomolskaya Pravda, 4 August 2009, www.kp.by/daily/24337/528445/ (accessed 27 August 2013).

¹⁵ Information received from Irina Kuchvalskaya, Belarusian Association of Women-Lawyers.

permitted to receive two parcels per year, which means that even if their family had the means to supplement their diet, they could not do so on a regular basis.

According to Article 10(6) of the Criminal Executive Code, all prisoners have the right to access health care. From a 2006 inquiry of life sentenced prisoners, approximately 90 per cent of those interviewed reported health problems.¹⁶ More than half of the respondents (52) had some form of chronic illnesses, the majority being gastrointestinal problems. The spread of TB has also been a serious concern for prisoners, which is compounded by overcrowded cells, and a lack of appropriate nutrition. The UN Developmental Programme reported in September 2009 that none of Belarus' prisons fully complied with the World Health Organization's TB infection control guidelines.

The majority of lifers interviewed in 2006 were not satisfied with the level of psychiatric care provided. Approximately 30 per cent suffered from some form of mental health issues.

A psychologist based in Zhodino colony stated that a prisoner is subject to obligatory psychological testing, and prisoners may speak with a psychologist if they wish, but not all of them do.¹⁷ There is only one psychologist available at Zhodino.

A. A. Kralko, the head specialist of medical services of the Department of Execution of Punishments (PED) of the Ministry of Internal Affairs has stated that the financing of penitentiary facilities, including that needed for adequate health care, is not enough.¹⁸ This is compounded especially by the rising costs of resources (staff, food, medicines etc.) and the number of inmates.

Article 10 of the Criminal Executive Code establishes that all prisoners should have access to exercise and sports. However, lifers are only entitled to 30 minutes of walking per day and up to one hour if transferred from the special regime colony. A prison officer, in response to why sports and exercise are severely limited for lifers, stated that the 'prison personnel do not want serious criminals to have good muscles, [and] the metal parts of training equipment may be used improperly, and there is a high risk of traumas ... We'll have to write a lot of explanations if a convict gets hurt from sporting equipment and not from us.'¹⁹

Almost all prisoners have demonstrated some interest in accessing books, newspapers and magazines. A high proportion of inmates have expressed a desire to access educational literature including legal texts. Life sentenced prisoners have also made requests for educational programmes, particularly secondary education and to study foreign languages, information technology, and psychology; to train in some kind of profession (carpenter, builder, tailor, electrician, accountant etc.); to take part in creative activities; and to have access to sports equipment.

Prisoners are permitted to perform religious rites and access priests in Zhodino and Glubokoye, and there are some rooms provided for prayers.

Due process concerns

The rights of the defendant are often not observed in practice. Article 60(2)(8) of the Code of Criminal Procedure stipulates that a person who has confidentially assisted a case cannot

¹⁶ Information received from Irina Kuchvalskaya, Belarusian Association of Women-Lawyers.

¹⁷ Sentenced to Live, Yekaterina Nechayeva, BELTA, 25 August 2010.

¹⁸ Medical and sanitarian provision of convicts: condition and problems—situation at detention facilities of Belarus (Assessment of achievements and reformation prospects), A.A. Kralko, PRI, 2008, p. 80.

¹⁹ Sentenced to Live, Yekaterina Nechayeva, BELTA, 25 August 2010.

be questioned as a witness without his or her consent and the consent of the prosecuting authority. This rule means the prosecutor has the opportunity to use sources of information that cannot be cross-examined by the defence, thereby undermining the equality of arms between prosecution and defence.

The UN Working Group on Arbitrary Detention has raised concerns about adequate legal assistance, raising examples of court-appointed lawyers for indigent defendants demanding to be paid to be present during interrogations.²⁰ The Working Group also raised concerns that defence lawyers have limited or non-existent access to prosecutorial evidence and expertise and thus have difficulty preparing and executing a defence.

Monitoring prisons

Belarus is a country where individuals cannot complain to the Constitutional Court, cannot seek judicial review of regulatory acts adopted by the executive, and where there is no Ombudsman institution. Belarus has yet to ratify the Optional Protocol to the Convention Against Torture and establish a National Preventive Mechanism.

Neither of the two forms of detention monitoring that do exist (the Office of the Prosecutor and the Executive Oversight Commissions) could be said to be effective or independent. The Office of the Prosecutor is responsible for supervising the correct application of all laws. It oversees criminal investigations and prosecutes criminal defendants in courts, but also supervises places of detention and has the right of uninhibited access to all detention facilities and documents, the right to question officials in detention facilities and to order them to undertake specific measures. The prosecutors are also authorised to quash any illegal decisions taken by detention facility officials and institute disciplinary or criminal proceedings against them, and are under an obligation to release any person illegally detained.

However, the prosecutors are utterly dependent on the executive and the President in particular. The Prosecutor-General is appointed by and answerable to the President of Belarus; while regional prosecutors and local prosecutors are appointed by the Prosecutor-General. The Working Group on Arbitrary Detention was concerned about the excessive powers granted to the Prosecutor's office and investigators during the pre-trial detention phase in particular. It noted that the decision to keep a person in detention or to extend the period of his or her detention should be one that is taken not by a judge, not by the public prosecutor.²¹ More recent reports from NGOs based in the country allege that the Prosecutor's office fails regularly to properly investigate allegations of torture²² and fails to take proper account of the testimony of victims.²³

Executive Oversight Commissions (EOCs) were created by a 2001 Presidential Decree²⁴ and are responsible for monitoring the situation in the penitentiary system. In order to visit a penal institution or a pre-trial detention facility, the commission files a request with the head

²⁰ Report of the Working Group on Arbitrary Detention: Mission to Belarus, 25 November 2004, E/CN.4/2005/6/Add.3, para. 42.

²¹ UN Working Group on Arbitrary Detention, E/CN.4/2005/6/Add.3, 25 November 2004.

²² Report of Belarusian non-governmental organizations and human rights defenders on implementation by the Republic of Belarus of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, <http://humanrightshouse.org/Articles/15392.html> (accessed 28 August 2013).

²³ Report of Belarusian non-governmental organizations and human rights defenders on implementation by the Republic of Belarus of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, <http://humanrightshouse.org/Articles/15392.html> (accessed 28 August 2013).

²⁴ Presidential Decree No. 460 of 28 August 2001, available at <http://www.pravo.by/WEBNPA/text.asp?RN=P30100460> (accessed 28 August 2013).

of the Department of Corrections and upon receiving permission, negotiates the time of the visit with the correctional facility administration. The commission is permitted to visit a facility if permission has been granted, contact the warden and other officials of the facility, and talk with prisoners in the presence of a facility administration representative. Members of the commission are not allowed to: acquaint themselves with the materials of the operative activities, personal files of inmates, or other documents related to the execution of sentences; to film, photograph, and make video-and audio-records; or to take written requests from prisoners. At the same time, the Regulations emphasise that in case of violation of these rules, as well as 'providing false information about activities of bodies and institutions administering corrections to a foreign state, foreign or international organisations, and the media', a commission member may be expelled. Civil society and the media are also heavily restricted in terms of visiting prison facilities or reporting on the conditions and treatment of prisoners.

EOCs comprise 3-11 members, drawn from 'duly registered organisations whose statutes provide for the protection of citizens' rights': public servants, local councillors, trade union members and 'members of other organisations'.²⁵ EOC members and chairpersons are appointed at the unlimited discretion of the regional departments of the Ministry of Justice. 'Other organisations' does not in general mean human rights NGOs (almost all of them are denied registration) but rather associations of law-enforcement veterans. Only one member of an independent human rights NGO (Belarusian Helsinki Committee) is a member of an EOC in Mahilyou region. Even though the substance of their mandate comprises the monitoring of the respect for human rights of convicts by the penitentiary administration, the EOCs generally focus on assisting the administration in carrying out its functions (participation in the decision-making on the transfer of prisoners from one institution to another, from one regime to another, advice on release on parole etc.).²⁶ The EOCs therefore are unlikely to engender credibility and legitimacy as independent monitoring bodies. Furthermore, any decisions they do make lack weight as they are not binding.

²⁵ 2001 Statute, para 5.

²⁶ See para. 4 of the Statute of the Commissions attached to the 2001 Presidential Decree.