United Nations A/HRC/WGAD/2019/60

General Assembly

Distr.: General
23 July 2020

Original: English

Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-sixth session, 18–22 November 2019

Opinion No. 60/2019 concerning four minors (Minors A, B, C and D, whose names are known to the Working Group) (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 42/22.

2. In accordance with its methods of work (A/HRC/36/38), on 11 July 2019 the Working Group transmitted to the Government of Belarus a communication concerning four minors. The Government replied to the communication on 28 August 2019. 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).

Submissions

Communication from the source

4. The source submits the case of four individuals who were minors at the time of their arrest and were convicted with long sentences for non-violent offences involving drugs. All of the cases were initially qualified under article 328, paragraph 1, of the Criminal Code, which provides for a maximum penalty of five years of imprisonment. However, the cases were subsequently reclassified under paragraphs 3 or 4 of the article, which allow for a penalty of between 8 and 20 years of imprisonment.

5. The reclassification allegedly took place after the investigation revealed that the actions of the accused minors had been carried out in an organized group. However, the source argues that, in all cases, the organized group and its members were unidentified or unspecified. There is apparently no evidence that the accused minors were aware of the group. There was no information on the group structure, stability of its composition, its members or its main core. There was also no information about the duration of the criminal activity of the group or the relationship between its members.

6. The source claims that there were violations during each arrest and period of detention, in particular the use of physical force against minors. The violations also included unjustified use of handcuffs and humiliation; untimely notification of legal representatives and lawyers; and pressure from the investigators to make full confessions.

7. According to the information received, the Court's judgment did not show that the best interest of the child was a relevant factor in determining how to proceed with these cases. In the verdicts, the only relevant reference to the age of the child was in sentencing the child to the minimum punishment, which was 9 or 10 years of imprisonment. Other means of mitigating the sentence or of finding alternatives to prison sentences were allegedly not explored, including through applying the note at the end of article 328 to exempt the accused child from criminal liability in cases where he or she cooperated with the investigation. The source also claims that there is no evidence that the prosecution took into account the best interests of the child in these cases, which would require exploration of alternatives to prosecution. In addition to article 328 of the Criminal Code, the Court was reportedly also guided by Presidential Decree No. 6 of 28 December 2014, on urgent measures to counter drug trafficking, which significantly increased prison penalties and reduced the age of criminal responsibility for actions related to the sale of drugs.

8. The source also reports that, since December 2014, when Presidential Decree No. 6 was issued, Belarus has taken a harsh and punitive approach to drug users. The Decree increased prison terms for drug-related offences and courts have handed down long sentences to drug users. The criminal law on drug possession and distribution does not recognize drug possession for personal consumption, resulting in harsh penalties for drug users, who are considered to be distributors even if they only possess drugs for personal or social use.

Minor A

9. According to the source, Minor A, who was 17 years old at the time of the arrest, was arrested on 12 April 2018 in the Minsk district while he was travelling on public transport. Agents of the Drug Control and Anti-Trafficking Department of the Leninsky District Department of Internal Affairs approached him, without showing a warrant, snatched the phone from his hands, put handcuffs on him and pulled him out of the bus at the next stop, where they conducted a search. Minor A was allegedly injured during the arrest and search. The detention and personal inspection were carried out without the presence of a legal representative or a lawyer. The legal representative of Minor A was not notified.

10. The arrest was carried out on the suspicion of drug possession and trafficking, as the police allegedly found marijuana weighing at least 0.13 g. On that basis, Minor A was detained and his actions were qualified under article 328, paragraph 1, of the Criminal Code. At the time of detention, Minor A was not in a state of drug or alcohol intoxication.

11. During the period from his arrest in April until November 2018, Minor A was transferred multiple times and held in different locations, including the temporary detention centre of Leninsky District Department of Internal Affairs; Minsk region remand prison; prison No. 8 in Zhodino; detention centre No. 1 in Minsk; and prison No. 2 in Bobruisk, where he is currently being held.

12. The source reports that Minor A cooperated during the investigation. He did not resist communicating with the operational staff during the arrest, revealed all relevant information and answered all questions. Moreover, it is claimed that all actions of operational workers were carried out without the presence of Minor A's legal guardians (his parents) and without a lawyer. After the arrest, his legal representatives (his parents) were not immediately informed, as required by article 432 of Code of Criminal Procedure.

13. The source reports that, according to the court verdict, on 9 April 2018, Minor A acquired at least 0.87 g of a dangerous psychotropic substance (*alpha*-PVP), which he transported the next day and left in the forest in the village of Kolodishchi. According to the testimony of the prosecutor, the content of the Internet correspondence of the "Telegram group" proved that Minor A had made this stash in order to sell it to another person. These actions were qualified under article 328, paragraph 4, of the Criminal Code.

14. Minor A did not plead guilty to committing a crime with intent to supply. From his testimony, it follows that he acquired marijuana for his own consumption and kept it at home. Minor A also admitted that he was making a stash. He was sure that the package contained a smoking mixture.

15. On 20 July 2018, the court sentenced Minor A to 10 years' imprisonment. The actions of the teenager were qualified as participation in the activities of an organized group, controlled by an unidentified person related to the "Telegram group". The source reports that, despite the cooperation of Minor A, no mitigation was granted in relation to the sentence, even though it would have been possible under article 63 of the Criminal Code.

16. While in custody, Minor A reportedly attempted suicide. At the time of his arrest, Minor A was a student in grade 11 and was unable to pass his final exams because of his detention.

Minor B

17. According to the source, Minor B, who was 16 years old at the time of the arrest, was arrested on 9 October 2017 in the Minsk district on suspicion of drugs possession, under article 328, paragraph 1, of the Criminal Code. He was released the same day. Minor B was arrested again on 9 November 2017 on suspicion of drugs possession and trafficking. According to the investigation, he was in possession of 1.49 g of marijuana, which he then sold to another minor.

18. The source reports that it was decided to close the criminal case against Minor B owing to the absence of the subject of the crime, since the other minor was less than 16 years old at the time and the investigation did not prove all the issues relating to the commission of the crime. Minor B was thus released on 23 November 2017.

19. On 12 May 2018, Minor B was detained again, without a warrant, reportedly on direct suspicion of drugs possession for the purpose of sale, under article 328, paragraph 2, of the Criminal Code. According to the investigation, he was in possession of 0.55 g of marijuana, which on 12 September 2017, he sold to another minor, receiving payment of 60 Belarusian roubles (about $28).

20. The source reports that, during the arrest, police officers used obscene language and treated Minor B very harshly. In the car, he was laid on the ground face down with his hands behind his back while handcuffed. The legal guardians of Minor B were not notified, nor was a teacher or a psychologist invited to participate in the investigation. Blood and urine samples were taken for testing and analysis, without notifying the parents and a psychologist.

21. In the detention report, the reason for the arrest was indicated as suspicion of using and possessing drugs. During a personal search of Minor B, however, allegedly nothing

forbidden was found. The biological examination also failed to indicate the presence of alcohol or drug intoxication.

22. According to the source, Minor B did not plead guilty and claimed that he had not sold drugs. A witness in the case reported that he had taken marijuana from Minor B, but not in exchange for money and only for personal consumption. The witness was sentenced by the court to four years' imprisonment. The prosecution believed that Minor B's guilt was fully proved, including from the results of the investigation and through the use of the testimony of those who bought drugs from the accused.

23. On 4 July 2018, the court sentenced Minor B to nine years' imprisonment. The actions of the teenager were qualified as participation in the activities of an organized group, controlled by an unidentified person, under article 328, paragraphs 2 and 3, of the Criminal Code.

Minor C

24. According to the source, Minor C, who was 17 years old at the time of arrest, was arrested on 16 March 2018 on his way to his residence in Minsk on suspicion of trafficking drugs. Riot police approached Minor C and questioned whether he had prohibited substances on his person. He voluntarily reported that he was in possession of narcotic substances. Police found a total of 3.5 g of the drug *alpha*-PVP stored in eight packets on Minor C's person during the personal search. The detention and the personal inspection were carried out without the presence of a legal guardian or a lawyer.

25. During the arrest, physical force was used and Minor C was handcuffed. After the detention, legal guardians or parents were not immediately informed, as required by article 432 of the Code of Criminal Procedure. Permission to visit Minor C was not granted to his parents until the day after the arrest.

26. The investigation allegedly found that the minor had acted as part of an organized group, named ECLIPSE, which specializes in the sale of psychotropic substances. Minor C communicated with other group members via the communication apps Telegram and VIPole, where the group members, for example, wrote information about the stashes of drugs, took pictures of the stashes and reported payment information. The investigation also found that Minor C had stored 17.95 g of *alpha*-PVP for making further stashes.

27. However, the source reports that the investigation failed to prove the existence of a stable, manageable organized group, and that it could not establish the names and identities of the participants in this group. In the actions of Minor C, there were no signs of the commission of a crime as part of an organized group. There was allegedly no evidence pertaining to when, where, in what circumstances, on what basis and by whom an organized group was involved in the case.

28. Minor C pleaded guilty in part. In court, he said that he wanted to make money with his girlfriend. He saw a job advertisement looking for a courier and decided to try. He does not recognize what he did as having constituted participation in an organized group and declared that no one led or coordinated his actions. He repented for what he did.

29. The source reports that witnesses – all of whom were police officers – reported that the minor was creating the drug stashes, while other people were responsible for packing and selling the drugs.

30. On 4 September 2018, the court sentenced Minor C to 10 years' imprisonment. The actions of Minor C were qualified as participation in the activities of an organized group, controlled by an unidentified person, under article 328, paragraph 4, of the Criminal Code.

31. The source claims that the court did not take into account the positive aspects of Minor C's character: his studies, medals, diplomas, the care he provided for a disabled person and the fact that his family had a financial crisis at that time, as both parents were unemployed.

Minor D

32. According to the source, Minor D, who was 17 years old at the time of the arrest, was arrested on 5 April 2017 in Grodno during a search operation known as "Test purchase". He was arrested on suspicion of storing drugs, under article 328, paragraph 1, of the Criminal Code. According to the detention order, he kept 0.553 g of psychotropic substances in a jacket at his home for personal use. During the arrest, Minor D was put in handcuffs, with his hands behind his back, a position in which he spent more than two hours. He was put on the floor of a minibus on his knees, and the interrogation was conducted in this position. This reportedly happened without the presence of a lawyer. His legal guardian, his mother, and a lawyer were only informed later on the day of the arrest, at about 8 p.m.

33. Subsequently, the investigation reportedly established that Minor D was part of an unidentified organized group, which had acquired 2.0653 g of psychotropic substances for the purposes of transferring it to another person for further sale. In addition, it was also alleged that on 14 March 2017 in Grodno, Minor D independently transferred 7.703 g of a narcotic substance to another person and received 90 Belarusian roubles (about $43).

34. The source reports that the investigation reportedly proved that the drug had been sold by the other person. In addition, two months prior to Minor D's detention, the undercover investigation organized a "purchase" of the substance from the other person. Similar investigative measures regarding Minor D were not carried out.

35. Minor D did not plead guilty to committing the crime with intent to supply, under article 328, paragraphs 1 and 3, of the Criminal Code. Allegedly, he reported that he had not transferred the drug to the other person and had not participated in the organized group. He sold tobacco under the guise of a drug to another person and received 90 Belarusian roubles. He allegedly acknowledged those actions and repented for them.

36. The source also reports that Minor D was detained in the remand prison before and during the trial, although this was allegedly not necessary. In total, he was detained for more than six months.

37. On 24 August 2017, the Court sentenced Minor D to nine years' imprisonment. The actions of the teenager were qualified as participation in the activities of an organized group, controlled by an unidentified person, under article 328, paragraph 3, of the Criminal Code.

38. The source claims that the decision of the District Court to sentence Minor D to nine years' imprisonment is excessive, given the crime committed. The Court applied article 328, paragraph 3, of the Criminal Code; however, the prosecutor in the trial failed to prove the existence of a stable and manageable organized group, because the names and identities of the participants in this group could not be established.

Legal analysis

39. Given the above outlined facts, the source argues that the sentences received by the children are disproportionate and violate the Convention on the Rights of the Child. The source also argues that, in accordance with article 9 of the International Covenant on Civil and Political Rights, the State has an obligation to ensure the right to liberty and security of the person. The source recalls that, with regard to article 9, the Working Group on Arbitrary Detention has stated that States should have recourse to deprivation of liberty only insofar as it is necessary to meet a pressing societal need, and in a manner proportionate to that need. The Working Group has also noted that that principle is particularly relevant with regard to minors, and is accordingly enshrined explicitly in article 40, paragraphs 3 (b) and 4, of the Convention on the Rights of the Child.[1]

40. In these particular cases, the source claims the four minors were sentenced to long terms of imprisonment while they were still children. As a result, they were protected by the Convention on the Rights of the Child, in particular by article 3, paragraph 1.

[1] E/CN.4/2006/7, para. 63.

41. The source argues that, in these cases, the State did not take any action to ensure that the best interests of the child were a primary consideration since no psychologists, social workers or education specialists were invited by the police. In addition, no reports from such experts were ordered during the period of investigation, or by the judges during the court hearings. Long sentences were imposed, and neither prosecutors nor judges explored alternative measures to imprisonment. While the judges are bound by the law to impose at least the minimum sentence of imprisonment prescribed if the child is found guilty, steps could have been taken at an earlier stage, either to avoid prosecution altogether or to avoid it under the strictest parts of article 328 – namely paragraphs 3 and 4 – of the Criminal Code.

42. It has been argued that the harsh law and its restrictions on judges – which allow little discretion in the use of non-custodial sentences or shorter sentences – and the use of the law to prosecute children are evidence of a harsh approach to children who are involved with drugs, imposing disproportionate sentences upon them. Reportedly, no mention was made in the verdicts of the best interests of the child. Such long prison sentences have a direct impact on these children's lives, in terms of stopping their education, interrupting their family relations and, in some cases, negatively affecting both their mental and physical health, leading in at least one case to an attempted suicide.

43. The source stresses that children are also protected by article 37 of the Convention on the Rights of the Child.

44. According to the source, in these cases, imprisonment was used as a first measure of resort. Three of the children were also first-time offenders, while the fourth had previously only committed a theft. They were all convicted for non-violent offences, involving small quantities of drugs and were sentenced directly to long terms in prison, without an exploration of other options. The length of imprisonment was 9 or 10 years in all cases and clearly did not comply with the requirement that it be for the shortest appropriate period of time. In many other countries, a child found with less than a gram of marijuana or other drugs would not be facing any prison term, and other options are available to respond to this type of offending.

45. The source indicates that, in Belarus, the law in general provides for a range of alternatives to imprisonment. As a result, other options are generally available, but have been limited in terms of the minimum sentences that a judge must impose for crimes under article 328 of the Criminal Code. The State in these cases chose not to use such alternatives, owing to its harsh policies against drugs. In these cases, however, such harsh policies have resulted in violations of the Convention on the Rights of the Child and disproportionate sentencing, which are also a violation of article 9 of the Covenant. Under these circumstances, the source argues that the detention is arbitrary.

Response from the Government

46. On 11 July 2019, 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 9 September 2019, detailed information about the current situation of the four minors and to clarify the legal provisions justifying their 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. Moreover, the Working Group called upon the Government of Belarus to ensure the physical and mental integrity of the minors.

47. The Government submitted its reply on 28 August 2019. In its reply, the Government initially provides a brief overview of the fundamentals of the criminal justice system in Belarus, underlining the equality of everyone before the law. It then provides a detailed account of the arrest, interrogation, sentencing and appeal process for each of the minors.

48. According to the Government, with regard to Minor A, who had no criminal record, he was found guilty by the court of Minsk district on 20 July 2018 of illegal acquisition, storage, transportation and illegal sale of especially dangerous psychotropic substances, committed by an organized group (article 328, paragraph 4, of the Criminal Code); and of

illegal acquisition, storage and transportation of drugs without the purpose of sale (article 328, paragraph 1, of the Criminal Code). A final sentence of 10 years' deprivation of liberty in an educational colony, without confiscation of property, was handed down.

49. The legality and validity of the verdict was checked by the Minsk Regional Court on appeal. On 2 November 2018, the appeal court issued its verdict, in which it overturned the conviction of the illegal sale of an especially dangerous psychotropic substance. The remaining parts of the verdict were upheld.

50. The Government further explains that, on 13 February 2019, the Deputy Chair of the Supreme Court of Belarus brought forward a request to the Presidium of the Minsk Regional Court. On 13 March 2019, the Presidium of the Minsk Regional Court granted the request, which resulted in the exclusion of the indication that Minor A had committed illegal trafficking of especially dangerous psychotropic substances by an organized group. Minor A's actions with regard to illegal acquisition, storage and transportation of an especially dangerous psychotropic substance (*alpha*-PVP), weighing at least 0.87 g, were reclassified from paragraph 4 of article 328 of the Criminal Code to paragraph 3 of the same article.

51. In the light of the above, Minor A's final sentence is eight years' deprivation of liberty without confiscation of property.

52. According to the Government, the allegations of a violation of article 9 of the Covenant during the detention and personal search of Minor A and with regard to access to a lawyer and legal representative for purposes of participating in the preliminary investigation are not confirmed by the factual circumstances. To substantiate this argument, the Government provides the relevant legislation and explains that the participation in the case of the legal representatives of Minor A – his mother, his teacher and his lawyer – from the moment of his first interrogation is confirmed by the protocols of 14 April 2018.

53. The Government further claims that the legality of detention and compliance with the rules of criminal procedure law in the course of investigative actions involving Minor A were verified, and no violations were revealed.

54. The Government reports that Minor A was provided with a defence counsel after he was brought before the internal affairs authorities, which does not contradict the requirements of article 110, paragraph 1, of the Code of Criminal Procedure.

55. In view of the above, the Government believes that the arguments contained in the communication concerning Minor A about the violation of international law norms by Belarus are groundless.

56. With regard to Minor B, who had a criminal history, the Government explains that he was convicted by the court of the Moscow district of Brest on 4 July 2018. He was found guilty of illegal acquisition, storage, transportation or illegal sale of narcotics (article 328, paragraph 2, of the Criminal Code); and illegal acquisition, storage or illegal sale of narcotics by a person who had previously committed an offence (article 328, paragraph 3, of the Criminal Code).

57. A final sentence of deprivation of liberty was imposed on Minor B for a period of nine years, to be served in an educational colony.

58. The Government reports that the legality and the validity of the verdict of the court of the Moscow district of Brest of 4 July 2018 were verified by the Brest Regional Court on appeal. The appeal decision of 28 September 2018 confirmed the sentence.

59. The Government also explains that Minor B's legal representative filed an appeal. The appeal involved a review of the criminal case file. The appeal was rejected, and the mother of Minor B was informed in writing of that decision on 4 March 2019.

60. According to the Government, during the verification of the criminal case, no violations of the norms of the criminal procedure law were found that cast doubt on the credibility and admissibility of the evidence collected in the case or that would entail the unconditional abolition of the sentence. The arguments about a violation of article 9 of the Covenant during the detention and examination of Minor B and about ensuring access of a

legal representative and a teacher to participate in the preliminary investigation are not supported by the factual circumstances.

61. The Government also explains that on 9 October 2017, at approximately 4 p.m., during a personal search of a third individual, a polymeric bag with a vegetable substance of green origin was found to have been sold by Minor B.

62. On the same day, between 4.15 p.m. and 6.45 p.m., a detention protocol was drawn up for Minor B on suspicion of committing a crime, and a personal search was carried out. His rights were explained to him, as was the procedure to appeal his detention.

63. The Government adds that the protocols of detention on 9 October 2017 contain the signature of the defence lawyer. Those protocols document and confirm the participation of Minor B's legal representative (his mother), a pedagogue-psychologist and a defence lawyer in the case, from the moment of the minor's first interrogation. They also contain documentation of the personal search, an explanation of the suspect's rights and obligations, and the explanations given by Minor B.

64. The Government reports that Minor B was released on 9 October 2017 at 7 p.m. because there were no grounds for further detention. He was handed over to his mother. No physical force or special means were used during the detention of Minor B.

65. Moreover, the Government explains that Minor B was examined at a health-care institution – the Brest Regional Narcological Dispensary – on 9 October 2017 at 8.35 p.m. A doctor took a biological sample to conduct a rapid test to determine if narcotic drugs had been used. No blood was taken from Minor B. The results of the examination concluded that Minor B was not under the influence of narcotic drugs.

66. According to the Government, the arguments of the source about: undue pressure placed on the participants in the criminal process; failure to ensure participation of the psychologist, the parents and defence counsel in the investigative actions; and the taking of blood and urine without notification of the detainee's parents were investigated by the court of appeal. The decision of the judicial board on criminal cases of Brest Regional Court, dated 28 September 2018, found the claims to be groundless.

67. Moreover, the Government specifies that the defence counsel for Minor B filed a complaint with the court of the Moscow district of Brest concerning the imposition of a remand order in custody. The complaint was rejected by a decision of the court dated 24 May 2018. An appeal against that decision was not subsequently filed.

68. In view of the above, the Government believes that the arguments contained in the communication concerning Minor B, claiming that Belarus violated the norms of international law, are unfounded.

69. Turning to Minor C, who had no criminal history, the Government explains that he was found guilty by the court of the Sovetsky district of Minsk on 4 September 2018 of illegal acquisition, storage and transportation of especially dangerous psychotropic substances, committed by an organized group. Under article 328, paragraph 4, of the Criminal Code, Minor C was sentenced to 10 years' deprivation of liberty without confiscation of property, to be served in a penal colony under the general regime.

70. The legality and validity of the verdict dated 4 September 2018 were verified on appeal by the Minsk city court. In the decision of the appeal court dated 15 January 2019, the initial sentence was revised, in part as recognition of the fact that Minor C's active participation in revealing other participants of the crime was a mitigating circumstance. Otherwise, the sentence was upheld and the remaining part of the appeal was not granted.

71. During the appeal, the defence pointed to the violation of the Code of Criminal Procedure norms during the preliminary investigation, namely the illegality of the detention, the unjustified use of physical force, and the failure to notify the minor's defence counsel and legal representative about his detention. However, these arguments are not supported by the facts of the case.

72. On 16 March 2018, Minor C was detained under article 108 of the Code of Criminal Procedure on suspicion of committing an offence under article 328, paragraph 3, of the

Criminal Code. During his personal search, conducted in the presence of witnesses, the authorities confiscated a particularly dangerous psychotropic substance (*alpha*-PVP), a mobile phone and some personal belongings. The mother of Minor C was notified of her son's detention by police officers via mobile phone.

73. On 17 March 2018, a family member of Minor C was recognized as his legal representative. Before the start of his interrogation as a suspect, Minor C was provided with legal advice. A legal representative, a teacher and an attorney were present during the investigation, until the minor reached 18 years of age.

74. On 24 July 2019, Minor C filed a supervisory appeal to the Chairperson of the Minsk City Court against the verdict of the court of the Sovetsky district of Minsk dated 4 September 2018 and against the appeal decision of the court board on criminal cases of the Minsk City Court of 15 January 2019.

75. In view of the above, the Government argues that the source's arguments, with regard to Minor C and the violation of international law by Belarus, are unfounded.

76. With regard to Minor D, who had no criminal history, the Government explains that he was tried and sentenced by the Oktyabrsky District Court of Hrodna on 24 August 2017. He was found guilty of illegal acquisition, storage or illegal sale of a particularly dangerous psychotropic substance for the purpose of selling (article 328, paragraph 3, of the Criminal Code); illegal acquisition and storage of a psychotropic substance without the purpose of selling (article 328, paragraph 1, of the Criminal Code); and illegal possession of property by means of fraud (article 209, paragraph 1, of the Criminal Code).

77. Minor D was sentenced to deprivation of liberty for nine years without confiscation of property and is serving his sentence in an educational colony.

78. The Government reports that the legality and validity of the verdict of the Oktyabrsky District Court of Hrodna dated 24 August 2017 were verified on appeal by the Hrodna Regional Court. On 12 October 2017, the trial judgment was confirmed.

79. The Government also explains that the appeal by the defence pointed to the violation of the order of investigative measures against the accused. These arguments were not confirmed by the court.

80. According to the Government, factual circumstances do not confirm the arguments concerning: the violation of article 9 of the Covenant during the detention of Minor D; the lack of access to a defence lawyer and a legal representative for participation in the preliminary investigation; the conduct of operative-investigating actions; and the choice of a preventive measure.

81. The Government explains that, on 14 March 2017 at 4.35 p.m., Minor D was arrested near the cinema *Oktyabr* in Grodno as part of the search operation activities to detect and suppress crimes in the area pertaining to drug trafficking. Immediately after the arrest, he was interrogated in the presence of a lawyer, a teacher and his mother about the discovery of an unknown substance. He was released at 7.20 p.m.

82. On 5 April 2017, a criminal case was initiated against Minor D on the basis of illegal purchase of a substance with a mass of at least 0.0553 g, containing a particularly dangerous psychotropic substance ("MMBA (N)-BZ-F"), without intent to sell it, and illegal storage at his place of residence, until the seizure of the substance by police officers on 14 March 2017.

83. The Government also reports that, on 5 April 2017, Minor D was questioned as a suspect, in accordance with the requirements for questioning a minor, with the participation of a lawyer, a teacher and a parent. After questioning was finished, he was placed in detention under article 108 of the Criminal Procedure Code, and on 6 April 2017, with the approval of the Deputy Prosecutor of Grodno, a preventive measure in the form of remand in custody was chosen.

84. The investigation established that Minor D seized the money of a third individual by means of deception and that Minor D sold at least 2.0653 g of the highly dangerous psychotropic substance "MMVA (N)-BZ-F" to another individual.

85. The Government reports that no violations of the legal requirements in connection with the application of procedural coercive measures against Minor D have been revealed.

86. Moreover, according to the Government, during the preliminary investigation, no complaints were received from Minor D or his representatives about the violation of his rights during the initial arrest and over the course of the investigation.

87. The Government explains that, on 12 March 2018, Minor D's lawyer filed a review appeal with the Supreme Court of Belarus with regard to the court ruling against Minor D. The complaint was considered, but the decision was upheld. Minor D's lawyer was informed of the decision on 31 May 2018.

88. On 15 April 2019, the Deputy Prosecutor General of Belarus brought a review of the court rulings against Minor D to the Presidium of the Grodno Regional Court. The request was not satisfied by the decision of the Presidium of the Grodno Regional Court of 23 May 2019.

89. The Government argues that, during the verification of Minor D's criminal case, no violations of the norms of the criminal procedure law that cast doubt on the credibility and admissibility of the evidence, or that identify grounds for an unconditional revocation of the sentence, were established.

90. In view of the above, the Government states that the source's arguments with regard to Minor D and the violation by Belarus of norms of international law are groundless.

91. The Government argues that the information contained in the communication with regard to all four persons convicted does not correspond to the actual circumstances. The detention of the suspects and preparation of the relevant procedural documents – ensuring the right to defence, participation of the legal representatives and teachers, election of the preventive measure and consideration of criminal cases in court – were carried out in compliance with the procedure and terms established by the Code of Criminal Procedure. The purpose of the commission by convicted persons of trafficking in narcotic drugs and psychotropic substances was the sale of those substances, not personal consumption.

92. Moreover, according to the Government, no violations of the rules of criminal procedure law that call into question the veracity and admissibility of evidence or the grounds for unconditional reversal of the above convictions were found during the verification of the criminal cases.

93. The Government denies the submission made by the source that the four minors were denied their rights while in detention; specifically, none of them were denied the right to education or visits from their families. The Government submits they have access to education and can maintain social contact with their families by writing letters and receiving visits. The Government explains that none of its authorities has any information indicating that any of the four minors has attempted suicide.

94. The Government claims that in the criminal cases against the four minors, all the guarantees provided for in article 40, paragraph 2 (b), of the Convention on the Rights of the Child were ensured, including the following:

(a) Presumption of innocence;

(b) Immediate and direct notification of legal representatives and receipt of the necessary assistance in the preparation and implementation of the defence;

(c) Consideration of the case by a competent, independent and impartial court in accordance with the law, in the presence of a lawyer, taking into account the age of the accused;

(d) Guarantee of the prohibition of torture.

Additional comments from the source

95. The source further claims that Minor A could not take final exams and get a certificate of graduation. The Ministry of Education explained that the Education Code does

not provide for the possibility of travelling to prisons and administering exams for pupils there.

96. Moreover, Minor A's legal representative (the minor's mother) repeatedly made complaints to the Ministry of Internal Affairs about the refusal of assistance and the suppression of suicide attempts. The responses of government officials contained information on the absence of signs of suicide attempts on Minor A's body. Nevertheless, the reply of the head of the educational colony indicated recorded facts of the presence of linear scars on the body of the minor and the diagnosis of a "tendency to self-harm".

97. The protocol of detention of Minor A does not contain the signatures of a social worker and teacher. The signature of a lawyer on familiarization with the protocol of detention is registered the day after the initial day of detention. These facts indicate that the detention procedure was not carried out in accordance with the law.

98. With regard to Minor B, the source reiterates that the minor's parents were not informed of the detention in a timely manner, as evidenced by the case files. None of the documents drawn up during the detention bears the signature of a legal representative – specifically, there is no signature on the protocol of detention, the protocol of obtaining explanations, or the protocol of clarification of the procedure for appealing.

99. The source also claims that neither a social worker nor a psychologist was present during the detention of Minor B, which is also confirmed by the absence of their signatures. Additional evidence to this point is contained in the records of the head of drug trafficking unit response, who indicated: "The absence of a teacher and legal representative was a result of my omission".

100. Physical force was used during the detention. As stated in the protocol of the interview of a witness – who was a police officer – this was done to prevent the destruction of evidence.

101. According to the protocol of detention, Minor B was detained at 4 p.m. At 8.40 p.m., urine was taken for analysis. His parents were not present at the examination.

102. The source further claims that physical force was used against Minor C during the detention. According to the source, Minor C was brought to all trials in handcuffs under the supervision of an armed convoy. In the courtroom, he was placed in a special compartment with bars.

103. Moreover, the source states that Minor C's legal representatives (his mother and father) were first informed of the detention of their son five hours after it began, which is confirmed by the call of the investigator.

104. Access to a lawyer was first granted from the moment of the first interrogation, and not from the moment of his initial detention.

105. The source reports that, in total, Minor C was kept in custody for more than 11 months, from the day of the initial detention to the day of the trial.

106. Minor D was detained by police at 4.35 p.m. A police officer first called the minor's legal representative (his mother) at 9.22 p.m. In addition, in the release order, it was indicated that Minor D should have been released at 7.20 p.m. It is not clear why the minor continued to be detained by the police after the indicated time and why the minor's mother was not informed about the detention until 9.22 p.m.

107. The protocol of detention of Minor D contains no signatures from the lawyer and the teacher, which confirms their absence at the detention stage. The document contains only the signatures of the official witnesses.

Discussion

108. During its eighty-sixth session, the Working Group considered the communication submitted, adopting its views as opinion No. 60/2019 on 18 November 2019. However, the Working Group was informed subsequently of a timely Government response. Therefore, the Working Group was only able to finalize the present opinion on 1 May 2020, retaining the numbering allocated to it during the eighty-sixth session.

109. The Working Group thanks the Government and the source for their timely submissions. Noting that the source has not made specific submissions in relation to the categories of the Working Group, the Working Group shall proceed to examine the allegations made in turn. The Government has denied all the allegations of violations made by the source.

110. The Working Group observes that the source has submitted that Minor A was arrested on 12 April 2018 while travelling on a bus and that no arrest warrant was presented at the time of the arrest. The arrest was carried out without the presence of the legal guardian, and Minor A was subsequently questioned by the police in the absence of a legal guardian and a lawyer. Minor A was 17 years old at the time.

111. In its reply, the Government states that Minor A was arrested on 14 April 2018 and that the procedural steps envisaged by the law were strictly followed, and it denies the allegations made by the source. The Government submits that the legal guardian of Minor A (his mother), a teacher and a legal representative were present during the proceedings as required by law, and that Minor A was provided with legal assistance from the time he was delivered to the initial place of detention. The Working Group notes that in its additional comments, the source has not contested the different date of arrest provided by the Government.

112. The source submitted that Minor B was detained on 12 May 2018, without a warrant, and then questioned by the police without the presence of the minor's legal guardian or a lawyer. Minor B was 16 years old at the time.

113. The Government denies these allegations, arguing that Minor B was in fact arrested on 9 October 2017, together with another suspect who was found to be in the possession of the prohibited substances allegedly supplied by Minor B. The Government further argues that Minor B was questioned in the presence of a legal guardian, a teacher-psychologist and a lawyer. The Government also submits that Minor B was released on 9 October 2017 at 7 p.m., a submission not addressed by the source in its additional comments. Neither has the source addressed the significant discrepancy in the date of Minor B's arrest. The Government also submits that Minor B submitted a urine sample for testing at the Brest Regional Narcological Dispensary on 9 October 2017 at 8.35 p.m., which was negative for any prohibited substances. The Government has also denied any force used against Minor B during the arrest, a submission disputed by the source in its additional comments. The source also insists that the parents of Minor B were not present during the urine test.

114. The source argued that Minor C confessed to the possession of drugs when questioned by the police, who then searched and arrested Minor C without the presence of a legal guardian or a lawyer, despite the fact that Minor C was 17 years old at the time.

115. The Government contests these submissions, arguing that Minor C was arrested on 16 March 2018 and was searched in the presence of witnesses, and that the search revealed that the minor was in possession of prohibited substances. The Government also states that the mother of Minor C was informed of the arrest by mobile phone, but without specifying the time. The Government further submits that both a legal guardian and a lawyer were present during all procedural steps taken concerning Minor C, until the minor reached 18 years of age. In its additional comments, the source has argued that the mother of Minor C was not notified of the arrest until five hours after the arrest and that therefore, the minor's mother in her role as legal guardian first became a part of the proceedings at the time of the first interrogation, and not at the time of the actual arrest. The Working Group notes that this is a departure from the source's original submission that Minor C was questioned without the presence of a legal guardian.

116. Finally, although the source does not provide the exact circumstances of Minor D's arrest, it has argued that Minor D was detained without the presence of the legal guardian or lawyer, despite the fact that Minor D was 17 years old at the time of the arrest.

117. In its reply, the Government submits that Minor D was arrested on 14 March 2017 near a cinema as part of a wider raid on drugs carried out by the law enforcement agencies. According to the Government, Minor D was immediately questioned in the presence of his legal guardian (his mother) and a lawyer and was released that same day at 7.20 p.m. The

source contests this in its additional comments, arguing that the mother of Minor D was first notified about the arrest at 9.22 p.m. However, the source has not replied to the information submitted by the Government that the arrest was carried out in the remit of a wider raid on drugs by the law enforcement agencies, nor did the source specify whether Minor D was released later the same day.

118. The Government further stated that a criminal investigation was initiated in relation to Minor D, who was questioned in the presence of his legal guardian, a teacher and a lawyer on 5 April 2017. Following the questioning, a decision to remand Minor D into custody was made on 6 April 2017.

119. As the Working Group has previously stated, in order for a deprivation of liberty to have a legal basis, it is not sufficient that there is a law that may authorize the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant.[2] In the present case, Minors A, B and C were arrested without such a warrant. The Working Group accepts that the arrest of Minor D could have been a legitimate part of a wider raid carried out by the law enforcement agencies, thus falling under the exception of arrest in flagrante delicto.[3] However, while the Government has explained the circumstances of the arrests of Minors A, B and C, the Working Group notes that these explanations have not extended to reasons for the lack of arrest warrants. In these circumstances, the Working Group finds that when arresting these three minors, the national authorities of Belarus failed to properly invoke the legal basis justifying their arrests as required by article 9 (1) of the Covenant and article 37 (b) of the Convention on the Rights of the Child. Their arrests are therefore arbitrary and fall under Category I of the Working Group.

120. The Working Group further observes that all four individuals were minors at the time of their respective arrests, which placed them in a heightened situation of vulnerability. This requires additional safeguards to be complied with in order to ensure that such arrests are legally carried out.[4] However, while the information initially submitted by the source indicated that all four minors had been arrested outside of the presence of their legal guardians, and without their legal guardians having even been informed, it was then rebutted by the Government in its reply, in which it argued that the legal representatives, lawyers and teachers had been present during all investigatory steps in the cases of these four minors. The Working Group must observe that in its additional comments, the source then claims that the notifications to the legal guardians (the parents) had not been timely and that some investigative actions had been undertaken without their presence.

121. Noting the seriousness of the allegations and the change in the submissions made by the source, the Working Group is unable to ascertain the true course of events in this case and is therefore unable to conclude whether the legal guardians and lawyers were present during the questioning and crucial investigatory steps, such as the searches. However, it is clear to the Working Group that the arrests of Minors A, B and C were carried out without the presence of their legal guardians and, unlike the case of Minor D, could not have been carried out in flagrante delicto. The Working Group therefore finds a further breach of article 9 (1) of the Covenant and article 37 (b) of the Convention on the Rights of the Child. The arrests of these three minors therefore fall under Category I.

122. Moreover, Minor C was arrested following a search that was carried out in the presence of witnesses but in the absence of legal guardians, while Minor B appears to have given a urine sample without the presence of a legal guardian. The Working Group therefore finds that there were violations of articles 40 (2) (b) (i) and (iv) of the Convention on the Rights of the Child and articles 9 (1) and 14 (2) of the Covenant in relation to Minor B and Minor C.

[2] See, e.g., opinions No. 46/2017, No. 66/2017, No. 75/2017, No. 35/2018 and No. 79/2018.

[3] See, e.g., opinion No. 9/2018.

[4] See, e.g., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37, annex), principle 18 and guideline 18.

123. The Working Group further notes the discrepancy between the submissions of the source with regard to the use of physical and verbal abuse. The source initially submitted that physical and verbal abuse had been used in the arrest of all four minors, a claim that has been denied by the Government. Noting that in its additional comments, the source insisted that physical force had only been used against Minor B and Minor C, the Working Group finds itself again unable to establish the true course of events and therefore makes no finding on the matter.

124. The Working Group notes that the source also submitted that the detention of the four minors was arbitrary as they have been convicted for drug-related crimes and sentenced to long terms of imprisonment without due regard for the fact that, at the time of their arrests, they were all minors. As a result, the best interests of the child, as stipulated in the Convention on the Rights of the Child, require that they not be subjected to such long terms of imprisonment. In its reply the Government has not addressed these allegations directly and stated only that the actions of all law enforcement agencies and courts in the cases of these four minors were strictly in accordance with the applicable domestic legislation.

125. While the Working Group considers that it is entitled to assess the proceedings of the court and the law itself to determine whether they meet international standards,[5] it has consistently refrained from taking the place of the national judicial authorities or acting as a kind of supranational tribunal when it is urged to review the application of domestic law by the judiciary.[6] In the present case, the source has made lengthy submissions on whether there was sufficient evidence to suggest that the actions of the four minors could have been classified as actions carried out in an organized group. This type of evaluation of alleged criminal activities of individuals falls outside the mandate of the Working Group. Indeed, to conclude otherwise would require the Working Group to act as a kind of supranational appellate body, which it is not. Disputes of this nature are the sovereign domain of the highest national courts, which the Working Group respects. Therefore, the submissions made by the source pertaining to the lack of evidence concerning the allegations that the four minors acted in an organized group fall outside the mandate of the Working Group.

126. The source further argued that the four minors had been arrested, tried and ultimately sentenced to long terms of imprisonment for what the source submits are relatively minor drug offences, which would not have attracted such severe penalties in other countries. The source has submitted that while the judges are bound by the law to impose at least the minimum sentence of imprisonment prescribed if the child is found guilty, steps could have been taken at an earlier stage to avoid either prosecution of the four minors altogether or prosecution under the strictest parts of article 328 – namely paragraphs 3 and 4 – of the Criminal Code. The Government has chosen not to respond to this allegation.

127. The Working Group once again must point out the scope of its mandate, which entitles it to assess the national law in order to determine whether it complies with international standards.[7] However, the Working Group cannot substitute itself for the highest national courts and examine whether the laws have been correctly interpreted by the national judicial authorities.[8] Therefore the question of whether the prosecution could have been avoided or whether the four minors should have been prosecuted under a different article of the national Criminal Code falls outside the mandate of the Working Group.

128. The submissions made by the source also indicated that all four minors had cooperated with the investigations; that three of them did not have criminal records; that none of them, at the time of arrest, had been under the influence of drugs or alcohol; and that those mitigating circumstances should have been taken into account by the national authorities. Once again, these aspects fall outside the mandate of the Working Group for the reasons noted above.

[5] See, e.g., opinions No. 33/2015 and No. 15/2017.
[6] See, e.g., opinions No. 40/2005 and No. 35/2019.
[7] See, e.g., opinions No. 33/2015 and No. 15/2017.
[8] See opinion No. 58/2019.

129. Having said this, the Working Group must remark on what appears to it to be a highly disproportionate response to rather minor drug offences committed by the four minors. All four individuals were 16 or 17 years of age when the minor drug offences were committed and as a result, they should have benefited from the protection envisaged in article 40 (4) of the Convention on the Rights of the Child. The Working Group wishes to reiterate its concern about the use of criminal detention as a measure of drug control following charges for drug use and possession. The Working Group considers that criminal laws and penal measures imposed in relation to drug control must meet the strict requirements of legality, proportionality, necessity and appropriateness, and that fair trial standards must be upheld in relation to the prosecution of drug-related offences, including the right to ongoing periodic review.[9] In the present case, criminal sanctions for drug offences have resulted in very long custodial sentences imposed upon four minors.

130. The Working Group would welcome the opportunity to provide assistance to the Government in ensuring that its drug control laws are consistent with international human rights standards. To this end, the Working Group recalls that only a few months ago, the Human Rights Council requested it to prepare a study on arbitrary detention relating to drug policies to ensure that upholding the prohibition thereon was included as part of an effective criminal justice response to drug-related crimes, in accordance with international law, and that such a response also encompassed legal guarantees and due process safeguards.[10] The Working Group looks forward to engaging with all Governments in the exercise of this study.

131. The Working Group is concerned by the source's submission that Minor A attempted suicide while in prison, an allegation that has been denied by the Government but repeated by the source in its additional comments. The Working Group reminds the Government that, in accordance with article 10 of the Covenant, all persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person, and that denial of medical assistance constitutes a violation of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), in particular of rules 24, 25, 27 and 30. The Working Group also recalls article 37 (c) of the Convention on the Rights of the Child, which requires that every child deprived of liberty be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In accordance with paragraph 33 (a) of its methods of work, the Working Group also refers the present case to the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, for appropriate action.

132. In accordance with paragraph 33 (a) of its methods of work, the Working Group also refers the present case to the Special Rapporteur on the situation of human rights in Belarus, for appropriate action.

Disposition

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

(a) The deprivation of liberty of Minors A, B and C, being in contravention of articles 3 and 9 of the Universal Declaration of Human Rights and articles 9 (1) and 14 (2) of the International Covenant on Civil and Political Rights, is arbitrary and falls within category I;

(b) In the light of the information received, the Working Group files the case of Minor D, in accordance with paragraph 17 of its methods of work.

134. The Working Group requests the Government of Belarus to take the steps necessary to remedy the situation of Minors A, B and C 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.

[9] A/HRC/30/36, paras. 57–62. See also opinion No. 90/2018.

[10] Human Rights Council resolution 42/22.

135. The Working Group considers that, taking into account all the circumstances of the case, noting the time spent already in prison, the appropriate remedy would be to release Minors A, B and C immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the global coronavirus disease (COVID-19) pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure the immediate release of Minors A, B and C.

136. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Minors A, B and C and to take appropriate measures against those responsible for the violation of their rights.

137. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the situation of human rights in Belarus and to the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, for appropriate action.

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

Follow-up procedure

139. 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 Minors A, B and C have been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Minors A, B and C;

(c) Whether an investigation has been conducted into the violation of Minors A, B and C's rights and, if so, the outcome of the investigation;

(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.

140. 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.

141. 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 any failure to take action.

142. 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.[11]

[*Adopted on 1 May 2020*]

[11] Human Rights Council resolution 42/22, paras. 3 and 7.