Opinions adopted by the Working Group on Arbitrary Detention at its 86th 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 the 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 cases were initially qualified under article 328 part 1 of the Criminal Code, which provide for the maximum penalty of five years of imprisonment. However, the cases were subsequently reclassified under part 3 or part 4 of the above-mentioned article, which allow the penalty of eight to 20 years of imprisonment.

5. The reclassification allegedly took place after the investigation showed that the actions of the accused minors were carried out in an organised group. However, the source argues that, in all sentences, the organised 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, neither information about the duration of the criminal activity of the group or relationship between members.

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

7. According to the information received, the Court’s judgement 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 nine 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 from criminal liability in cases where the accused child 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. The court, in addition to article 328 of the Criminal Code, was reportedly also guided by Presidential Decree No. 6 of 28 December 2014 “On Urgent Measures to Counter Illicit 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 informs 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 recognise drug possession for personal consumption, resulting in harsh penalties for drug users, who are considered to be distributors, even if in fact they only had 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 in 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. Mr. Emil 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 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 grams. On this basis, Minor A was detained and his actions were qualified under article 328 of part 1 of the Criminal Code. At the time of detention, Minor A was not in a state of drug or alcohol intoxication.

11. From the moment of his arrest in April, to November 2018, Minor A was transferred multiple times and held in different locations, including the Temporary detention centre of
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 Minor A’s legal guardians (his parents) and without a lawyer. After the detention, legal representatives (his parents) were not immediately informed, as required by article 432 of Code of Criminal Procedure.

13. The source informs that, according to the court verdict, on 9 April 2018, Minor A acquired the dangerous psychotropic substance “Alpha-PVP” (weighing at least 0.87 grams), the next day transported and left it in the forest, in the village of Kolodishchi. According to the testimony of the Prosecutor, from the content of the Internet correspondence in the “Telegram group”, it proved that Minor A made this contactless “stash” in order to sell it to another person. These actions were qualified under article 328 part 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, “Telegram group”. The source reports that, despite his cooperation, no mitigation was granted in relation to the sentence, as possible under article 63 of the Criminal Code.

16. While in custody, Minor A reportedly attempted suicide. At the time of arrest, Minor A was a school 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 Minsk district, on suspicion of drugs possession, under article 328 part 1, and was released the same day. Then, Minor B was arrested again on 9 November 2017 on suspicion of drugs possession and trafficking. According to the investigation, he kept 1.49 grams of marijuana and then sold it to another minor.

18. The source reports that it was decided to close the criminal case of Minor B due 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 part 2 of the Criminal Code. According to the investigation, he kept 0.55 grams of marijuana and then, on 12 September 2017, sold it to another minor and received payment of 60 roubles (about 28 US dollars).

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, 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 parents and a psychologist.

21. In the detention report, the reason for the arrest was indicated as the suspicion of using and possessing drugs. However, during a personal search of Minor B, allegedly nothing forbidden was found; the biological examination also did not show 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 took marijuana from Minor B, but not 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 during operational investigative actions and using the testimony of “buyers.”

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, parts 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 total of 3.5 grams of the drug “Alpha-PVP” was stored in eight packets on Minor C’s person and these were during the personal search. Detention and 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 Procedures. Permission to visit Minor C was given to his parents only the day after the arrest.

26. The investigation allegedly found that the minor 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 “Telegram” and “Vipole”, where the group members wrote information about the stashes of drugs, took pictures of the stashes, reported payment information, etc. The investigation also found that Minor C stored 17.95 grams of “Alpha-PVP” for making further stashes.

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

28. Minor C pleaded partially guilty. 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 participation in an organized group and declared that no one led or coordinated his actions. He repented of what he did.

29. The source informs that witnesses, all police officers, reported that the minor was doing work on creating stashes, while other persons were packing and selling 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, part 4 of the Criminal Code.

31. The source claims that the court did not take into account the positive aspects of Minor C character, the place of study, medals, diplomas, care 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 “Test purchase” on suspicion of drugs storage. According to the detention order, he kept in a jacket at home 0.553 grams of psychotropic substance for personal use (article 328, part 1 of the Criminal Code). During the arrest, Minor D was put in handcuffs, with his hands behind his back, a position in which he spent more than 2 hours. He was put in a minibus on his knees, on the floor 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 in the evening of that day, at about 20.00.
33. Subsequently, the investigation reportedly established that Minor D was part of an unidentified organized group, which acquired 2.0653 grams of psychotropic substance in order to transfer 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 grams of a narcotic substance to another person and received 90 roubles (about 43 US dollars).

34. The source informs that investigation reportedly proved that the drug was 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, part 3 and part 1 of the Criminal Code. Allegedly, he reported that he did not transfer the drug to the other person and did not participate in the organized group. He sold tobacco under the guise of a drug to another person and received 90 roubles, actions which allegedly he recognized and was repentant of.

36. The source also informs that Minor D was detained in the remand prison before the trial 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, part 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 to the crime committed. The Court applied article 328, part 3 of the Criminal Code, however, the prosecutor in the trial failed to prove the existence of a sustainable and manageable organized group, it could not establish the names and identities of the participants in this group.

Legal analysis

39. Given the above outlined facts, the sources 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 “Covenant”), the State has an obligation to ensure the right to liberty and security of the person. The source recalls what the Working Group has stated with regard to article 9: 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. This 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. (E/CN.4/2006/7, par. 63)

40. In these particular cases, the source claims the four minors were sentenced to long terms of imprisonment whilst they were still children and as such were protected by the Convention on the Rights of the Child and in particular, by article 3.1.

41. The source argues that, in these cases, the State did not take any action to ensure that the best interest of the child was a primary consideration since no psychologists, social workers or education specialists were invited by the police and no reports from such experts were ordered during the period of investigation, nor by the judges during the court hearings. Long sentences were imposed and neither prosecutors nor judges explored measures alternative 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 to avoid either prosecution altogether or prosecution under the strictest parts of article 328 (3 and 4) of the Criminal Code.

42. It is argued that the harsh law and its restrictions on judges, which allows little discretion to use non-custodial sentences or shorter sentences, as well as the use of this harsh law to prosecute children, is an 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 are having a direct impact on these children’s lives, in terms of stopping their education, interrupting
their family relations and in some cases, affecting negatively 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 only previously 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 nine or ten 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, so other options are generally available, but have been limited in terms of the minimum sentences that a judge must impose for article 328 of the Criminal Code. The State in these cases chose not to use such alternatives, due 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 Belarus’ obligations 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 their physical and mental integrity.

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 goes on to provide a detailed account of the arrest, interrogation, sentencing and appeal process of 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 of 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); 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 this 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 Chairman of the Supreme Court of the Republic of Belarus brought forward a protest to the Presidium of the Minsk Regional Court. On 13 March 2019, the Presidium of the Minsk Regional Court granted this protest, 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 especially dangerous psychotropic substance “Alpha-PVP” weighing at
least 0.87 grams were reclassified from part 4 of article 328 of the Criminal Code to part 3 of article 328 of the Criminal Code.

51. In the light of the above, Minor A's final sentence is defined as 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, as well as during his access to a lawyer and legal representative to participate in the preliminary investigation, are not confirmed by the factual circumstances. To substantiate this argument, the Government provides firstly the relevant legislation. Then, the Government 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 the first interrogation of the minor is confirmed by 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 violation of the international law norms by the Republic of 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 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); or 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, served in an educational colony.

58. The Government reports that the legality and the validity of the verdict of the Moscow District Court of Brest on 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 was reviewed with a review of the criminal case file and rejected, of which his mother of Minor B was informed in writing 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 that cast doubt on the credibility and admissibility of the evidence collected in the case or on the grounds that entailed the unconditional abolition of the sentence were found. 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, around 16.00, during a personal search of 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 16.15 and 18.45 hours, a detention protocol of Minor B was drawn up on direct suspicion of committing a crime and his personal search was carried out. The rights of the suspects were explained to him, as well as the procedure to appeal his detention.

63. The Government adds that the participation in the case of the legal representative of Minor B (his mother), of a pedagogue-psychologist and of a defence lawyer from the moment of the first interrogation of the accused minor, the personal search and explanation of the rights and obligations of the suspect, as well as explanations of Minor B are reported and
confirmed by the presence of the defence lawyer's signatures in the protocols of detention of 9 October 2017.

64. The Government reports that Minor B was released on 9 October 2017 at 19.00 because there were no grounds for further detention and 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 the health care institution “Brest Regional Narcological Dispensary” on 9 October 2017 at 20.35 hours in order to detect the condition caused by the use of narcotic drugs. A doctor took a biological sample to conduct a rapid test to determine the use of narcotic drugs in it. No blood was taken from Minor B for research. 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 on the participants of the criminal process, failure to ensure participation in the investigative actions of the psychologist, parents and defence counsel, taking blood and urine without notification of the detainee's parents were investigated by the court of appeal and the decision of the judicial board on criminal cases of Brest regional court dated 28 September 2018 were not granted due to groundlessness.

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 of the Moscow district of Brest dated 24 May 2018, which was not subsequently appealed against.

68. In view of the above, the Government believes that the arguments contained in the communication concerning Minor B that the Republic of Belarus has 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 Sovetsky district of Minsk of 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 and served in a penal colony under the general regime.

70. The legality and validity of the verdict of 4 September 2018 were verified on appeal by the Minsk city court. In the decision of the appeal court of 15 January 2019, the initial sentence has been revised in part as a recognition 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 his detention, unjustified use of physical force, failure to notify his defence counsel and legal representative about his detention. However, these arguments are not supported by the materials 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, mobile phone and 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 the interrogation as a suspect, Minor C was provided with legal advice. The legal representative, a teacher and an attorney were present during the investigation of Minor C (until reaching the age of majority).

74. 24 July 2019, Minor C filed a supervisory appeal to the Chairperson of the Minsk City Court against the verdict of the of the court of Sovetsky district of Minsk of 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 arguments of the source with regard to Minor C about the violation of international law by the Republic of Belarus are unfounded.

76. With regard to Minor D, who had no criminal history, the Government explains that he has been tried and sentenced of the Oktyabrsky District Court of Hrodna of 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, i.e. in the commission of an offence (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); or 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 serving his sentence in an educational colony.

78. The Government reports that the legality and validity of the verdict of the Kastrychnitski district court of Hrodna of 24 August 2017 against Minor D were verified on appeal by the Hrodna regional court. On 12 October 2017, the trial judgement 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, the arguments about the violation of article 9 of the Covenant during the detention of Minor D, the access of a defence lawyer and a legal representative to participate in the preliminary investigation, the conduct of operative-investigating actions and the choice of a preventive measure are not confirmed by the factual circumstances.

81. The Government explains that, on 14 March 2017 at 16.35, Minor D was arrested near the cinema "Oktyabr" in Grodno as part of the operatively-search activities to detect and suppress crimes in the area of illicit drug trafficking. Immediately after the arrest he was interrogated in the presence of a lawyer, teacher and mother about the discovery of an unknown substance, after which he was released at 19.20.

82. On 5 April 2017, a criminal case was initiated against Minor D on the fact 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 its seizure by police officers on 14 March 2017.

83. The Government also reports that, on 5 April 2017, Minor D was questioned as a suspect and in accordance with the requirements for questioning a minor (with the participation of a lawyer, teacher and parent). After the questioning, 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 the facts of seizure by Minor D of a third individual’s money by means of deception and sale by Minor D of 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 the minor's rights during the detention and investigation activities.

87. The Government explains that, on 12 March 2018, the lawyer of Minor D filed a review appeal with the Supreme Court of the Republic of Belarus against the court rulings against Minor D. The said complaint was considered with the claim of the case materials and left without satisfaction, which the lawyer was informed about on 31 May 2018.

88. On 15 April 2019, the Deputy Prosecutor General of the Republic of Belarus brought a review of the court rulings against Minor D to the Presidium of the Grodno Regional Court.
The protest 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 point out the grounds for unconditional revocation of the sentence were established.

90. In view of the above, the Government states that the arguments of the source concerning Minor D about the violation by the Republic of 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 illegal trafficking in narcotic drugs and psychotropic substances was their sale, not their 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 criminal cases.

93. The Government denies the submission made by the source that the four minors are denied the rights whilst in detention and specifically denied the right to education or denied visits from their families. The Government submits they have access to education and can maintain social contact with their families via writing letters and receiving visits. The Government explains that none of its authorities has any information that any of the four minors has attempted a 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: presumption of innocence; immediate and direct notification of legal representatives and receipt of the necessary assistance in the preparation and implementation of the defence; 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; freedom from being forced to make visits; and the guarantee of the prohibition of torture.

Additional comments from the source

95. The source further claims that Minor A could not take the final exams and get a certificate of graduation. The Ministry of Education explained that the Education Code does not provide for the possibility of traveling to prisons and taking exams for pupils there.

96. Moreover, Minor A’s legal representative (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, in the answer of the Head of the educational colony, the recorded facts of the presence of linear scars on the body of the minor and the diagnosis “tendency to self-harm” were indicated.

97. The Protocol of detention of Minor A does not have 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 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 parents were not timely informed of the detention, as evidenced by the case files. None of the documents drawn up during the detention has the signature of legal representative, namely there is no signature in the
Protocol of detention, the Protocol of obtaining explanations, 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 the records of the head of drug trafficking unit response: “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 16:00. At 20:40, 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 (mother, father) were informed about the detention of their son five hours after the moment of detention, which is confirmed by the call of the investigator.

104. The lawyer was granted only from the moment of the first interrogation, and not from the moment of actual detention.

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

106. Minor D was detained by police at 16h35. A police officer called the legal representative (mother) only at 21h22. In addition, in the Release Order it was indicated that Minor D should be released at 19h20. Accordingly, it is not clear why the minor was detained by the police after the indicated time, and the mother was informed about the detention only at 21h22.

107. In the Protocol of detention of Minor D, there are no signatures of the lawyer and teacher, which confirms their absence on detention stage. The document contains only signatures of official witnesses

Discussion

108. During its 86th session, the Working Group considered the communication submitted, adopting its views as opinion No. 60/2019 on 18 November 2019. However, subsequently the Working Group was informed of a timely Government response. Therefore, the Working Group was only able to finalise the present Opinion on 1 May 2020 keeping the numbering allocated to it during the 86th 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 violation made by the source.

110. The Working Group observes that the source has submitted that Minor A was arrested on 12 April 2018 whilst 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 legal guardian and 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 denies allegations made by the source. The Government submits that the legal guardian of Minor A, the mother, as well as teacher and legal representative were present during the proceedings as required by law and that Minor A was provided with legal assistance from the time the Minor A was delivered to the initial place of detention. The Working Group notes that in its further
comments the source has not contested the different date of the 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 legal guardian or 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 legal guardian, teacher-psychologist and a lawyer. The Government also submits that Minor B was released on 9 October 2017 at 19:00, a submission not addressed by the source in its further comments. Neither has the source addressed the significant discrepancy in the date of Minor’s B arrest. The Government also submits that Minor B submitted a urine sample for testing in the Narcological Centre of Brest Region on 9 October 2017 at 20:35 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 further comments who also insists that the parents of Minor B were not present during the urine testing.

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 the legal guardian or lawyer although Minor C was 17 years old at the time.

115. The Government contests these submissions by arguing that Minor C was arrested on 16 March 2018 and searched in the presence of witnesses, the search revealing possession of prohibited substances. The Government also states that the mother of Minor C was informed of the arrest over the mobile phone without specifying the timing. The Government further submits that the legal guardian as well as a lawyer was presented during all procedural steps taken concerning Minor C until the minor reached 18 years of age. In its further 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 mother as legal guardian only was part of the proceedings from the time of the first interrogation and not 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 the legal guardian (the mother) and a lawyer and released later that same day, at 19:20. The source contests this in its further comments, arguing that the mother of the Minor D was only notified on the arrest at 21:22 but the source has not replied to the information submitted by the Government that the arrest was carried out in the remits of a wider raid on drugs by the law enforcement agencies or indeed 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 this questioning, the decision to remand Minor D in 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 which may authorise the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant. In the present case, Minor A, Minor B and Minor C were arrested without such. The Working Group accepts that the arrest of Minor D could have been legitimate as

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part of a wider raid carried out by the law enforcement agencies thus falling under the exception of arrest as flagrante delicto. 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. However, while the information initially submitted by the source indicated that all four minors were arrested without the presence of or even informing their legal guardians, it was then rebutted by the Government in its reply who argued that the legal representatives, lawyers and teachers were present during all investigatory steps in the cases of these four minors. The Working Group must observe that in its further comments the source then claims that the notifications to legal guardians (the parents) were not timely and that some investigative actions were taken 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 of the true course of events in this case and therefore is unable to conclude whether the legal guardians and lawyers were present during the questioning and crucial investigatory steps such as searches. However it is clear to the Working Group that 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 circumstances. 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 which was carried out in the presence of witness but in the absence of legal guardians while Minor B appears to have given urine sample without the presence of legal guardian. The Working Group therefore finds that a violation of articles 40 (2) (b) (i) and (iv) of the UN Convention on the Rights of the Child and articles 9(1) and 14 (2) of the Covenant took place in relation to these two minors.

123. The Working Group further notes the discrepancy between the submission of the source that physical and verbal abuse was used in the arrest of all four minors, which has been denied by the Government. Noting that in its further comments the source insisted that the physical force was only used against Minors B and 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 is arbitrary as they have been convicted for drug related crimes to long terms of imprisonment without due regard that at the time of their arrests they were all minors and thus the best interests of the child, as stipulated in the Convention on the Rights of the Child, required that they would not receive such long imprisonment terms. In its reply the Government has not addressed these allegations directly and only stated that the actions of all law enforcement agencies and courts in the cases of these four minors have been strictly in accordance with the applicable domestic legislation.

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2 See, e.g., opinion No. 9/2018.
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, 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 judiciary. 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 organised 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 supra-national 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 on the lack of evidence concerning the allegations that the four minors acted in an organised group fall outside the mandate of the Working Group.

126. The source further argued that the four minors were arrested, tried for and ultimately sentenced to long terms of imprisonment for what 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 (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. 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. Therefore the question of whether the prosecution could have been avoided or whether the four minors should have been prosecuted under different article of the national Criminal Code falls outside the mandate of the Working Group.

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

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 that these four minors have committed. All four individuals were 16 and 17 years of age when they committed these minor drug offences and as such, 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 (A/HRC/30/36, paragraphs 57–62). 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 mandated it to produce a study on arbitrary detention relating to drug policies to ensure that upholding the prohibition thereon is included as part of an effective

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4 See, e.g., opinions Nos. 33/2015 and 15/2017.
7 Opinion No. 58/2019.
8 See also opinion No. 90/2018.
criminal justice response to drug-related crimes, in accordance with international law, and that such a response also encompasses legal guarantees and due process safeguards. 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 whilst in prison, an allegation that has been denied by the Government but repeated by the source in its further 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 to the inherent dignity of the human person and that denial of medical assistance constitutes a violation of the UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), Rules 24, 25, 27 and 30 in particular. 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 is 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 human rights situation 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 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.

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 human rights situation in Belarus and to the Special Rapporteur on 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. ¹⁰

[Adopted on 1 May 2020]

¹⁰ See Human Rights Council resolution 42/22, paras. 3 and 7.