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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-fourth session, 30 November-4 December 2015

Opinion No. 40/2015 concerning Saparmamed Nepeskuliev (Turkmenistan)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 1/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013.

2. In accordance with its methods of work (A/HRC/30/69), on 28 September 2015 the Working Group transmitted a communication to the Government of Turkmenistan concerning Saparmamed Nepeskuliev. The Government replied to the communication on 16 November 2015. 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 sentence or despite an amnesty law applicable to him) (category I);

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

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



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

(e) When the deprivation of liberty constitutes a violation of international law 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. Mr. Nepeskuliev, born on 5 February 1978, worked as a civic activist and a freelance reporter for Radio Free Europe/Radio Liberty and Alternative Turkmenistan News.

5. On 7 July 2015, Mr. Nepeskuliev was arrested while on a reporting assignment in the coastal resort in Avaza to photograph an amusement park and other sites. His family last heard from Mr. Nepeskuliev on that day, when he called to say he was returning home to Balkanabat by train. When he did not arrive, his family began searching everywhere for him, including police stations and the morgue, without any success.

6. Several days later, the family filed a missing persons report with the Balkanabat police. The police stated that he could have drowned in the sea, and phoned the morgue in Turkmenbashi city.

7. On 28 July 2015, the family found out that Mr. Nepeskuliev was alive and being held in a pretrial detention centre in the village of Akdash. Later, Mr. Nepeskuliev was transferred to Balkanabat, where he has been kept in custody in a local detention centre ever since. The source submits that this information was not officially communicated to the family and that his current whereabouts have also not been confirmed, despite Turkmenistan's law requirement that in such cases the family must be informed within 72 hours.

8. The source asserts that, while the details of the arrest are unknown, it is believed to have been carried out by the officers of the State Service for Protecting the Security of a Healthy Society of Turkmenistan (formally known as the State Service to Fight against Drugs) or by officers of the Ministry of National Security of Turkmenistan.

9. On 28 July 2015, the family of Mr. Nepeskuliev was told that he had been arrested for possession of pills containing narcotic substances, allegedly Tramadol, and that "he will soon be tried and imprisoned". Reportedly, Mr. Nepeskuliev was charged under article 292 (possession of drugs with intent to sell) and article 293 (possession of drugs without intent to sell) of the Penal Code of Turkmenistan.

10. The source submits that, following a campaign in support of the release of Mr. Nepeskuliev, which was launched by media outlets located outside of Turkmenistan, communication between the source and Mr. Nepeskuliev's family was interrupted for 18 days after the source tried to contact his sister on 5 August 2015. Reportedly, on that day a female voice answered Mr. Nepeskuliev's phone and declared to the source that her brother was "an addict" who "regularly beat [her] and [his] mother". The source asserts that the female voice might have belonged to someone from the law enforcement authorities of Turkmenistan, who could have tried to impersonate Mr. Nepeskuliev's sister in order to prevent his family from communicating by telephone with journalists and anyone from

abroad. Furthermore, the source alleges that Mr. Nepeskuliev's family has been threatened by Turkmenistan's security forces.

11. The source contends that the deprivation of liberty of Mr. Nepeskuliev is arbitrary and falls under categories II and III as classified by the Working Group.

12. With regard to category II, the source asserts that the arrest, detention and imprisonment of Mr. Nepeskuliev resulted from the exercise of his rights or freedoms guaranteed by the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights. In particular, he is a civic activist and a freelance reporter for Radio Free Europe/Radio Liberty and Alternative Turkmenistan News, mainly covering social and infrastructural issues in and around Turkmenbashi and Balkanabat and often drawing attention to incompetence and abuses on the part of local government.

13. With regard to the charges of possession or sale of drugs, the source submits that the family denied that Mr. Nepeskuliev had ever used narcotics or been involved in their sale. The source argues that the law enforcement authorities could have planted drugs on Mr. Nepeskuliev in order to silence him and prevent information that was critical of the current Government of Turkmenistan from reaching the outside world. The source further states that this could have been done with the view to teaching other journalists and civil activists in Turkmenistan a lesson. In support of that argument, the source refers to the human rights record of Turkmenistan, in particular, that the Government has never allowed free and independent media.

14. The source claims that the accusations and charges were used by the Government to silence Mr. Nepeskuliev and justify his arrest, detention, conviction and sentencing, in violation of his rights to freedom of opinion and expression, as guaranteed by article 19 of the International Covenant on Civil and Political Rights and Universal Declaration of Human Rights. The source claims that the Government persecuted Mr. Nepeskuliev because of his photo reportage for Radio Free Europe/Radio Liberty, which was published under a pseudonym, and covered such issues as water shortages, luxury villas for judges, security officials and other civil servants, and delays in completing the construction of a hospital. For Alternative Turkmenistan News, Mr. Nepeskuliev reported on such issues as the chaotic state of health care in his home town Balkanabat.

15. As a civic activist, Mr. Nepeskuliev had already been on the radar of the law enforcement authorities of Turkmenistan. In 2013, during the visit of the country's President, Gurbanguly Berdimuhamedov, to Balkan province of Turkmenistan, Mr. Nepeskuliev took to the streets with a poster in an attempt to draw the President's attention to his several years of unsuccessful attempts to challenge his unlawful dismissal from his job by appealing to various governmental agencies. As a result, Mr. Nepeskuliev was forcibly confined to a mental institution for two weeks, where he was given strong psychotropic drugs. Reportedly, he could not recall anything about what happened to him during that period.

16. With regard to category III, the source claims that Mr. Nepeskuliev has been held incommunicado from the moment of his arrest on 7 July 2015, with no access to a legal representative. Since his arrest, he has not been allowed to exercise his right to inform his family. His family has no official information about where he is being held, or about how and by whom the investigation is being conducted.

17. The family attempted to see him in Akdash, but were refused a visit. Upon Mr. Nepeskuliev's transfer to Balkanabat, his sister tried to see him, but was again refused, without any explanation. There has been no official notice that Mr. Nepeskuliev has been transferred, but the guards in the Balkanabat detention facility accepted a food parcel addressed to him.

18. On 4 September 2015, his family reported to the source that Mr. Nepeskuliev had been sentenced to three years in prison on 31 August 2015. However, it has not been possible to officially confirm this. The source expresses grave concern that Mr. Nepeskuliev could have been tortured during his detention and subsequently tried in camera, in violation of due process and the right to a fair trial, in particular that a hearing be conducted in public.

Response from the Government

19. In its response of 16 November 2015, the Government provided the information outlined below.

20. On 7 July 2015, on the basis of operative information, members of law enforcement arrested Mr. Nepeskuliev, born on 5 February 1978, in Balkanabat city on suspicion of illicit trafficking of drugs containing tramadol hydrochloride. In the same Government response, it is stated that Mr. Nepeskuliev was arrested on 7 July 2015 in Turkmenbashi city.

21. During personal search and examination of the suspect's belongings in the presence of witnesses, 44 tablets (8.8 g) of Tramadol, circulation of which is prohibited in Turkmenistan, were found in his bag. Based on this fact, on 10 July 2015 the Investigation Division of the Office of Balkan Velayat of the State Service for Protecting the Security of a Healthy Society initiated a criminal investigation regarding a violation of article 303.1.1 of the Criminal Code (illicit trafficking of drugs containing tramadol hydrochloride or other psychoactive substances).

22. A preliminary investigation was then conducted, with the participation of his lawyer. Upon the arrest of Mr. Nepeskuliev, his relatives were informed about the arrest.

23. In the course of the investigation by the members of the State Service, Mr. Nepeskuliev was not subjected to any physical or psychological pressure.

24. On 31 August 2015, upon hearing of the criminal case against Mr. Nepeskuliev, the court of Turkmenbashi city found the accused guilty of committing the offence under article 303.1.1 of the Penal Code and sentenced him to three years of imprisonment.

25. Mr. Nepeskuliev is currently serving the sentence. The terms and conditions of his detention and visits by his close relatives are in accordance with the existing legislation of Turkmenistan.

Further comments from the source

26. The source contends that some of the claims in the Government's response are not true, and that the rest are at best assertions, which are impossible to verify due to the lack of independent local monitoring of Mr. Nepeskuliev's case.

27. According to the source, it was only the reply from the Government provided to the Working Group that shed some light on the case of Mr. Nepeskuliev. In violation of article 476 of the Criminal Procedure Code, the prison authorities did not notify Mr. Nepeskuliev's relatives about where he had been sent to serve his term. Mr. Nepeskuliev's mother was never informed by any state body or attorney about the detention of her son. In violation of national law, Mr. Nepeskuliev was deprived of his right to inform close relatives about his detention and the place where he was being held. The relatives of Mr. Nepeskuliev were not informed about the trial.

28. The Government failed to demonstrate that Mr. Nepeskuliev had been tried, convicted and sentenced following due process. From the Government's information, it is

not known how many court hearings were held. If there were any court hearings at all, there is grave concern that they were not public.

29. In the source's view, claims by the Government that the preliminary investigation was conducted in presence of Mr. Nepeskuliev's attorney are not true. The source maintains that Mr. Nepeskuliev was not provided the opportunity to request a lawyer of his own choice and was held incommunicado.

30. Claims by the Government that relatives of Mr. Nepeskuliev were informed about his detention once it occurred are also untrue. Mr. Nepeskuliev's mother was never informed by any state body or attorney about the detention of her son.

31. The source reiterates concern that Mr. Nepeskuliev was mistreated and tortured during the investigation, and that he was held incommunicado. The source also cites additional sources, according to which in the beginning of September Mr. Nepeskuliev was seen covered and bruised. The source notes that the Turkmen security services, including the State Service for Protecting the Security of a Healthy Society of Turkmenistan, are known for mistreating and torturing suspects, especially those detained for political reasons. In the source's view, the mere fact that Mr. Nepeskuliev was held incommunicado suggests that it might have been done to conceal traces of torture.

32. The source reiterates that the relatives of Mr. Nepeskuliev were not informed about the trial, and that therefore there is grave concern about whether any hearings took place at all.

Discussion

33. The Government, in its reply, did not rebut the allegations of grave violations of Mr. Nepeskuliev's rights beyond a brief assertion to the contrary. Those allegations include, in particular, incommunicado detention, violation of his right to legal assistance of his own choosing and his right to a public trial, as well as torture and ill-treatment in detention. The Working Group notes that even the basic information in the reply by the Government was confusing. In particular, the place where Mr. Nepeskuliev was arrested on 7 July was indicated as the city of Balkanabat and then elsewhere in the same document as the city of Turkmenbashi.

34. The Working Group reiterates its jurisprudence¹ and recalls that, when it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he or she is entitled, the burden to prove the negative fact asserted by the applicant lies with the public authority, because the latter is "generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law ... by producing documentary evidence of the actions that were carried out".²

35. A similar approach has been adopted by the Human Rights Committee, according to which the burden of proof cannot rest on the author of the communication alone, especially considering that the author and the State party do not always have equal access to the evidence and frequently the State party alone has the relevant information.³

¹ See, for instance, opinions No. 41/2013 (Libya), No. 48/2013 (Sri Lanka) and No. 53/2013 (Jordan).

² *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, International Court of Justice, Judgment, 30 November 2010, para. 55.

³ See, for instance, communication Nos. 1412/2005, *Butovenko v. Ukraine*, Views adopted on 19 July 2011, para. 7.3; No. 1297/2004, *Medjnoue v. Algeria*, Views adopted on 14 July 2006, para. 8.3; No. 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, para. 7.2; and No. 30/1978, *Bleier v. Uruguay*, Views adopted on 29 March 1982, para. 13.3.

36. The Working Group has previously found violations, similar to those alleged in the present case, in other cases concerning Turkmenistan.⁴

37. Furthermore, the Committee against Torture expressed its concern that “a number of persons ... have been arrested and sentenced at closed trials without proper defence and imprisoned incommunicado” in Turkmenistan.⁵ The Committee urged Turkmenistan “to take all appropriate measures to abolish incommunicado detention and ensure that all persons held incommunicado are released, or charged and tried under due process”. The Committee also urged Turkmenistan “as a matter of priority, to inform the relatives of those who have been detained incommunicado of their fate and whereabouts, and facilitate family visits”.⁶ Similarly, the Human Rights Committee expressed concern at “increased reports of torture and ill-treatment in places of detention” in Turkmenistan.⁷ Accordingly, the Committee recommended that Turkmenistan take appropriate measures to put an end to torture”.⁸ The Committee also recommended that Turkmenistan take concrete measures to put an end to the practice of incommunicado detention and imprisonment.⁹

38. As emphasized by the Working Group in another case concerning Turkmenistan, the mere assertion of observance of the rights of the accused is not sufficient. The human rights activities of the detainee place a heavy burden on the Government to show that his fundamental rights, including the right to a fair trial, were observed.¹⁰

39. In the present case, the Government failed to provide any documentary or other evidence that would demonstrate that Mr. Nepeskuliev was provided with legal assistance (e.g. name of counsel, or when and by whom counsel was assigned). Likewise, the Government has not presented any support for its assertion that the trial was conducted in open session and was available for public scrutiny (e.g. place of the trial, copy of public announcement of the date and place of the trial, copy of a letter informing his family of the date and place of the trial).

40. In violation of articles 10 and 11 of the Universal Declaration of Human Rights and article 14 of the International Covenant on Civil and Political Rights, a one-day trial of Mr. Nepeskuliev took place in closed session. The Government has not refuted the fact that Mr. Nepeskuliev was not granted a public hearing. In this regard, the Working Group recalls that it is the public character of hearings that protects an accused against the administration of justice without public scrutiny.

41. Mr. Nepeskuliev has been held incommunicado with no access to a legal representative; he was deprived of his right to legal assistance of his own choosing. The Government has not provided a rebuttal to this allegation beyond a mere assertion to the contrary.

42. The Working Group considers that the non-observance of international human rights norms, namely articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights, in the case under consideration is of such gravity as to give the deprivation of liberty of Mr. Nepeskuliev an arbitrary character. Thus, the deprivation of liberty of Mr. Nepeskuliev

⁴ See opinions No. 5/2013 and 22/2013.

⁵ See CAT/C/TKM/CO/1, para. 15.

⁶ Ibid.

⁷ See CCPR/C/TKM/CO/1, para. 9.

⁸ Ibid.

⁹ Ibid., para. 10.

¹⁰ See opinion No. 22/2013 (Turkmenistan).

falls within category III of the categories applicable to the consideration of cases submitted to the Working Group.

43. The Working Group also considers that Mr. Nepeskuliev has been deprived of liberty for having peacefully exercised his right to freedom of expression as guaranteed by article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights. Therefore, the deprivation of liberty of Mr. Nepeskuliev also falls within category II of the categories applicable to the consideration of cases submitted to the Working Group.

Disposition

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

The deprivation of liberty of Mr. Nepeskuliev is arbitrary, being in contravention of articles 9, 10, 11 and 19 of the Universal Declaration of Human Rights and articles 9, 14 and 19 of the International Covenant on Civil and Political Rights; it falls within categories II and III of the categories applicable to the consideration of the cases submitted to the Working Group.

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

46. The Working Group believes that, taking into account all the circumstances of the case, the adequate remedy would be to release Mr. Nepeskuliev and accord him an enforceable right to compensation in accordance with article 9 (5) of the International Covenant on Civil and Political Rights.

47. In accordance with article 33 (a) of its methods of work (A/HRC/30/69), the Working Group considers it appropriate to refer the allegations of torture (including alleged incommunicado detention, which may amount to inhuman treatment) to the Special Rapporteur on torture for appropriate action.

[Adopted on 2 December 2015]
