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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 for reasons of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation or disability or other status, that aims towards or can result in ignoring the equality of human rights (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 (RFE/RL) and for Alternative Turkmenistan News (ATN).

5. On 7 July 2015, Mr. Nepeskuliev was arrested while he was 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 going back home in Balkanabat by train. When he did not return, 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. He was being held in a pre-trial detention centre in the village of Akdash. Later, Mr. Nepeskuliev was transferred to Balkanabad where he has been kept in custody in a local detention centre. The source submits that this information was not officially communicated to the family and his current stay is not confirmed either, despite the 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 be carried out by the officers of the State Service for Security and Protection of 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 the journalist was told that Mr. Nepeskuliev was arrested for possession of pills containing narcotic substances, allegedly Tramadol, and that "he will soon be tried and imprisoned". Reportedly, Mr. Nepeskuliev was charged with article 292, possession of drugs with intent to sell, and article 293, possession of drugs without intent to sell, of the Turkmenistan's Criminal Code.

10. The source submits that following a campaign in support of release Mr. Nepeskuliev, which was launched by media outlets located outside of Turkmenistan, the 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 on Mr. Nepeskuliev's phone and declared to the source that her brother was "an addict" that "regularly beat [her] and [his] mother". The source asserts that the female voice might have belonged to someone from the Turkmenistan's law-enforcement authorities, who could have tried to impersonate Mr. Nepeskuliev's sister in order to keep his family away from telephone communications with journalists and anyone from abroad. Furthermore, the source alleged 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 ICCPR and the UDHR. In particular, he is a civic activist and a freelance reporter for RFE/RL and for ATN, mainly covering social and infrastructural issues in and around Turkmenbashi and Balkanabat and often drawing attention to local government incompetence and abuses.
13. With regard to the charges in possession or sale of drugs, the source submits that the family rejected that Mr. Nepeskuliev ever used narcotics or was involved in their sale. The source argues that the Turkmenistan's law enforcement authorities could have planted drugs on Mr. Nepeskuliev in order to silence him and prevent the flow of information about Turkmenistan criticizing the current Government to the outside world. The source further states that that could have been done with the view to teach other journalists and civil activist in Turkmenistan a lesson. In support of this argument, the source refers to the Turkmenistan's human rights record, in particular, that the Government has never allowed free and independent media.
14. The source claims that those accusations and charges were used by the Government of Turkmenistan 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 ICCPR and UDHR. The source claims that the Government of Turkmenistan persecuted him because Mr. Nepeskuliev's photo reportages for RFE/RL, which were published under a pseudonym, covered such issues as water shortages; luxury villas for judges, security officials and other civil servants; as well as delays in completing the construction of a hospital. For ATN, Mr. Nepeskuliev reported on such issues as the chaotic state of health care in his home town Balkanabad.
15. As a civic activist, Mr. Nepeskuliev had already been on the radar of Turkmenistan's law enforcement authorities. In 2013, during the visit of the country's President Gurbanguly Berdimuhamedov to Balkan Province of Turkmenistan, Mr. Nepeskuliev took the streets with a poster in an attempt to draw the President's attention to several years of his 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 of 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, and 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, how and by whom the investigation being conducted.
17. The family attempted to see him in Akdash, but were denied a visit. Upon Mr. Nepeskuliev transfer to Balkanabad, his sister tried to see her brother, but was denied once again without any explanation. There has been no official notice that Mr. Nepeskuliev has been transferred, but the guards in Balkanabad detention facility accepted a food parcel addressed to him.
18. On 4 September 2015, his family reported to the source that Mr. Nepeskuliev was sentenced to three years in prison on 31 August 2015. However, it has not yet been possible to officially confirm this. The source expressed grave concern that Mr. Nepeskuliev could have been tortured during his detention and subsequently tried in camera in violation of due process and fair trial requirement of conducting hearing in public.

Response from the Government

19. In its response of 16 November 2015 the Government provided the following information:
20. On 7 July 2015, on the basis of operative information, the members of the law enforcement arrested Mr. Nepeskuliev, born on 5 February 1978, in Balkanabat city on suspicion of illicit trafficking drugs containing tramadol hydrochloride. In the same Government's response, it is stated that, on 7 July 2015, Mr. Nepeskuliev was arrested in Turkmenbashi city.
21. During personal search and examination of suspect's belongings in the presence of witnesses, 44 tablets (8.8g) of "Tramadol", circulation of which is prohibited in Turkmenistan, was 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 the Protection of Security of Healthy Society initiated criminal investigation on violation of article 303.1.1 of the Criminal Code (illicit trafficking drugs, containing tramadol gidrahlorid or other psychoactive substances).
22. Preliminary investigation was then conducted with 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 Protection of Security of Healthy Society, Mr. Nepeskuliev was not subjected to any physical or psychological pressure.
24. On 31 August 2013, upon hearing of the criminal case against Mr. Nepeskuliev, the court of Turkmenbashi city found the accused guilty in committing the offence under article 303.1.1 of the Criminal Code and sentenced him to 3 years imprisonment.
25. Currently Mr. Nepeskuliev serves 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 the rest are at best assertions, which are impossible to verify due to the lack of independent local monitoring of Nepeskuliev's case.
27. According to the source, only this reply from the Government provided to the Working Group shed some light on the case of Mr. Nepeskuliev. In violation of Article 476 of the CCP, the prison authorities did not notify Mr. Nepeskuliev's relatives about where the convict was 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 the 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 was tried, convicted and sentenced in a 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 of the Government that the preliminary investigation activities were conducted in presence of Mr. Nepeskuliev's attorney are not true. The source maintains that Mr. Nepeskuliev was not provided the opportunity to invite a lawyer of his own choice and was kept incommunicado.

30. Claims of the Government that upon detention relatives of Nepeskuliev were informed about it 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 had been mistreated and tortured during the investigation provided that he was held incommunicado and refers to sources, according to which in the beginning of September Mr. Nepeskuliev was seen battered and all broken. The source notes that the Turkmen security services, among which is the State Service for Security Protection of 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, therefore there is a grave concern whether any hearings took place at all.

Discussion

33. The Government in its reply has not rebutted the allegations of grave violations of Mr. Nepeskuliev's rights beyond the brief assertion.

Those allegations include, in particular, incommunicado detention, the violation of his right to legal assistance of his own choosing; the right to public trial, torture and ill-treatment in detention. The Working Group notes that even the basic information in the concise Government's reply is confusing. In particular, the place where Mr. Nepeskuliev was arrested on 7 July is indicated in the reply as the city of Balkanabat and then in the same document the place is named as the city of Turkmenbashi.

34. The Working Group reiterates its jurisprudence¹ and recalls that, where it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he was 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

36. The Working Group previously found violation, similar to those alleged in this case, in other cases concerning Turkmenistan.⁴

37. Furthermore, the Committee against Torture expressed its concern that "a number of persons who have been arrested and sentenced at closed trials without proper defence and imprisoned incommunicado" in Turkmenistan.⁵ The Committee urged Turkmenistan "to

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

² *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639, para. 55.

³ See, for instance, communications Nos. 1412/2005, *Butovenko v. Ukraine*, Views adopted on 19 July 2011, para. 7.3; 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3; 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, para. 7.2; 139/1983, *Bleier v. Uruguay*, Views adopted on 29 March 1982, para. 13.3.

⁴ Opinions Nos. 5/2013 and 22/2013.

⁵ Concluding observations of the Committee against Torture (2011), Turkmenistan, CAT/C/TKM/CO/1, para. 115.

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 Turkmenistan to take appropriate measures to put an end to torture⁸ The Human Rights Committee also recommended Turkmenistan to take concrete measures to put an end to the practice of incommunicado detention and imprisonment.⁹

38. As emphasised 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 put a heavy burden on the Government to show that his fundamental rights, including the right to a fair trial, were observed.¹⁰

39. In this case, the Government failed to provide any documentary or other evidence which would demonstrate that Mr. Nepeskuliev was provided with legal assistance (the name of the counsel, when and by whom he was assigned, etc.) 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 (the place of the trial, a 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, etc.)

40. In violation of articles 10 and 11 of the UDHR and article 14 of the ICCPR, 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 hearing 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 rights to legal assistance of his own choosing. The Government has not provided rebuttal to this allegation rather than a mere assertion to the contrary.

42. The Working Group considers that the non-observance of the international human rights norms, namely articles 9, 10 and 11 of the UDHR and articles 9 and 14 of the ICCPR 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 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 UDHR and article 19 of the ICCPR. 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.

⁶ Ibid.

⁷ Concluding observations of the Human Rights Committee (2012), Turkmenistan, CCPR/C/TKM/CO/1, para.9.

⁸ Ibid.

⁹ Ibid., para. 10.

¹⁰ Opinion No. 22/2013 (Turkmenistan).

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 UDHR and articles 9, 14, and 19 of the ICCPR; 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 UDHR and ICCPR.

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

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]
