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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-eighth session, 19-28 April 2017

Opinion No. 2/2017 concerning Loknath Acharya (Bhutan and India)

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. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/33/66), on 20 June 2016 the Working Group transmitted to the Governments of Bhutan and India a communication concerning Loknath Acharya. The Government of Bhutan replied to the communication on 28 June 2016. The Government of India has not replied to the communication. Bhutan is not a party to the International Covenant on Civil and Political Rights. India is a party to the Covenant.

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. Loknath Acharya is a 52-year-old refugee settled in Nepal with a refugee identification number issued by the Office of the United Nations High Commissioner for Refugees. He was born in 1965 in Bhutan and belongs to the Lhotshampa (Nepalese) ethnic minority, which has resided in southern Bhutan since the late nineteenth century. According to the source, he is a human rights activist.

5. The source reports that, in 1990, Mr. Acharya was forcibly evicted by Bhutanese authorities from his home in Danabari, Geylegphug, Bhutan, following a series of public demonstrations that he had organized. The demonstrations were in protest against legislative provisions that had been passed by the Government of Bhutan that discriminated against ethnic minorities, including the Lhotshampa. The provisions included the 1985 Citizenship Act, which served as the basis for the census exercise in southern districts of Bhutan and according to which every member of the southern population had to produce documentary evidence of legal residence since 1958 or risked being declared a non-national. Furthermore, in 1989, all Nepali-speaking Bhutanese citizens became liable to a fine or imprisonment if they wore anything other than the northern traditional costume known as “Gho” for males and “Kira” for females. The Nepali language was also removed from the school curriculum.

6. Following his eviction from Bhutan, Mr. Acharya subsequently sought refugee status in Nepal, where he resided in Jhapa, in the Beldangi II Refugee Camp. Since arriving in Nepal, Mr. Acharya has been a member of a human rights organization. In that capacity, he has collected information on the human rights situation and political developments in Bhutan with the express intention of sharing such information with international human rights organizations. Mr. Acharya has endeavoured to build a human rights network within Bhutan and has led awareness campaigns on human rights and democracy for individuals inside Bhutan by holding clandestine meetings along the border areas.

7. On the morning of 16 October 2014, Mr. Acharya travelled from the town of Siliguri, India, to the town of Mal Bazar, located in Jalpaiguri District in the West Bengal region of India to attend a human rights meeting. According to the source, upon arriving at Mal Bazar, Mr. Acharya was arrested and transported to Bhutan by Bhutanese police officers dressed in plain clothes who did not show an arrest warrant or provide reasons to Mr. Acharya for his detention.

8. The source alleges that a large reward had been offered by the Bhutanese authorities for information on the whereabouts and travel movements of Mr. Acharya. The source further alleges that the Bhutanese police had been involved in luring Mr. Acharya to a human rights meeting in Mal Bazar.

9. Between 16 and 18 October 2014, Mr. Acharya was allegedly held in the Bhutanese Army Camp in Sanchi District, Bhutan. On 18 October 2014, he was transferred to the Rabuna Army Jail in Wangdue Phodrang District, where according to the source he is being detained. Mr. Acharya’s family first learned from witness testimonies that he had been detained in Bhutan. It is reported that, at some point during November or December 2014, Mr. Acharya was brought to a public hospital in the town of Wangdue Phodrang for a visit that lasted one day. He was escorted by the police throughout his stay at the hospital.

10. To date, Mr. Acharya’s family has not officially been informed by the authorities of his arrest or his location. He has not been permitted to contact his family at any stage since he was arrested and remains incommunicado. The charges against Mr. Acharya remain unclear. It is further unknown whether Mr. Acharya has been brought before a judicial authority since his detention or granted access to legal counsel.

11. The source submits that the deprivation of liberty of Mr. Acharya is arbitrary in accordance with categories I, II, III and V of the categories applied by the Working Group.

12. In relation to category I, the source submits that there is no legal basis justifying the deprivation of liberty of Mr. Acharya. The source asserts that there is no evidence to suggest that Mr. Acharya’s human rights activities were ever in breach of domestic

Nepalese, Indian or Bhutanese laws. In addition, the source submits that there is no evidence to suggest that Mr. Acharya engaged in any illegal activity in crossing the border to India. It is understood that Bhutanese refugees do not require visas to cross the border into India. It is alleged that Mr. Acharya was taken into Bhutan against his will, to the detriment of his freedom of movement and right of residence in Nepal as a recognized refugee. Mr. Acharya has therefore been denied the right to freedom of movement and to leave any country, including his own, and to return to his country, contrary to article 13 of the Universal Declaration of Human Rights.

13. In relation to category III, the source submits that no warrant was presented for the arrest of Mr. Acharya on 16 October 2014, and no charges have since been brought against him. Mr. Acharya has been held incommunicado and no official information has been provided by the authorities as to his whereabouts or the charges against him. It is alleged by the source that, under those circumstances and given the adverse treatment of human rights activists in Bhutan, it is unlikely that Mr. Acharya will be granted a fair trial, as guaranteed by articles 9 and 10 of the Universal Declaration of Human Rights.

14. Finally, in relation to categories II and V, the source asserts that Mr. Acharya was deprived of his liberty on the basis of his ethnic origin as a Lhotshampa and his human rights and political activism. The source submits that Mr. Acharya has not been guaranteed the right to equality before the law and equal protection of the law without discrimination, contrary to article 7 of the Universal Declaration of Human Rights. It is further alleged that Mr. Acharya's rights to freedom of thought, opinion and expression, and to peaceful assembly and association, as established in articles 18, 19 and 20 of the Universal Declaration of Human Rights, have been violated.

Response from the Governments

15. On 20 June 2016, the Working Group transmitted the allegations from the source to the Governments of Bhutan and India under its regular communication procedure. The Working Group requested the Governments to provide detailed information by 19 August 2016 about the circumstances of Mr. Acharya's detention and transfer to Bhutan and his current situation. The Working Group also requested the Governments to clarify the legal provisions justifying his continued detention and provide details regarding the conformity of his arrest and detention with international law, particularly the norms set out in the Universal Declaration of Human Rights.

16. The Government of Bhutan submitted a response dated 28 June 2016, which was received by the Working Group on 30 June 2016. In its response, the Government of Bhutan stated that it had ascertained that Mr. Acharya and his parents and two brothers had left Bhutan in 1992 from the Sarpang District and had registered themselves as Bhutanese refugees in Nepal. According to the Government of Bhutan, Mr. Acharya had been neither arrested nor detained by the Royal Bhutan Army or Police.

17. The Working Group regrets that it did not receive a response from the Government of India to the communication. The Government of India did not request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

Further comments from the source

18. The response from the Government of Bhutan was sent to the source on 30 June 2016 for comment. The Working Group has not received any further information from the source in relation to its initial allegations.

Discussion

19. The Working Group welcomes the prompt response from the Government of Bhutan to its communication. While the Working Group did not receive a response from the Government of India, this does not prevent the Working Group from considering the case in conformity with paragraph 15 of its methods of work.

20. The present case was considered by the Working Group for the first time at its session in November 2016. At that time, the Working Group considered that it did not have

sufficient information to determine whether Mr. Acharya's circumstances fell within any of its categories of arbitrary deprivation of liberty. The Working Group therefore decided to make further confidential enquiries with United Nations and other humanitarian organizations with a presence in the region in order to obtain further information on Mr. Acharya's location and current circumstances. Those enquiries included several attempts to contact the source in December 2016 and January and February 2017 to obtain further information in support of the allegations.

21. The confidential enquiries revealed that information surrounding the arrest and detention of Mr. Acharya is extremely limited. Other humanitarian organizations have not been able to locate Mr. Acharya, despite a complaint having been filed about his disappearance with the Nepalese police, or to obtain further information from his family. No relevant or significant information regarding Mr. Acharya's whereabouts and current situation is available, and attempts to follow up on the case have been unsuccessful.

22. Under those circumstances, the Working Group is deeply concerned about the very serious risk to Mr. Acharya's life and to his physical and psychological integrity. According to the source, there has been no contact from Mr. Acharya for more than two years since witness reports placed him at a hospital in November or December 2014 in the town of Wangdue Phodrang in Bhutan. The Working Group notes that the Government of Bhutan has denied any involvement in the deprivation of liberty of Mr. Acharya, stating that he and his family left Bhutan in 1992.

23. The Working Group considers that there is insufficient information contained in the source's communication for it to determine whether Mr. Acharya has been detained arbitrarily. Reports of Mr. Acharya's deprivation of liberty and his visit to a hospital in Bhutan appear to have been made on the basis of information obtained informally from witnesses, rather than confirmed reports that he is being held in Rabuna Army Jail. The Working Group has very little information on the circumstances in which Mr. Acharya was deprived of his liberty and where he was taken, and no information either on what charges he faces, or whether he has been afforded due process (e.g. given access to legal counsel or brought before a judicial authority), or his current legal status (e.g. whether he is awaiting trial or has been convicted of any crime).

24. In addition, the source did not provide any further information in support of its allegations after the response from the Government of Bhutan was sent to the source for comment. The Working Group invites the source to submit further information, including affidavits or statements from witnesses, any official documents sent to or from the Governments of Bhutan and India, or any other information that would clarify the circumstances of Mr. Acharya's deprivation of liberty.

25. It is likely that Mr. Acharya has been subjected to enforced or involuntary disappearance. It appears from the information submitted by the source that Mr. Acharya has been deprived of his liberty against his will, having been allegedly taken from India to Bhutan by the Bhutanese authorities, and that there is a refusal to acknowledge Mr. Acharya's deprivation of liberty as no official information on his location has been provided to his family. The Working Group has therefore decided to refer Mr. Acharya's matter to the Working Group on Enforced or Involuntary Disappearances for appropriate action.

Disposition

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

Based on the information obtained to date, the Working Group is not in a position to conclude that the detention of Loknath Acharya falls within any of the categories of arbitrary deprivation of liberty applied by the Working Group.

In accordance with paragraph 17 (c) of its methods of work, the Working Group decides to keep the case pending without prejudice to the ability of the source and the Governments to provide further information that would allow the Working Group to determine whether Mr. Acharya has been detained arbitrarily.

27. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Working Group on Enforced or Involuntary Disappearances.

[Adopted on 19 April 2017]
